

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

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Title 28, section 1331 of the United States Code provides the jurisdictional grounding for the majority of cases heard in the federal courts, yet it is not well understood. The predominant view holds that section 1331 doctrine both lacks a focus upon congressional intent and is internally inconsistent. I seek to counter both these assumptions by re-contextualizing the Court’s section 1331 jurisprudence in terms of the contemporary judicial usage of “right” (i.e., clear, mandatory obligations capable of judicial enforcement) and cause of action (i.e., permission to vindicate a right in court). In conducting this reinterpretation, I argue that section 1331 jurisdiction is best understood as a function of the federal right and cause of action plaintiff asserts. Under my view, these two concepts, when weighed against each other, offer strong evidence of congressional intent to vest the federal courts with jurisdiction and form the foundational elements for the federal question jurisdictional analysis. This principle underlies three standards which offer both a better explanation of the Court’s past section 1331 cases and better guides for future decisions than the Holmes test. Under the first standard, section 1331 jurisdiction lies when a plaintiff makes an assertion of a non-judicially created federal cause of action and a mere “colorable” assertion to a federal right. Under the second standard, section 1331 lies when a plaintiff alleges a state-law cause of action and asserts a more weighty “substantial” federal right. Finally, under the third standard, section 1331 jurisdiction lies when plaintiff asserts a cause of action created as a matter of federal common law and plaintiff asserts a “substantial” federal common law right coupled with a sufficient showing to support the right.

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I. INTRODUCTION

Section 1331, Title 28 of the United States Code is the general federal question jurisdictional statute, which vests federal district courts with original subject matter jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” This statute grounds the majority of civil actions heard in federal court.¹ Yet given the weighty doctrinal² and pragmatic³ consequences which flow from determinations that a plaintiff’s claim falls within the scope of § 1331, it is surprising to learn that we lack of a coherent view of what federal question jurisdiction under § 1331 entails. Professor Mishkin famously forwarded the classic theory that § 1331 jurisdiction lies when a plaintiff raises “a substantial claim founded ‘directly’ upon federal law.”⁴ But the federal courts have failed to establish a unified theory or practice of § 1331 in conformity with this view or any other.⁵ Academia has similarly failed to

¹ 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. See Administrative Office of the United States Courts, Federal Judicial Caseload Statistics, Table C-2 (March 31, 2006), available online at http://www.uscourts.gov/caseload2006/tables/C02_Mar_06.pdf (last visited Oct. 20, 2007).

² See, e.g., *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) (holding that without subject matter jurisdiction a federal court is only empowered to dismiss the cause before it).

³ 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 37%).

⁴ Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 168 (1953).

⁵ See, e.g., *Grable & Sons Metal Products, Inc. v. Darue Engineering & 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 Environment*, 523 U.S. 83, 90 (1998) (“Jurisdiction is a word of many, too many, meanings.”) (internal quotation marks omitted); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 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.”); *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 328 n. 4 (2d Cir. 1982) (“Attempting to define

coalesce upon Mishkin's, or anyone else's, principles.⁶ This is not to say that § 1331 jurisdiction is a puzzle in every case.⁷ It is assuredly true that in most cases, plaintiff's suit raising a federal claim generally will arise under § 1331, while a plaintiff's suit to litigate state-law questions generally will not.⁸ But there remains a significant proportion of cases where determining the existence of § 1331 jurisdiction is vexatious.⁹

In an effort to determine where § 1331's borderline falls, scholars have settled upon two perceived truths, which now predominate our understanding of § 1331 federal question jurisdiction. First, the received view holds that federal question jurisdiction has little to do with congressional intent despite Congress's clear constitutional power to regulate the statutory jurisdiction of the lower federal courts.¹⁰ Professor Friedman, in one of the definitive works in this regard,

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* 463 U.S. 1220 (mem.) (1983); Division 587, Amalgamated Transit Union, AFL-CIO v. Municipality of Metropolitan 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").

⁶ See, e.g., Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309 (2007); NOTE, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction Over State Law Claims Post-Merrell Dow*, 115 HARV. L. REV. 2272 (2002) [hereinafter *Mr. Smith*]; John Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 76 TEXAS L. REV. 1829 (1998); 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 (1984); William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967); Ernest J. London, *"Federal Question" Jurisdiction—A Snare and a Delusion*, 57 MICH. L. REV. 835 (1959); Mishkin, *supra* note 4; G. Merle Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17 (1946); James H. Chadbourne & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942); Ray Forrester, *The Nature of a Federal Question*, 16 TUL. L. REV. 363 (1942); Charles A. Willard, *When Does a Case "Arise" Under Federal Laws?*, 45 AM. L. REV. 373 (1911).

⁷ CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, VOL. 13B § 3562 (2007) ("[t] his 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.").

⁸ *Id.*

⁹ 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).

¹⁰ The Constitution prescribes the limits of subject matter jurisdiction for the federal courts. U.S. CONST. art. III, § 2. 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.

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.”¹¹ Many others forcefully contend that jurisdiction is properly a function of judicial discretion¹² that aims to determine the proper division of labor between the state and federal courts.¹³

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). 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 (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); see also Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L.L. REV. 129 (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 March 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).

¹¹ Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 24 (1990).

¹² See 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); Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035, 1041-46 (1990); 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); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985).

¹³ See *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8 (1983) (stating that the vesting § 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); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1225 (2004) (“A central task of the law of federal jurisdiction is allocating cases between state and federal courts.”); 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.”); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between the State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1772–87 (1992) (discussing seven factors relevant to determining the proper

The second perceived truth of the received 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)¹⁴ which offer competing rubrics for the vesting of federal question jurisdiction.¹⁵ 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.”¹⁶ This perceived incoherence has led some courts to complain that § 1331 jurisdiction is more of a “Serbian bog”¹⁷ 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.”¹⁸

In this article, I aim to fetch water from the 28 U.S.C. § 1331 well. Naturally, not everyone is pleased with the perceived truths of the received view. Many would welcome a greater focus upon legislative intent in the area of statutory federal question jurisdiction.¹⁹ Similarly, numerous jurists and scholars

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”).

¹⁴ See *infra* part II.A.

¹⁵ See, e.g., Freer, *supra* note 6 (arguing that the *Smith* line of cases employ a different test than the Holmes line of cases); Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1241-45 (2001) (describing the Court’s “two-track” approach to section 1331 jurisdiction); Oakley, *supra* note 6, at 1837-43 (describing the distinction between Category-I and Category-II jurisdiction).

¹⁶ Cohen, *supra* note 6, at 907; see also *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005) (the Court itself admits that it 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.”).

¹⁷ *Amoco Production Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1205 (5th Cir. 1988); see also *supra* note 12.

¹⁸ *Stone & Webster Engineering Corp. v. Ilesley*, 690 F.2d 323, 328 n. 4 (2d Cir. 1982), *aff’d* 463 U.S. 1220 (mem.) (1983).

¹⁹ See, e.g., *Snyder v. Harris*, 394 U.S. 332, 341-42 (1969) (Constitution places the power to “expand the jurisdiction of [the lower federal] courts . . . specifically . . . in the Congress, not in the courts.”); 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 deems to be in need of national attention, be it kidnapping, alcohol consumption, bank robbery, fraud, or nondiscrimination.”); Redish, *supra* note 13, at 1790-91 (welcoming a greater focus upon congressional intent to vest § 1331 jurisdiction);

have called for a “bright-line” approach to jurisdictional doctrine in order to bring clarity and certainty to these issues.²⁰ I contend that, by re-conceptualizing § 1331 jurisdiction as a function of the viability of the federal right plaintiff asserts and congressional control over the subject matter jurisdiction of the federal courts as expressed by the creation of a cause of action, both of these goals can be achieved to the greatest extent possible absent wholesale statutory revision.²¹

I support these claims by reinterpreting the § 1331 canon in terms of the federal right and the cause of action asserted by the plaintiff. This re-conceptualization affords two benefits over leading theories of federal question jurisdiction. First, by focusing upon federal rights and causes of action, which I contend constitute strong indicia of legislative intent to vest the federal courts with § 1331 jurisdiction, this reinterpretation affords congressional intent a more prominent role in grounding § 1331 jurisdiction than under the received view. As congressional control over the subject matter jurisdiction of the lower federal courts is indubitably a constitutional enshrined prerogative,²² this new view advances deep-rooted constitutional values.²³

Mishkin, *supra* note 4, 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.”).

²⁰ See, e.g., *Grable & Sons*, 545 U.S. at 320–22 (Thomas, J., concurring) (lamenting the lack of clear cut rules for § 1331 jurisdiction); (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,” leaving parties to “spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction.”); John F. Preis, *Jurisdiction and Discretion in Hybrid Cases*, 75 U. CIN. L. REV. 145, 190–91 (2006) (calling for the adoption of a rule, as opposed to a standard, in *Smith*-style cases); Friedman, *supra* note 13, at 1225 (“[o]ne ought not make a fetish of bright line rules, but they have their place, and one place in particular is the law of jurisdiction.”); Redish, *supra* note 13, at 1794 (“jurisdictional uncertainty can surely lead to both a waste of judicial time and added expense to the litigants.”).

²¹ 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 doctrine, 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.

²² See *supra* note 10.

²³ See, e.g., *supra* note 19.

Second, I argue that such a reinterpretation of the § 1331 canon fosters clarity. The leading theory of § 1331 jurisdiction employed by the courts is the Holmes test, which focuses solely upon the state versus federal origin of the cause of action as the controlling factor for the vesting of § 1331 jurisdiction. I argue that the Holmes test, which is said to support the majority of § 1331 cases,²⁴ is neither a necessary or sufficient condition for § 1331 jurisdiction. As such, its continued prominence leads only to confusion.

I suggest that we discontinue this focus upon the Holmes test in favor of a reinterpretation that focuses upon both rights and causes of action. This reinterpretation has much to offer over the Holmes test. First, it reveals a unifying principle for § 1331 jurisdiction; namely that federal question jurisdiction is best understood as a function of the viability of the federal right plaintiff asserts and congressional control over the subject matter jurisdiction of the federal courts, as expressed by the creation of a cause of action. Second, the unified balancing principle, as I coin it, underlies three standards which offer a stronger explanatory thesis for the Court's past § 1331 cases, as well as more transparent guides for future decisions, than the Holmes test. Under the first standard, § 1331 jurisdiction lies when a plaintiff makes an assertion of a statutorily, treaty, or constitutionally created cause of action²⁵ and a "colorable"²⁶ assertion to a federal right.²⁷ Under the second standard, § 1331 lies when a plaintiff alleges a state-law created cause of action and asserts a "substantial"²⁸ federal right. The third standard represents an area ignored by most scholars as they generally attempt to categorize § 1331 doctrine into two standards.²⁹ Under this standard, § 1331 jurisdiction lies when plaintiff asserts a federal common law cause of action and asserts a substantial federal common law right coupled with a sufficient showing to support the right. These three instantiations of the unified balancing principle, then, foster important efficiency and transparency values by explicitly laying out relevant standards and a means of reconciling when these competing standards apply.

This article proceeds in the following manner. In Part II, I first review traditional federal question jurisdiction doctrine. Next, I layout the key concepts of right, cause of action, colorable and substantial. I assert that conceptualizing § 1331 doctrine in these terms adds clarity to the law, freeing federal question jurisdiction doctrine from a tyranny of obtuse stock phrases.

²⁴ Merrell Dow, 478 U.S. at 808.

²⁵ See *infra* part II.B discussing cause of action.

²⁶ See *infra* part II.C discussing colorable.

²⁷ See *infra* part II.B discussing right.

²⁸ See *infra* part II.C substantial.

²⁹ See *supra* note 15.

With these notions at hand, Part III proceeds to reinterpret the § 1331 canon in terms of the source for the federal right asserted; namely, statutory,³⁰ constitutional or federal common law. In so doing, I contend that the Court's holdings are best understood, not by a focus upon the Holmes test, but by focusing upon two key concepts: the viability of the federal right asserted and the cause of action asserted. Further, this focus affords a reclassification 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 plaintiffs to vindicate their rights in a federal court increases—as expressed by the existence, or lack there of, a non-judicially created, federal cause of action—the plaintiffs' need to assert a viable federal right lessens. Conversely, when there is little indicia that Congress wishes plaintiffs to vindicate their rights in federal court, plaintiffs must assert a more robust claim to a federal right in order for § 1331 to lie. I further contend that this unified understanding of § 1331 jurisdiction not only brings clarity to this important body of jurisdictional doctrine but that 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 in Part III. I begin with a brief primer on blackletter federal question jurisdiction doctrine. I note that in the cases which comprise the heartland of the traditional view, the Court often presents analyses of § 1331 jurisdiction in terms of “right,” “cause of action,” or “claims,” as modified by the notions of “colorable” and “substantial.” I turn, then, to an introduction to the contemporary understandings of the concepts of right, cause of action, claim and remedy in an effort to obtain a deeper understanding of the Court's often cliché statements of jurisdiction doctrine. I end this Part by defining the terms colorable rights and substantial rights, which play a central role in Part III's re-characterization of § 1331 cases.

A. *Federal Question Jurisdiction Doctrine Primer*

³⁰ I also include rights created by treaty under this rubric.

In 1875, Congress passed the first general grant of federal question jurisdiction now codified in § 1331.³¹ Even though the language of § 1331 parallels that of Article III of the Constitution, the Supreme Court never has held that § 1331 federal question jurisdiction is identical to constitutional federal question jurisdiction.³² Indeed, the Court interprets § 1331 as granting a much narrower scope of federal question jurisdiction than the Constitution permits.³³ In furtherance of this general restrictive interpretive principle, all § 1331 jurisdictional cases are subject to the well-pleaded complaint rule.³⁴ Following this rule, only federal issues raised in a plaintiff's complaint, not anticipated defenses, establish federal question jurisdiction.³⁵

Doctrinal heterodoxy states that the Court has established two independent tests for determining when a complaint raises a well-pleaded federal question.³⁶ According to the blackletter view, the majority of federal question cases³⁷ vest under § 1331 because federal law—be it by statute, Constitution or federal common law³⁸—creates the plaintiff's "cause of action."³⁹ As this understanding of § 1331 was forcefully put forward by Justice Holmes, this view is oft referred to as the "Holmes test." The Holmes test, however, best operates as a rule of inclusion not exclusion, as the Supreme Court has long recognized that federal question jurisdiction will lie over state-law causes of action that necessarily require construction of an imbedded federal question.⁴⁰ As *Smith v. Kansas City*

³¹ 28 U.S.C. § 1331 (1994). 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. Excepting statutory amounts in controversy, the act has been essentially unchanged since 1875. See, e.g., Pub. L. 96-486 (1980) (striking out the minimum amount in controversy requirement of \$10,000); Pub. L. 85-554 (1958) (raising the minimum amount in controversy requirement from \$3,000 to \$10,000). Instead, I simply refer to this act as § 1331, even if at a previous time it was codified at a different location.

³² *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494 (1983).

³³ *Id.* The Constitution prescribes the limits of subject matter jurisdiction for the federal courts. U.S. CONST. art. III, § 2. 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).

³⁴ *Randall*, *supra* note 10, at 370.

³⁵ See *Louisville & Nashville Rail Co. v. Mottley*, 211 U.S. 149, 152 (1908) (establishing the rule).

³⁶ See *supra* note 15.

³⁷ *Merrell Dow*, 478 U.S. at 808.

³⁸ *Illinois v. City of 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.")

³⁹ *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.) ("arises under the law that creates the cause of action").

⁴⁰ See *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.) (Holmes test is a rule of inclusion); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) (same and quoting *T.B. Harms*); see also *Grable & Sons Metal Products, Inc. v. Darue*

*Title & Trust Co.*⁴¹ is the Court’s classic statement of this position, this is line of cases is oft referred to as the *Smith* test.

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,”⁴² the Court has not consistently focused upon this language. In many cases, the Court states that a case arises under § 1331 if “the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.”⁴³ Still further cases state that § 1331 vests upon the presentation of a “federal interest”⁴⁴ or a “federal issue.”⁴⁵ This myriad of locutions is far from helpful as it presents an ever changing conceptual focus for the jurisdictional question.⁴⁶ This situation is made worse by the fact that the contexts in which many of these terms are drawn from are now outdated, draped in jargon no longer employed,⁴⁷ couched in outdated modes of pleading or inappropriately borrowed from analyses of Supreme Court appellate jurisdiction.⁴⁸ Thus, I suggest we deconstruct these stock-phrases and begin an analysis of § 1331 with a crisper understanding of these terms—right, cause of action, claim and remedy—which the Court continually employs as foundational jurisdictional concepts in its § 1331 canon.

The concepts of right, cause of action and remedy in traditional American jurisprudence were thought to be immutably linked—one did not exist without the

Engineering & Mfg., 545 U.S. 308, 312–13 (2005) (discussing the *Smith* test); *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808–09 (1986) (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.”).

⁴¹ 255 U.S. 180 (1921).

⁴² *Am. Well Works*, 241 U.S. at 260.

⁴³ *Franchise Tax Bd.*, 463 U.S. at 27-28.

⁴⁴ *Merrell Dow*, 478 U.S. at 814 n.12.

⁴⁵ *Grable & Sons*, 545 U.S. at 312; *Oneida Indian Nation of N. Y. State v. Oneida County, New York*, 414 U.S. 661, 666–67 (1974).

⁴⁶ *Oakley*, *supra* note 6, at 1853.

⁴⁷ 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 be easily 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 6, at 904; *Mishkin*, *supra* note 4, at 160–63.

⁴⁸ *Id.*

other.⁴⁹ As Justice Harlan noted, then “contemporary modes of jurisprudential thought . . . appeared to link ‘rights’ and ‘remedies’ in a 1:1 correlation.”⁵⁰ 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.”⁵¹ Moreover, under this earlier jurisprudence, “courts did not 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.”⁵² 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 and thus induces confusion for contemporary participants in the federal courts.

This traditional jurisprudence of congruity, which was waning for some time, had by the 1970s given way to a new regime.⁵³ Starting with *National Railroad Passenger Corp. v. National Association of Railroad Passengers*,⁵⁴ *Securities Investor Protection Corp. v. Barbour*,⁵⁵ and *Cort v. Ash*,⁵⁶ the Court began explicitly differentiating rights from the ability to enforce them by way of a cause of action.⁵⁷ By the end of the decade, the Court in *Passman v. Davis*⁵⁸ 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 by *Passman*; as such, an extended discussion of these notions is forthcoming.

⁴⁹ 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. Ziegler, *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).

⁵⁰ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 401 n.3 (1971) (Harlan, J., concurring).

⁵¹ 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries* *23).

⁵² Ziegler, *supra* note 49, at 72.

⁵³ *Id.* at 84–104. Ziegler notes this as a sea-change. But see Fitzgerald, *supra* note 15.

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

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

⁵⁶ 422 U.S. 66 (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).

⁵⁷ Ziegler, *supra* note 49, at 85–86.

⁵⁸ 442 U.S. 228, 239 (1979).

A right, under the contemporary analysis, is an obligation owed by the defendant to which plaintiff is an intended beneficiary.⁵⁹ 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.⁶⁰ In the Court's view, however, an obligation standing alone is not sufficient for the recognition of a right. To qualify as a right, an obligation must be mandatory, not merely hortatory.⁶¹ 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."⁶² This three-part test (i.e., mandatory obligation, clear statement, and enforceability⁶³) remains the standard by which the Court determines when a right exists.⁶⁴

A cause of action, by contrast, is a determination of whether plaintiff falls into a class of litigants empowered to enforce a right in court.⁶⁵ 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."⁶⁶ 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

⁵⁹ *Passman v. Davis*, 442 U.S. 228, 239 (1979).

⁶⁰ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L. J.* 710 (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 (1913) (same).

⁶¹ *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 24 (1980) (that provisions of the Developmentally Disabled Assistance and Bill of Rights Act "were intended to be hortatory, not mandatory.").

⁶² *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 431–32 (1987).

⁶³ 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 collapsing 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 *Ziegler*, *supra* note 49, at 84–104 (criticizing this jurisprudential move), however, it would be a disservice to read this collapse into this article's jurisdictional analysis unless it is absolutely necessary. I will, thus, focus on the notions of obligation, mandatory, clearly stated.

⁶⁴ *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). See also *Blessing v. Freestone*, 520 U.S. 329, 341–42 (1997); *Lividas v. Bradshaw*, 512 U.S. 107, 132–33 (1994); *Suter v. Artist M.*, 503 U.S. 347, 363 (1992); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509–10 (1990).

⁶⁵ *Passman v. Davis*, 442 U.S. 228, 239 (1979).

⁶⁶ *Id.* at 239 n.18.

them. But the concept of cause 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.⁶⁷ That is to say, Congress may vest individuals with rights but not vest them with causes of action to enforce them by way of a private suit. As a corollary, then, a plaintiff in a federal question case can fail to present a cause of action by either 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.⁶⁸ 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 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, which was rejected by the authors of the Federal Rules of Civil Procedure.⁶⁹ Thus, in order to have a federal claim in this contemporary sense, 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.⁷⁰ 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 plaintiff has a right and is empowered to enforce it in court—yet lack a claim due to the inability to present an adequate transaction or occurrence that would justify a remedy.⁷¹

⁶⁷ See, e.g., *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) (holding that 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, see *Cort v. Ash*, *supra*, or other public causes of actions.”).

⁶⁸ *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.’”).

⁶⁹ *Id.* at 237–39.

⁷⁰ 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 6, at 1858-59 (1998).

⁷¹ See Fed. R. Civ. P. 12(b)(6).

Finally, under the contemporary view, the notion of claim is analytically distinct and prior to the question of what relief may be afforded.⁷² Traditionally, the correlation of rights with remedies empowered federal courts to employ all available remedies to vindicate the violation of a federal right.⁷³ More recently, the Court has been reserved in its statements about the presumption that all remedies are always available to remedy wrongs, allowing for the possibility of a right coupled with a cause of action to which a court could not afford relief.⁷⁴

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 the viability of the federal right plaintiff and the cause of action asserted, understood in the contemporary sense outlined above.

This focus is not to downplay the importance of the concepts of remedy and claim to a successful suit. Indeed, the Constitution’s “case and controversy” clause requires, as a jurisdictional matter, that plaintiffs establish the likelihood that a federal court can afford a remedy should they prevail.⁷⁵ 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.⁷⁶ Claim is also a key concept to a successful suit, but as the Court has squarely held, whether plaintiff presents a claim, even in a federal question case, is not a jurisdictional matter.⁷⁷

C. Colorable and Substantive Rights

Not every invocation of the Holmes or *Smith* test will arise under § 1331, however, even when understood as a function of rights and causes of action. The Court further limits federal question jurisdiction to those cases raising

⁷² *Passman*, 442 U.S. at 239.

⁷³ *Ziegler*, *supra* note 49, at 95. See also *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582, 595 (1983) (“where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief.”).

⁷⁴ *Ziegler*, *supra* note 49, at 96; see also *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 213 (2005) (“The distinction between a claim or substantive right and a remedy is fundamental”) (quotations and citations omitted).

⁷⁵ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁷⁶ See, e.g., *Massachusetts v. E.P.A.*, — U.S. —, 127 S.Ct. 1438, 1453 (2007) (“Article III of the Constitution limits federal-court jurisdiction to ‘Cases’ and ‘Controversies.’”).

⁷⁷ *Montana-Dakota Utilities Co. v. Northwestern Public Service 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.1 (discussing the Court’s treatment of federal common law cases).

“substantial” rights.⁷⁸ The Court, however, does not consistently employ the modifier substantial. Often, it holds that a merely “colorable” federal claim will arise under § 1331.⁷⁹ In some instances, the Court appears to use these terms—substantial and colorable—as synonyms.⁸⁰ In still other instances, it employs the term colorable as an antonym to substantial.⁸¹ In yet other cases, it would appear that substantial is used in a manner meant to convey something more than merely colorable.⁸² The best course here is to proceed, as the Court once noted, by considering these concepts within the context of each case.⁸³ To this end, I will define colorable and 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 in the following manner. An assertion of a federal right is colorable so long as it is not “patently without merit,”⁸⁴ “frivolous,”⁸⁵ “immaterial or made solely for the purpose of obtaining jurisdiction.”⁸⁶ 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).⁸⁷ Similarly, if plaintiff’s allegation

⁷⁸ See, e.g., *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998) (jurisdiction lies unless it is “wholly insubstantial and frivolous”).

⁷⁹ 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”).

⁸⁰ See, e.g., *Duke Power Co. v. Carolina Environmental 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).”)

⁸¹ 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).

⁸² See, e.g., *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983) (holding that federal question jurisdiction lies “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”)

⁸³ *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 824 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 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.”).

⁸⁴ *Hagans*, 415 U.S. at 542–43.

⁸⁵ *Bell v. Hood*, 327 U.S. 678, 683 (1946).

⁸⁶ *Id.*

⁸⁷ See, e.g., *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002) (Removal statute “requires that a federal court have original jurisdiction over an action in order for it to be removed

of a right is absolutely foreclosed by prior decisions of Supreme Court, and it is not a good faith attempt to overrule the precedent, it is not an assertion of a colorable right.⁸⁸ Conversely, a substantive right meets this standard if it has “any arguable basis in law.”⁸⁹ 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.⁹⁰ Further, a right is colorable in cases where neither party is contesting the legal content of the right, but rather the parties are contesting only factual issues related to the vindication of the right.⁹¹ Further still, the veracity of plaintiff’s factual averments are immaterial to this jurisdictional question.⁹²

I define substantial rights as a more rigorous test, following the *Smith* line of cases.⁹³ 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, which 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

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 Exp., Inc. v. Averitt Exp., 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).

⁸⁸ See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974).

⁸⁹ *Michigan Southern R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass'n, Inc.*, 287 F.3d 568, 573 (6th Cir. 2002).

⁹⁰ *Bell*, 327 U.S. at 685 (“the 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”).

⁹¹ See, e.g., *Mishkin*, *supra* note 4, at 169–74.

⁹² *Bell*, 327 U.S. at 685 (“[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.”).

⁹³ See *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 312 (2005) (using substantial in this manner); see also *Freer*, *supra* note 6 (arguing that the *Smith* line of cases employ a different test than the *Holmes* line of cases).

forum.”⁹⁴ Or as Professor Freer coins this issue, to be substantial the right at issue must be central to the litigation and contested by the parties.⁹⁵ That is to say, the federal right at issue must be the dispositive issue in the case, not merely one of several issues that could throw the outcome to one party or the other.⁹⁶ 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.⁹⁷ 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, plaintiff need not actually win or state a claim to assert a substantial right.⁹⁸

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 right, both colorable and substantial, and causes of action. This analysis is organized by the origin of the asserted federal right. I begin, then, with a discussion of federal statutory and treaty rights, turning next to constitutional rights and ending with an analysis of federal common law rights. Although most scholars organize the § 1331 into two standards that roughly track the Holmes and *Smith* tests,⁹⁹ in conducting this reinterpretation, three standards are forwarded as instantiations of a unified balancing principle. First, if a plaintiff alleges a non-judicially created, federal cause of action, then § 1331 jurisdiction lies if plaintiff makes a colorable allegation to 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

⁹⁴ *Grable & Sons*, 545 U.S. at 313 (citing *Chicago v. International College of Surgeons*, 522 U.S. 156, 164, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 814 & n.14 (1986); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 28 (1983)); *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109, 117-18 (1936); *Shulthis v. McDougal*, 225 U.S. 561, 569 (1900).

⁹⁵ Freer, *supra* note 6, at 310.

⁹⁶ *Id.*

⁹⁷ See, e.g., *Grable & Sons*, 545 U.S. at 313 (citing cases); Mishkin, *supra* note 4, at 169–74 (describing this requirement as applying to all § 1331 cases and critiquing it).

⁹⁸ See, e.g., *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) (plaintiff losses).

⁹⁹ See *supra* note 15 (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 v. Lincoln Mills*. 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 CHERMERINSKY, *FEDERAL JURISDICTION* 282 (5th ed. 2007) (Aspen Publ).

jurisdiction lies if plaintiff makes a substantial assertion to a federal right. Third, if plaintiff alleges a right and a cause of action created as a matter of “pure” federal common law, 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 test affords—even in cases in which federal law provides the cause of action.

A. *Congressionally Created Rights*

This section analyzes the Court’s taking of § 1331 jurisdiction in situations where the plaintiff asserts a congressionally created right, including rights created by treaties. I draw the following conclusions. First, despite the emphasis upon cause of action in the Holmes test as the determining jurisdictional factor, an assertion of a federal 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. Two standards follow from this finding. If plaintiff alleges a congressionally created cause of action—either by direct statutory command, by inference, by complete preemption or by treaty—then § 1331 jurisdiction lies if plaintiff makes a colorable assertion of a congressionally created right. If plaintiff alleges a state-law cause of action, then § 1331 jurisdiction lies if plaintiff makes a substantial assertion of a federal statutory right.

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 sets of circumstances where such cases arise. The first set encompasses cases where an act of Congress creates a cause of action to enforce purely state-law rights. And the second set of cases involve the assertion of a federal right that is frivolous. In both instances, the Court holds that it lacks subject matter jurisdiction because plaintiff fails to assert a colorable federal right, “despite the usual reliability of the Holmes test.”¹⁰⁰

¹⁰⁰ Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 814 n.12 (1986).

a. federal statutory causes of action over state-law rights

I focus first upon a quirky set of cases,¹⁰¹ 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*.¹⁰² In *Shoshone*, Congress had 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.”¹⁰³ Thus, the case presented a situation where state law created all the rights at issue, but Congress had created a cause of action entitling a class of persons to enforce these state rights.

The issue for the Court was whether the mining rights act could ground federal question jurisdiction. A straight forward application of the Holmes test would have found jurisdiction, as Congress clearly created the cause of action. Nevertheless, the Court held that this cause of action could not support 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.”¹⁰⁴ That is to say, the Court held that a congressionally created cause of action to enforce state-law rights does not arise under § 1331.

Similarly, the Court rejects all federal question suits that allege jurisdiction under § 1331 because the real property at issue was once conveyed by the United States. The lead case in this corner of jurisdiction jurisprudence is *Shulthis v. McDougal*.¹⁰⁵ Here, the Court holds that land sold by the federal government is entirely governed by state law after the sale.¹⁰⁶ As such, disputes

¹⁰¹ See *Grable & Sons*, 545 U.S. at 317 n.5 (“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).”).

¹⁰² 177 U.S. 505 (1900).

¹⁰³ *Id.* at 508.

¹⁰⁴ *Id.* at 509.

¹⁰⁵ 225 U.S. 561, 569–70 (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. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws”). See also *People of Puerto Rico v. Russell Co.*, 288 U.S. 476, 483 (1933) (“The federal nature of the right to be established is decisive—not the source of the authority to establish it.”); *Joy v. City of Saint Louis*, 201 U.S. 332, 341 (1906).

¹⁰⁶ *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 676–77 (1974) (“Once [a land] patent issues, the incidents of ownership are, for the most part, matters of local property law to be

involving these parcels of real property do not present a colorable federal right sufficient to ground jurisdiction under § 1331, absent unusual circumstances, because state law entirely governs the rights and duties of the litigants.¹⁰⁷ This is the case even though plaintiff alleges a congressionally created cause of action to enforce these state-law rights.¹⁰⁸

Finally, in *People of Puerto Rico v. Russell & Co.*,¹⁰⁹ the Court made, perhaps, its clearest statement that the proper focus for § 1331 purposes, despite the Holmes test, is upon the assertion of a federal right—not the federal cause of action. In this case, Puerto Rico was seeking to collect a tax debt. For lengthy reason not relevant here,¹¹⁰ 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.¹¹¹ Puerto Rico, relying upon this congressional creation of a cause of action, began a suit in the Puerto Rican courts to collect the tax. Defendant removed to federal district court, relying upon the Holmes test, contending that the case arose under § 1331 as federal law created the cause of action. The Court disagreed. Federal question jurisdiction, the Court held, may only be “invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is nonfederal, merely because the plaintiff’s right to sue is derived from federal law.”¹¹² The Court went on to make the point even more bluntly, “[t]he federal nature of the right to be established is decisive [for jurisdictional purposes]—not the source of the authority to establish it.”¹¹³ This rule remains a valid part of the § 1331 fabric, although it is now eclipsed by the dominant rhetoric of the Holmes test.¹¹⁴

vindicated in local courts, and in such situations it is normally insufficient for “arising under” jurisdiction merely to allege that ownership or possession is claimed under a United States patent.”).

¹⁰⁷ Id. Only if federal law continues to govern the right, see *id.*, or if the suit is to decide whether the United States did, in fact, originally convey it, see *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 22 (1935); does an action to enforce that right arise under § 1331.

¹⁰⁸ Id.

¹⁰⁹ 288 U.S. 476 (1933).

¹¹⁰ Id. at 477–83.

¹¹¹ Id. at 483–84.

¹¹² Id. at 483.

¹¹³ Id.

¹¹⁴ See *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 317 n.5 (2005); *Jackson Transit Authority v. Transit Union*, 457 U.S. 15 (1982) (holding that the federal courts lack § 1331 jurisdiction over claims under the Urban Mass Transportation Act because Congress instructs that these rights are to be determined by state law); *Bay Shore Union Free School 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

b. frivolous assertions to a federal statutory right

A like analysis is used in cases where the alleged federal right is so frivolous as to be non-colorable.¹¹⁵ As with *Shoshone*, the colorable test is exceedingly difficult to fail and is rarely used to dismiss a case.¹¹⁶ A right is non-colorable under this doctrine only if it is purely procedural or it is wholly without merit, such as being barred by previous Supreme Court holdings directly on point.¹¹⁷ In *Deming v. Carlisle Packing Co.*,¹¹⁸ for example, the parties, who were not completely diverse, went to trial in a Washington state court over a contract for salmon (i.e., a state-law right coupled with a state-law cause of action). Two of the three defendants claimed, in a petition for removal to federal court, 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 State Supreme Court review. Defendants argued “that a Federal question was involved in the refusal to grant the petition for removal.”¹¹⁹ 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” that it failed to give rise to federal question jurisdiction.¹²⁰ Although this case arose in the context of the Supreme Court’s appellate jurisdiction, later Supreme Court opinions, usually in dicta,¹²¹ have interpreted it as a limit upon § 1331.¹²²

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 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”).

¹¹⁵*Steel Co. v. Citizens for a Better Environment*, 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); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359 (1959); *Bell v. Hood*, 327 U.S. 678, 682–83 (1946); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

¹¹⁶ *Goosby v. Osser*, 409 U.S. 512, 518 (1973) (discussing the difficulty of proving insubstantiality).

¹¹⁷ See, e.g., *Goosby*, 409 U.S. at 518.

¹¹⁸ 226 U.S. 102 (1912).

¹¹⁹ *Id.* at 105.

¹²⁰ *Id.*

¹²¹ See *Crowley Cutlery Co. v. U.S.*, 849 F.2d 273, 276 (7th Cir. 1988) (stating that most invocations of the substantiality rule by the Court are in dicta).

The lower courts, however, rely upon this rule from time to time. For example, when plaintiffs attempt 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,¹²³ a choice of law statute¹²⁴ or a rule of procedure¹²⁵ to vest jurisdiction. These procedural bodies of law,¹²⁶ while federal in origin, 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).¹²⁷

In reviewing these cases in which plaintiffs fail to allege colorable federal rights, it is clear the presence of a congressionally created cause of action, despite the numerous incantations of the Holmes test by the Court,¹²⁸ is not the key factor

¹²² See *supra* note 115.

¹²³ *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002) (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.”).

¹²⁴ *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).

¹²⁵ *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 Exp., Inc. v. Averitt Exp., 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).

¹²⁶ 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).

¹²⁷ See, e.g., 28 U.S.C. § 2072 (stating that the rules of civil procedure “shall not abridge, enlarge or modify any substantive rights”); Fed. R. Civ. P. 82 (“[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts”); *accord* *United States v. Sherwood*, 312 U.S. 584, 589–90 (1941).

¹²⁸ See, e.g., *Grable & Sons Metal Products, Inc. v. Darue Engineering & 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 Environment*, 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. International College of Surgeons*, 522 U.S. 156, 164 (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); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) (same); *Christianson v. Colt Industries 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

in determining whether a claim will arise under § 1331. Rather, it is the status of the right as colorable that determines whether the Court takes jurisdiction.¹²⁹

2. *Colorable assertion to a congressionally created right and congressionally created cause of action*

By focusing on the issue of colorable federal right asserted, the Court's treatment of cases with a congressionally created cause of action and a highly dubious claim to a federal right become less opaque. In such cases, the Court regularly takes jurisdiction.¹³⁰ A recent example can be found in the Court's *Blessing v. Freestone*¹³¹ decision. In this case, plaintiffs brought a 42 U.S.C. § 1983 cause of action.¹³² While § 1983 creates a statutory cause of action for the violation of federal rights by state officials, it does not create rights; rather, it merely empowers a class of persons to enforce federal rights located in the Constitution or other statutes.¹³³ 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*, then, plaintiffs alleged that defendants violated their federal rights as codified in the substantial compliance provision of Title IV-D of the Social Security Act.¹³⁴ The Court held that the act did not create federal rights.¹³⁵ It ruled that the substantial compliance provision "was not intended to benefit individual children and custodial parents," but rather it establishes "a yardstick for the Secretary to measure the systemwide performance of a State's Title IV-D program."¹³⁶ Plaintiffs' claims were barred, but the Court did not dismiss for lack of jurisdiction, as it does in cases such as *Shoshone Mining* where plaintiffs lack even a colorable claim to a federal right.

complaint establishes either that federal law creates the cause of action.") (internal quotations omitted); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983) (same).

¹²⁹ *People of Puerto Rico v. Russell & Co.*, 288 U.S. 476, 483 (1933).

¹³⁰ See, e.g., *Gonzaga University v. Doe*, 536 U.S. 273 (2002) (holding plaintiff's 42 U.S.C. § 1983 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.

¹³¹ 520 U.S. 329 (1997).

¹³² *Id.* at 333.

¹³³ *Nevada v. Hicks*, 533 U.S. 353, 403-04 (2001) ("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).

¹³⁴ *Blessing*, 520 U.S. at 332-33.

¹³⁵ *Id.* at 343.

¹³⁶ *Id.*

Plaintiffs' case in *Blessing*, which in the final analysis failed even to establish an extant federal right, vests under § 1331 because the allegation of a federal right was colorable. It was colorable because plaintiffs alleged a substantive right that, at the time the case was filed, while highly dubious was not absolutely barred by precedent. This non-robust allegation of a federal right is all that is required to vest § 1331 when coupled with an assertion to a congressionally created 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 a cause of action from the statute.¹³⁷ The federal courts regularly hold that in such situations the inference, or lack thereof, of a cause of action does not implicate the court's jurisdiction.¹³⁸ These cases again illustrate that in the realm of colorable congressionally created rights, subject matter jurisdiction rests primarily on the existence of a colorable claim to a congressionally created right, not on the existence of a federal cause of action as the Holmes test suggests. Consider two examples.

¹³⁷ 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) 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.

¹³⁸ See, e.g., *Steel Co. v. Citizens for a Better Environment*, 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."); *Northwest 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); *Thompson v. Thompson*, 484 U.S. 174, 178 (1988) (affirming court of appeals 12(b)(6) dismissal because there is no implied private right of action under the Parental Kidnapping Prevention Act); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951) (holding existence of implied cause of action under the Federal Power Act is not jurisdictional); *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); *Oneida Indian Nation of N. Y. State v. Oneida County*, 414 U.S. 661, 666-67 (1974); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359 (1959); *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U.S. 56, 60 (1939); *The Fair v. Kohler Die and 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.").

In *Securities Investor Protection Corp. v. Barbour*¹³⁹ the Court held that although the Securities Investor Protection Act created rights for the shareholder plaintiffs, they lacked an explicit cause of action to enforce them against the federally chartered Securities Investor Protection Corp. Thus, 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 Corp.] was, of course, the protection of investors. It does not follow . . . that an implied right of action by investors who deem themselves to be in need of the Act’s protection, is either necessary to or indeed capable of furthering that purpose.”¹⁴⁰ In lieu of private actions, the Court noted a litany of oversight procedures which were designed to protect persons similarly situated to the plaintiffs.¹⁴¹ The Court barred the suit, but not on jurisdictional grounds.

The Court takes the same jurisdictional stance to inferred causes of action even when it holds that the statute in question does not create federal rights. In *Pennhurst State School and Hospital v. Halderman*,¹⁴² for instance, the Court held that plaintiffs lacked both rights under the Developmentally Disabled Assistance and Bill of Rights Act and that it would not infer a cause of action under the act. The Court held that the language of the act did not create rights as “Congress made clear that the provisions of § 6010 were intended to be hortatory, not mandatory,”¹⁴³ barring plaintiffs’ action for lack of a right. Nevertheless, the Court did not hold that plaintiff failed to assert a colorable claim to a right under the statute for jurisdictional purposes. As a result, the Court never questions jurisdiction here even though the claim lacks an independent congressionally created cause of action and plaintiffs’ claim to a federal right is merely colorable.

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 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

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

¹⁴⁰ Id. at 421.

¹⁴¹ Id. at 418–20.

¹⁴² 451 U.S. 1 (1981).

¹⁴³ Id. at 24.

of action—be it explicitly created or sought by inference. The jurisdictional focus, as 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 suits to enforce treaty rights follows this same colorable assertion 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 vest the federal courts with jurisdiction to hear suits arising from a treaty. Despite these straightforward propositions, not every treaty to which the United States enters creates federal rights enforceable in federal courts by private parties. Most international law, including treaties, is binding only upon nation-states.¹⁴⁴ As such, most claims in federal court involving a treaty would have the United States as a party and, therefore, not arise under § 1331.¹⁴⁵ Nevertheless, some claims to the vindication of a treaty right do not involve the United States as a party, which I turn to presently.

Of prime importance in this area is the Supreme Court’s longstanding distinction between self-executing and non-self-executing treaties.¹⁴⁶ A self-executing treaty is one that creates judicially enforceable rights without the need for implementing legislation passed by Congress, and a non-self-executing treaty, conversely, does not create judicially enforceable rights without additional legislative implementation.¹⁴⁷ Treaties coupled with implementing legislation do not pose a jurisdictional quandary, as the federal statute implementing the treaty obligations suffices for § 1331 purposes just like any other federal statute.¹⁴⁸ But treaties that lack implementing legislation pose a unique jurisdictional question.

When a treaty lacks implementing legislation, the federal courts treat the treaty’s status as self-executing as a jurisdictional issue. If the treaty is self-

¹⁴⁴ See, e.g., DAVID J. BEDERMAN INTERNATIONAL LAW FRAMEWORKS 50 (2001).

¹⁴⁵ See 28 U.S.C. §§ 1345, 1346.

¹⁴⁶ *Foster and Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829) (Marshall, C.J.); see also LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 198–211 (2d ed. 1996) (providing a brief discussion of self-executing doctrine); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995) (providing a critical review of self-executing doctrine).

¹⁴⁷ See *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (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 146, at 696.

¹⁴⁸ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (“it is the implementing legislation, rather than the [treaty] itself, that is given effect as law”).

executing, then the court will take § 1331 jurisdiction over the case.¹⁴⁹ Most treaties, however, are not self-executing.¹⁵⁰ 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 § 1331.¹⁵¹

This treatment, when analyzed from a perspective that focuses upon the allegation of federal rights, 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.”¹⁵² 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 treated as if they were statutory rights,¹⁵³ it is not surprising to see that jurisdictional rulings for suits based upon treaty rights follow the same standard as statutory rights. That is to say, if a plaintiff asserts a non-colorable claim to a treaty right, because the treaty is non-self-executing and lacks implementing legislation, then 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 to vest jurisdiction 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 United States 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.¹⁵⁴ In *Buechold v. Ortiz*, the Ninth Circuit refused to hear such a

¹⁴⁹ See, e.g., *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881 (5th Cir. 1996); *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir. 1976); *Seth v. British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir. 1964).

¹⁵⁰ See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (“[t]reaties of the United States do not generally create rights that are privately enforceable in courts.”); *Dreyfus v. Von Finck*, 534 F.2d 24, 29 (2d Cir.), cert. denied, 429 U.S. 835 (1976); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); 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”).

¹⁵¹ See, e.g., *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir. 1977); *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957).

¹⁵² RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3).

¹⁵³ 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.”).

¹⁵⁴ See *Buechold v. Ortiz*, 401 F.2d 371 (9th Cir. 1968).

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.”¹⁵⁵

Again, the federal courts’ treatment of cases predicated upon the vindication of a treaty-created rights follows the jurisdictional treatment afforded statutory claims. Namely, section 1331 jurisdiction lies so long as plaintiff makes a colorable claim to a congressionally created right (be this found in a statute or a treaty) and plaintiff makes some allegation, either explicitly or by inference, to 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 import from the status of the congressionally created right that plaintiff asserts—not the origin of the cause of action as the Holmes test directs.

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 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 imbedded federal issues. In such cases, the primary jurisdictional factor remains the status of plaintiff’s asserted federal right. But in such cases, as plaintiff fails to allege a congressionally created cause of action, the Court requires that the congressionally created right asserted be substantial, as compared to the more common colorable standard.¹⁵⁶ In the second category, complete preemption cases, the defendant upon removal asserts that plaintiff’s

¹⁵⁵ Id. 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.”).

¹⁵⁶ See, e.g., *Empire Healthchoice Assur., Inc. v. McVeigh*, — U.S. —, 126 S.Ct. 2121, 2136–37 (2006); *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 313 (2005); *Syngenta Crop Protection, 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); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 814 (1986); *Franchise Tax Bd. of Cal. v. Constr. Laborers’ Vacation Trust*, 463 U.S. 1, 28 (1983); *Gully v. First Nat’l Bank in Meridian*, 299 U.S. 109, 117–18 (1936).

claim is in reality a claim to recover under a federal statute. In these cases, as this is but an odd assertion of a congressionally created right and a congressionally created cause of action, the Court requires that plaintiff's newly reconstituted federal complaint allege a colorable assertion to a statutory right in order to satisfy § 1331.

a. Smith-style cases

The Court recently revisited *Smith*-style cases in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*¹⁵⁷ 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. Five years later, Grable sued Darue in state court to quiet title, a state law cause of action. 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.¹⁵⁸ Upon removal, the federal district court held, and the Supreme Court affirmed, that because plaintiff's state law cause of action depended necessarily upon a claim of a substantial federal statutory right jurisdiction under § 1331 arose.¹⁵⁹

In its opinion, the Court went to pains to distinguish mere colorable assertions of a congressionally created right, which will ground § 1331 jurisdiction when a congressionally created cause of action is asserted, from the "substantial" and "serious" claims to a congressionally created right, which is necessary to establish § 1331 jurisdiction when a state-law cause of action is asserted.¹⁶⁰ The Court stressed that the federal right at issue must be the central and predominant question in the case, which it was in *Grable & Sons*.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 here.¹⁶² 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.¹⁶³

¹⁵⁷ 545 U.S. 308 (2005).

¹⁵⁸ *Id.* at 311 (Grable maintained that the IRS failed to comply with the notice procedures of 26 U.S.C. § 6335(a)).

¹⁵⁹ *Id.* at 316.

¹⁶⁰ See, e.g., *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.").

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ 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

Thus, under *Grable & Sons*, in instances where plaintiff asserts a state-law cause of action to enforce a congressionally created right, the Court will take § 1331 jurisdiction if the plaintiff alleges a substantial congressionally created right and vesting jurisdiction in this particular case comports with congressional intent.

The Court took the a similar approach in the oft-cited *Gully v. First National Bank*¹⁶⁴ opinion but found jurisdiction lacking. In *Gully*, a national banking association conveyed all its assets to First National Bank in Meridian in exchange for First National’s promise to pay all the banking association’s debts. One of these debts was an overdue state tax. 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.¹⁶⁵ 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.¹⁶⁶ The Supreme Court disagreed.¹⁶⁷ 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.¹⁶⁸ Which is to say, 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.”¹⁶⁹ 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.”¹⁷⁰ 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.

Importantly, it is the coupling of the asserted federal right to a state-law cause of action that triggered this more probing jurisdictional review. If the plaintiff in *Gully* had sought an inferred cause of action from a federal statute, jurisdiction undoubtedly would have been found. In *Gully*, the federal act that failed to create rights for the plaintiff is essentially the same as the federal statutory scheme in *Halderman*, which failed to create rights for the plaintiff.¹⁷¹ But in *Halderman* the Court found § 1331 jurisdiction. The key difference is that

congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331,” *id.* at 313–14.

¹⁶⁴ 299 U.S. 109 (1936).

¹⁶⁵ 299 U.S. at 112.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 117–18.

¹⁶⁸ *Id.* at 115–16.

¹⁶⁹ *Id.* at 112.

¹⁷⁰ *Id.* at 114.

¹⁷¹ 451 U.S. 1 (1981).

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. As *Grable & Sons* and *Gully* illustrate, the Court asks for more in terms of the viability of the federal right at issue when plaintiff relies upon a state-law cause to provide the cause of action.¹⁷² Meeting this standard requires that the right asserted be substantial and that the vesting of jurisdiction in any particular case comports with congressional intent.

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 plaintiff initially alleges a state-law cause of action in both instances.¹⁷³ Preemption doctrine falls into two varieties. “Normal” preemption doctrine governs cases where defendant presents a federal defense to plaintiff’s state-law claim. 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.¹⁷⁴ In a complete preemption case, however, defendant is not merely presenting a federal defense to a state-law claim. Rather defendant asserts that Congress has so occupied this area of law that the plaintiff does not legally state a state law claim, even though the complaint asserts one, and that the only possible interpretation of plaintiff’s claim is one based on federal law.¹⁷⁵

¹⁷² See Freer, *supra* note 6 (discussing the Court’s heightened substantiality requirements for *Smith*-style cases).

¹⁷³ See, e.g., *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (treating issue of complete preemption as jurisdictional); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (same); *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 22–27 (1983) (same); *Land v. CIGNA Healthcare of Florida*, 339 F.3d 1286 (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). *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 2003) (similar). See also Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 WAKE FOREST L. REV. 927 (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 (1986) (same).

¹⁷⁴ *Metropolitan Life Ins.*, 481 U.S. at 63 (“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.”).

¹⁷⁵ 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.”); *Metropolitan Life Ins.*, 481 U.S. at 63-64.

Complete preemption doctrine, then, is but a species of statutory interpretation as it is for Congress to direct by statute when federal law provides the exclusive cause of action for the claims asserted within a particular realm.¹⁷⁶ This may be done explicitly by Congress, as is the case under the Price-Anderson Act,¹⁷⁷ or the Court using tools of statutory construction may hold that it was Congress's intent to completely preempt an area of state law, as it has done under the National Banking Act,¹⁷⁸ E.R.I.S.A.,¹⁷⁹ and the Labor Management Relations Act.¹⁸⁰

In a complete preemption scenario, then, plaintiff files a case seeking to enforce a state-law right with a state-law cause of action in state court. Nevertheless defendants in such cases seek removal to federal court on the theory that plaintiff's claim is in reality a federal claim masquerading as a state-law claim.¹⁸¹ If the court holds that the cause of action is completely preempted, then the case arises under § 1331 jurisdiction.¹⁸² Given this quirky set of circumstances, the courts read plaintiff's reconstituted complaint as if it presents a claim to a colorable federal right that Congress intends as the exclusive foundation of a claim in this field.¹⁸³ That is to say, the federal courts employ the same colorable standard that they use when plaintiff directly files a claim under federal law.¹⁸⁴

In reviewing the cases in which a plaintiff claims 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 capture the cases. If plaintiff alleges a congressionally created cause of action—either by direct statutory command, by inference or by complete preemption—then § 1331 jurisdiction lies if plaintiff makes a colorable assertion to a congressionally created right. If plaintiff alleges a state-law created cause of action, then § 1331 jurisdiction lies if plaintiff makes

¹⁷⁶ *Beneficial Nat'l Bank*, 539 U.S. at 8.

¹⁷⁷ *Id.* at 6 (discussing 42 U.S.C. § 2014(hh)).

¹⁷⁸ *Id.* (holding that National Banking Act preempts state-law usury claims against national banks).

¹⁷⁹ *Metropolitan Life Ins.*, 481 U.S. 58 (1987) (holding that E.R.I.S.A preempts state-law claims of improper allocation of benefits from employee benefit plans).

¹⁸⁰ *Avco Corp. v. Machinists*, 390 U.S. 557 (1968) (holding that the L.M.R.A. preempts breach of contract claims regarding union agreements with employers).

¹⁸¹ See *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 397 n.2 (1981); *Avco*, 390 U.S. 557 (1968).

¹⁸² See *id.*

¹⁸³ Cf. *Twitchell*, *supra* note 173, at 865.

¹⁸⁴ See *Oakley*, *supra* note 6, 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.”).

a substantial allegation to a congressionally created right coupled with a determination that vesting jurisdiction in this particular case squares with congressional intent.

B. *Constitutionally Protected Rights*

In considering jurisdiction to hear constitutional cases, the Court focuses, just as with statutory cases, upon the right asserted—not upon the cause of action as the Holmes test suggests. In the constitutional context, 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. Only in the case where plaintiff explicitly relies upon a state-law cause of action must plaintiff allege a substantial right.

1. *Non-colorable assertion to constitutionally protected rights*

I begin with non-colorable assertions of constitutionally protected rights. The Court, in the oft-cited case of *Bell v. Hood*,¹⁸⁵ held that that “where the complaint . . . is so drawn as to seek recovery directly under the Constitution . . . the federal court . . . must entertain the suit.”¹⁸⁶ That is to say, the Court held that the federal courts have original jurisdiction to hear all claims arising directly under the Constitution. Despite this strong language, the Court has another long line of case denying that subject matter jurisdiction lies for suits arising directly under the Constitution. I contend that these exceptions to the *Bell* rule are best understood as failures to assert a colorable federal right.

Many of these cases, but not all, form the core of the political question doctrine, which has vexed scholars for years.¹⁸⁷ I do not intend to forward a theory of the political question doctrine here.¹⁸⁸ For the purposes of this jurisdictional discussion, we need only note that once the Court has held that the case raises a political question—whether this is because plaintiff is not an intended beneficiary of the constitutional clause at issue or it is beyond the competency of the judiciary to enforce the clause—the Court dismisses the case

¹⁸⁵ 327 U.S. 678 (1946).

¹⁸⁶ *Id.* at 681–82.

¹⁸⁷ 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.”).

¹⁸⁸ See *id.* at 1302 (reviewing “prudential” theories and “textualist” theories of the doctrine); see also Jesse Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L. J. 1457 (2005) (arguing that judicial ability to fashion coherent tests should be the guide for the application of the political question doctrine).

on jurisdictional grounds. Moreover, these jurisdictional dismissals are issued even when Congress has provided a statutory cause of action for the plaintiff, 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 instance where the Court applies the political question doctrine.¹⁸⁹ The Constitution states that the “United States shall guarantee to every State in this Union a Republican Form of Government.”¹⁹⁰ The seminal case interpreting this clause is *Luther v. Borden*,¹⁹¹ 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.¹⁹² 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.¹⁹³

Or reinterpreted in terms of colorable rights, the question presented required the Court to pass upon the rights of the polity, as opposed to individual rights of the litigants at bar, explaining why the Court held that the judiciary lacked subject matter jurisdiction to resolve the case.¹⁹⁴ That is the case because 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.¹⁹⁵ Thus the parties lacked both

¹⁸⁹ 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 Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 140-51 (1912) (same); *Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849).

¹⁹⁰ U.S. Const., Art. IV, sect. 4.

¹⁹¹ 48 U.S. (7 How.) 1 (1849).

¹⁹² *Id.* at 47.

¹⁹³ *Id.* at 46.

¹⁹⁴ *Id.* at 47.

¹⁹⁵ See *id.* at 39 (“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.”); *id.* at 42 (“the 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.”).

the obligation and enforceability elements of the contemporary conception of a right, rendering the alleged federal right non-colorable.¹⁹⁶

Of course, *Luther*, an 1849 case, pre-dates 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 employed is of a constitutional, not statutory, nature.¹⁹⁷ Nevertheless, the Court has often relied upon this same political-question rationale to dismiss suits arising under federal question jurisdiction, as was the case in *Baker v. Carr*.¹⁹⁸ Moreover, in *Carr*, the Court jurisdictionally dismissed plaintiff's constitutional claim even though Congress had provided a statutory cause of action for the claim.¹⁹⁹ As such, *Carr* illustrates again that, despite the Holmes test, the Court's focus is actually upon the status of the federal right asserted.²⁰⁰

Jurisdictional dismissals for failing to assert a colorable claim to a constitutionally protected right are not limited to instances of the political question doctrine, however. For example, the Court holds that it lacks jurisdiction to hear claims directly under the full faith and credit clause of the Constitution.²⁰¹ 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 courts.²⁰² The Court takes a similar approach to claims brought to enforce

¹⁹⁶ See *supra* part II.C. 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 beyond the competency of the judiciary to enforce the clause. See Redish, *supra* note 187, 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.

¹⁹⁷ *Luther*, 48 U.S. at 34.

¹⁹⁸ 369 U.S. 186 (1962).

¹⁹⁹ See *id.* at 187, 218–229 (jurisdictionally dismissing plaintiff's § 1983 claim on political question grounds).

²⁰⁰ The Court offers other jurisdictional holdings, linked to the lack of a colorable individual right, in other constitutional contexts that are considered political questions. See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993) (holding that the federal courts lack jurisdiction to adjudicate the procedures the Senate employs when holding impeachment trials for judges); *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (holding that the federal courts lack jurisdiction to hear a suit seeking to enforce the faithfully execute the laws clause against the President); *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973) (holding that that the federal courts lack jurisdiction to hear a substantive due process claim to evaluate the training, weaponry and orders of the Ohio National Guard by the explicit command of Art. I, § 8, cl. 16); *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion) (holding that the federal courts lack jurisdiction to hear a suit to enforce the qualification of members of Congress clause).

²⁰¹ *Thompson v. Thompson*, 484 U.S. 174, 182 (1988); *Minnesota v. Northern Secs. Co.*, 194 U.S. 48, 72 (1904).

²⁰² *Id.* 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

the supremacy clause, even when Congress has provided a cause of action by statute.²⁰³ In *Chapman v. Houston Welfare Rights Organization*,²⁰⁴ the Court held, in a case where 42 U.S.C. § 1983 provided a statutory cause of action, 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.²⁰⁵ Again, plaintiff’s lack of a colorable assertion of constitutionally protected rights forms the lynchpin to the Court’s jurisdictional ruling, not the origin of the cause of action as the Holmes test states.

Finally, this focus on assertions to colorable constitutionally protected rights is further supported in instances where the Court recognizes a right where it previously held one did not exist. For example, in *Kentucky v. Dennison*,²⁰⁶ a pre-Civil War case, the Court held that the extradition clause of Article IV section 2 of the Constitution did not vest state governors with a right to judicially enforce an extradition request against other states, because the constitutional command installed merely a “moral duty” to do so.²⁰⁷ As a result, the Court held that it lacked jurisdiction to hear such cases, given that 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.)²⁰⁸ In 1987, the Court reversed itself.²⁰⁹ It held that the extradition clause created a clear, ministerial duty that it could enforce, and thus took jurisdiction.²¹⁰ Simply put, the Court now holds that the extradition clause creates federal rights, thereby vesting § 1331 jurisdiction. 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.

In reviewing these cases, where plaintiffs fail to present a colorable claim to a constitutionally protected right, the following rule can be surmised: The Court lacks jurisdiction over non-colorable claims to constitutional rights

given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting.”).

²⁰³ *Chapman v. Houston Welfare Rights Organization*, 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 court lacks subject matter jurisdiction under 28 U.S.C. § 1331 as a result).

²⁰⁴ 441 U.S. 600 (1979).

²⁰⁵ *Id.* at 613.

²⁰⁶ *Commonwealth of Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860).

²⁰⁷ *Id.* at 108–09.

²⁰⁸ *Id.* at 110.

²⁰⁹ *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

²¹⁰ *Id.* at 226–29.

regardless of whether a cause of action is created by federal law, contrary to the basic tenets of the Holmes test.

2. *Colorable assertion to constitutionally protected rights*

Just as with statutory rights, jurisdiction over colorable claims to constitutionally protected rights depend primarily upon the status of right asserted, not the origin of the cause of action. First, if 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.²¹¹ Of more interest here are suits that ultimately fail to establish a constitutionally protected right, but the plaintiff managed to assert a colorable allegation to constitutional protection and asserted a congressionally created cause of action.²¹²

Just such a fact pattern arose in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*²¹³ Here plaintiffs challenged the constitutionality of the Price-Anderson Act that caps liability for federally licensed nuclear power plant operators at \$560 million should a nuclear accident occur. The plaintiffs sought declaratory judgment,²¹⁴ thus employing a federal statutory cause of action.²¹⁵ Plaintiffs asserted that the substantive due process provisions of the Fifth Amendment ran contrary to this liability cap.²¹⁶ The Court disagreed, holding that the Fifth Amendment does not impart such a right to the plaintiffs.²¹⁷ 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).”²¹⁸ The rule expressed here, which is generally applied, can be restated as where Congress has created a cause of action, 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 a lack of a cause

²¹¹ See, e.g., *Wilkinson v. Austin*, 545 U.S. 209 (2005) (holding, in a § 1983 case, that the California penal system violated the Fourteenth Amendment by temporarily segregating prisoners by race).

²¹² See, e.g., *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005) (holding plaintiff failed to present a due process claim without questioning jurisdiction in a § 1983 case).

²¹³ 438 U.S. 59 (1978).

²¹⁴ *Id.* at 67.

²¹⁵ See 28 U.S.C. § 2201.

²¹⁶ *Duke*, 438 U.S. at 82.

²¹⁷ *Id.* at 83.

²¹⁸ *Id.* at 72.

of action to bring suit under the Constitution does not raise a jurisdictional defect.²¹⁹ The leading case in this regard is *Bell v. Hood*.²²⁰ In *Bell*, which predates *Bivens v. Six Unnamed Federal Narcotics Agents*,²²¹ plaintiffs brought suit against several FBI agents for illegal arrest, false imprisonment, and unlawful searches and seizures. Plaintiffs asserted that these acts violated the Fourth and Fifth Amendments to the Constitution and sought a cause of action to be inferred directly from the Constitution itself. The Court assumed, based upon the complaint, that the plaintiffs alleged viable constitutional violations.²²² The only question for the Court was whether it had jurisdiction to infer a cause of action for monetary damages.²²³ 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 end of the day.²²⁴ Indeed, it held that the taking of jurisdiction is necessarily prior to the question of whether to infer a cause of action.²²⁵ This holding, which de-couples 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. The Court then specifically reserved the question of whether to infer such a cause of action—again illustrating that the status of a cause of action is not the key jurisdictional factor so long as a colorable federal right has been alleged by the plaintiff.²²⁶

The Court takes the same tact when plaintiffs seek a cause of action inferred directly from the Constitution even when it does not assume that constitutional rights were violated. In *Wheeldin v. Wheeler*,²²⁷ for example,

²¹⁹ See, e.g., *Duke Power*, 438 U.S. at 71-72 (holding existence of implied cause of action directly under the Constitution is not a jurisdictional question); *Mt. Healthy City Board of Education 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 Detention Centers*, 422 F.3d 1090 (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 – U.S. –, 127 S. Ct. 664; 166 L. Ed. 2d 521.

²²⁰ 327 U.S. 678 (1946).

²²¹ 403 U.S. 388 (1971) (creating a cause of action for monetary damages by inference from the Constitution itself).

²²² *Bell*, 327 U.S. at 683.

²²³ *Id.* at 684.

²²⁴ *Id.* at 681–82.

²²⁵ *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.”).

²²⁶ *Id.* at 684.

²²⁷ 373 U.S. 647 (1963).

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.²²⁸ The Court further held that the Fourth Amendment was not violated and that it would not infer a cause of action.²²⁹ Nevertheless, citing *Bell*, the Court took jurisdiction over the claim on the ground that plaintiff's unsuccessful assertion of a constitutional right was nevertheless colorable.²³⁰

In sum, where a colorable constitutional right is asserted the Court vests § 1331 jurisdiction under the colorable assertion standard. Under this standard, § 1331 jurisdiction lies if plaintiff asserts a colorable claim to a constitutionally protected right coupled with an allegation of a statutory or a constitutionally inferred cause of action.

3. *Constitutionally protected rights and state law causes of action*

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

The lead case is *Smith v. Kansas City Title & Trust Co.*²³¹ itself. In *Smith*, a stockholder sued in federal court to enjoin his corporation from purchasing bonds issued pursuant to the Federal Farm Loan Act.²³² 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.²³³ 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 . . . ,

²²⁸ *Id.* at 650.

²²⁹ *Id.* at 649

²³⁰ *Id.*

²³¹ 255 U.S. 180 (1921). See also *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 319–22 (1936) (taking jurisdiction over a state law fiduciary duty case which presented an embedded constitutional challenge to a corporate purchase of electricity from the T.V.A.); *Wheeldin v. Wheeler*, 373 U.S. 647, 659–60 (1963) (Brennan, J., dissenting) (similar).

²³² *Smith*, 255 U.S. at 195.

²³³ *Id.* at 198.

and that such federal claim is not merely colorable, . . . the District Court has jurisdiction under this provision.”²³⁴

In so doing, the Court found that a plaintiff could avail himself of a federal forum on a state-law theory of recovery without being diverse from the defendant because plaintiff’s Missouri cause of action necessarily required the court to pass upon the constitutionality of a federal act. Reinterpreted as a function of rights and causes of action, the Court held that 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.²³⁵ Moreover, plaintiff alleged a substantial right, because the parties were actually contesting the legal content of the right and the alleged right was the central issue in the case.²³⁶

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

²³⁴ Id. at 199.

²³⁵ Id. at 212. 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. 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., *U.S. v. Morrison*, 529 U.S. 598 (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); *U.S. v. Lopez*, 514 U.S. 549 (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, defendant necessarily asserts that Congress owes the defendant a clear and mandatory duty and the courts have the ability to afford relief (i.e., 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 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 Foundation, Inc.*, — U.S. —, 127 S.Ct. 2553, 2559 (2007), it would seem that most potential Commerce Clause plaintiffs lack an injury-in-fact, see *Lujan*, 504 U.S. at 561, which is a necessary component to constitutional standing. The plaintiff in *Smith*, by contrast, due to the quirky 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.

²³⁶ See *Smith*, 255 U.S. at 199; see also *supra* Part II.C (discussing substantial rights).

constitutionally protected right. If plaintiff alleges a state-law cause of action, then § 1331 jurisdiction lies only if plaintiff makes a substantial allegation to a constitutionally protected right.

C. *Federal Common Law Rights*

Federal common law presents a different jurisdictional scheme than is found when plaintiff asserts statutory or constitutional rights, even though the predominate view generally does not treat them as such.²³⁷ I contend that this failure to distinguish pure-federal-common-law cases as a separate body of § 1331 doctrine leads to an inability to fully capture the Court's practice. In this section, then, I review the circumstances in which federal-common-law cases arises under § 1331. I conclude that the federal courts require that plaintiffs seeking to ground § 1331 jurisdiction on a federal common law claim plead a substantial right and facts sufficient to justify the assertion of such a right (i.e., plaintiffs must assert a claim). As with statutory and constitutional suits, I contend that the Holmes test's limited focus upon the origin of the cause of action does not adequately capture the Court's practice in these cases.

There is much debate as to what constitutes the proper definition of federal common law.²³⁸ While there are at least three views on the subject,²³⁹ I will

²³⁷ See *supra* note 15.

²³⁸ See Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 590–94 (2006).

²³⁹ *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). This broad view would encompass many actions, such as the inferring causes of actions from statutes or the constitution, often not traditionally considered components of federal common law. Tidmarsh & Murray, *supra* note 238, at 591–94. Indeed, 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 law-making. 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 it 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., thus involving interpretation) and federal common law cases (i.e., those employing legislative authority). Compare *supra* parts III.A and

employ the “standard view”²⁴⁰ in my discussion. Pursuant to 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.”²⁴¹

Under this definition, there are two differing categories of federal common law.²⁴² First, there are areas where Congress has statutorily commanded the federal courts to create a body of common law.²⁴³ Such is the case, for example, under the Labor Management Relations Act²⁴⁴ and the Sherman Act.²⁴⁵ Secondly, there are “pure” areas of federal common law in which the Court does not have a statutory directive to create common law. This category of pure federal common law itself falls into six broad areas.²⁴⁶ Many of these six instances are inapplicable to our discussion of § 1331 jurisdiction, as Congress has provided a separate statutory font under which such cases typically arise.²⁴⁷

III.B with *infra* part III.C. Further, whether it makes sense or not, the courts continually assert that inferring cause of action from a statute or the Constitution is a different task than creating federal common law. See, e.g., *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 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.”).

²⁴⁰ Tidmarsh & Murray, *supra* note 238, at 591.

²⁴¹ RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 685 (5th ed. 2003).

²⁴² 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 federal-common-law making. 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.”). I believe this 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 to not that these cases tend to follow the colorable assertion standard.

²⁴³ *Texas Indus v. Radcliff Materials*, 451 U.S. 630, 640 (1981).

²⁴⁴ *Id.* at 642–43; *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

²⁴⁵ *Nat'l Soc. of Prof. Eng. v. U.S.*, 435 U.S. 679, 688 (1978).

²⁴⁶ Tidmarsh & Murray, *supra* note 238, 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 (1943); (2) cases involving interstate controversies, see, e.g., *Washington v. Oregon*, 297 U.S. 517 (1936); (3) cases which call upon the court to make substantive judgments regarding international relations, see, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); (4) cases arising in admiralty, see, e.g., *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994); (5) cases creating federal defenses to state law claims, see, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); and (6) cases where Erie doctrine requires the adoption of a federal rule of decision, see, e.g., *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

²⁴⁷ 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. §§ 1345–1347, 1491. Interstate controversies, which typically feature two or more states suing each other, arise under the

Despite these many limitations, pure federal common law suits can arise under § 1331.²⁴⁸ First, the rights and obligations of the United States can apply in cases in which the United States is not a party and thus arise under § 1331.²⁴⁹ Interstate controversies, another area of pure federal common law, can arise in a suit that does not feature two states directly litigating against each other and thus arise under § 1331.²⁵⁰ Finally, plaintiffs may seek to enforce a right created by the federal common law of foreign relations and use § 1331 as a federal jurisdictional font. It is with this limited set of § 1331 cases that I turn to next.

1. *Federal common law of rights and obligations of the United States*

Cases that rely upon the federal common law of the rights and obligations of the federal government may arise under § 1331 in situations where the United States is not a party.²⁵¹ In such a case, the federal court is asked to fashion both a federal right and a federal cause of action without reference to a statute or the Constitution. Given that in these cases the plaintiff is asserting a federal cause of action, albeit one created by the courts, one might suspect that these cases would easily vest under the Holmes test.²⁵² Or one might suspect that jurisdiction would vest upon the assertion of a colorable federal common law right just as in the statutory and constitutional cases reviewed above. The Court, however, employs a different jurisdictional analysis here.

The Court's opinion in *Empire Healthchoice Assurance, Inc. v. McVeigh*²⁵³ is illustrative. Here, the Court dismissed a putative federal common law claim for lack of subject matter jurisdiction. The plaintiff, who was 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

Supreme Court's exclusive and original jurisdiction pursuant to 28 U.S.C. § 1251(a). Most admiralty cases arise under 28 U.S.C. § 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 28 U.S.C. § 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 Erie doctrine, by definition, must arise under diversity jurisdiction. See 28 U.S.C. § 1332.

²⁴⁸ *Illinois v. Milwaukee*, 406 U.S. 91, 99–100 (1972).

²⁴⁹ See, e.g., *Empire Healthchoice Assur., Inc. v. McVeigh*, — U.S. —, 126 S.Ct. 2121, 2131–33 (2006)

²⁵⁰ See, e.g., *Milwaukee*, 406 U.S. 91 (1972).

²⁵¹ *Tidmarsh & Murray*, *supra* note 238, at 595.

²⁵² See, e.g., *Nat'l Farmers Union Ins. Co. 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).

²⁵³ — U.S. —, 126 S.Ct. 2121, 2126 (2006).

tort suit.²⁵⁴ The insurer argued that federal common law should govern this reimbursement claim and thereby ground § 1331 jurisdiction. The Court disagreed, refusing to fashion a federal common law rule.²⁵⁵ The Court held that it fashions federal common law in regard to the rights and obligations of the United States when the United States is not a party 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 interest.²⁵⁶ The plaintiff alleged that both of these prongs were met. Nevertheless, the Court held that plaintiff's failure to meet this test with a "showing" that these two elements were met created a jurisdictional defect in the plaintiff's claim.²⁵⁷

The *McVeigh* Court, therefore, required much more of the plaintiff than the assertion of a colorable or substantial federal right in order to vest jurisdiction. It held that jurisdiction would not lie unless plaintiff made *an actual showing*, as opposed to an assertion, that unique federal issues were at issue and the application of state law would constitute a significant conflict with federal policy.²⁵⁸ 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."²⁵⁹ Neither the colorable right standard²⁶⁰ nor the substantial right standard²⁶¹ require plaintiff 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 would have vested. The insurance company's assertion of a federal common law right was colorable as 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

²⁵⁴ *Id.* at 2127.

²⁵⁵ *Id.* at 2132–33.

²⁵⁶ *Id.* at 2132.

²⁵⁷ *Id.* at 2130 (reviewing the decision below) ("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) significantly conflict with (2) uniquely federal interests.") (internal citations and quotations omitted).

²⁵⁸ *Id.* at 2132–33 ("Unless and until that showing is made, there is no cause to displace state law, much less to lodge this case in federal court.")

²⁵⁹ *Bell v. Hood*, 327 U.S. 678, 682 (1946).

²⁶⁰ See, e.g., *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978) (even though the Court held that there was no such constitutional right as alleged by the plaintiff, it held the claim to such "constitutional rights is sufficiently . . . colorable to sustain jurisdiction under § 1331(a).").

²⁶¹ See, e.g., *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) (plaintiff loses his constitutional challenge).

been barred).²⁶² Indeed, a strong argument can be made (one that convinced four members of the Court) that federal common law should have controlled the case.²⁶³ Further, 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,²⁶⁴ it was the central issue in the case and the parties were contesting the legal content of the right.²⁶⁵ But the Court, instead of relying upon 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.²⁶⁶

In fact, its holding that the plaintiff failed to establish a right, as opposed to an inability to assert a colorable or substantial right, generally would be grounds for a successful Rule 12(b)(6) motion, not a Rule 12(b)(1) motion.²⁶⁷

²⁶² See *supra* part II.C (discussing colorable rights).

²⁶³ See *McVeigh*, 126 S.Ct. at 2140 (2006) (Breyer, J., dissenting, joined by Kennedy, Souter, and 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.’”); *Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 150 (2005), *aff’d* 126 S.Ct. 2121 (2006), (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); *id.* 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).

²⁶⁴ *Id.*

²⁶⁵ See *supra* part II.C (discussing elements of a substantial right).

²⁶⁶ *McVeigh*, 126 S.Ct. at 2132-33.

²⁶⁷ *Steel Company 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, n.5 (1979) (similar); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71-72 (1978) (similar); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951) (similar); *The Fair v. Kohler Die and 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. National 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

Moreover, this standard practice of employing a Rule 12(b)(6) dismissal under such circumstances is followed in other federal common law cases. In *Texas Industries v. Radcliff Materials*, for example, the Court declined to craft a common law right but dismissed under Rule 12(b)(6).²⁶⁸

The key to understanding the *McVeigh* line of federal-common-law cases as contrasted with *Texas Industries* line of federal-common-law cases, I contend, is that in the latter instances, where the Court has applied the more traditional colorable assertion of a right standard, the Court had a statutory directive to begin its common-law-making endeavor.²⁶⁹ That is to say, the *Texas Industries* line of cases were not pure-federal-common-law cases, but rather situations where Congress specifically directed the Court to craft federal common law by statute.²⁷⁰ 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 ultra-restrictive *McVeigh* approach to jurisdiction, requiring an actual showing that plaintiff can establish a federal common law right in order to vest jurisdiction.²⁷¹ This weaker indicia of congressional intent in pure-federal-common-law cases, as I will expound upon in Part IV, justifies the imposition of a more restrictive jurisdictional test. But for now, it is simply key to note that

defiance of its jurisdictional fealty.”) (internal citation omitted); *Johnsrud v. Carter*, 620 F.2d 29, 32 (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. v. National Broadcasting Co.*, 377 F.2d 194, 197 n.3 (2d Cir. 1967) (affirming only on 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. Hospital Bella Vista*, 254 F.3d 358, 364 (1st Cir. 2001) (Selya, J.) (“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.”).

²⁶⁸ See, e.g., *Texas Indus. v. Radcliff Materials*, 451 U.S. 630 (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); see also *Musson Theatrical, Inc. v. Federal Exp. Corp.*, 89 F.3d 1244, 1248–49 (6th Cir. 1994) (holding that the failure to recognize a federal common law right should result in a dismissal under 12(b)(6) not 12(b)(1)).

²⁶⁹ *Id.*

²⁷⁰ Of course, as this is not a well-settled area there are cases holding to the contrary. 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.”).

²⁷¹ 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); *City of Huntsville v. City of Madison*, 24 F.3d 169 (11th Cir. 1994) (affirming jurisdictional dismissal because the court failed to recognize a federal common law right regarding contractual rights of third party beneficiaries).

focusing solely upon the federal nature of the cause of action, as the Holmes test directs, fails to capture the Court's actual practice in federal-common-law cases such as these, because this limited focus upon the federal cause of action cannot explain the Court's divergent practices.

2. *Federal common law of interstate controversies*

I turn next to the federal common law of interstate controversies, which can also arise under § 1331 if the opposing parties to the suit are not both states. Such cases can arise in two procedural postures: (1) where the federal court is asked to fashion both a federal-common-law right and a federal cause of action²⁷² and (2) in a *Smith*-style setting where state law provides the cause of action.²⁷³ Given these procedural settings, one might expect § 1331 jurisdiction to vest if an allegation of a federal cause of action is coupled with a colorable claim to federal common law right or if an allegation to a substantial federal common law right is coupled with a state-law cause of action. But the federal courts treat federal-common-law-of-interstate-controversies cases under a more demanding standard that requires a substantive right plus an actual showing that the right vests.²⁷⁴

²⁷² *Illinois v. Milwaukee*, 406 U.S. 91, 104–06 (1972); see also *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907) (implicitly assuming that even a private party might file suit to enjoin interstate air pollution).

²⁷³ *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 95, 110 (1938).

²⁷⁴ See *U.S. 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); *California v. General Motors Corp.*, 2007 WL 2726871, at *16 (N.D. Cal. Sep 17, 2007) (slip copy) (holding that mere assertion of a federal common law right to nuisance not sufficient to vest § 1331 jurisdiction); *Norfolk Southern Ry. Co. v. Energy Development Corp.*, 312 F.Supp.2d 833, 836–38 (S.D. W.Va. 2004) (jurisdictionally dismissing suit for failing to make a showing that the federal common law of nuisance would apply); but see *N.Y. v. DeLyser*, 759 F.Supp. 982, 986–87 (W.D.N.Y. 1991) (dismissing federal common law of nuisance on Rule 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) 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) (*Milwaukee II*). The Court in *Milwaukee II* held that the Federal Water Pollution Act Amendments of 1972 displaced federal common law, which was the sole asserted ground for jurisdiction. Frustratingly, after holding that the federal common law was displaced, the Court remanded without directing a procedural posture. The Seventh Circuit on remand held, inter alia, that while federal common law no longer grounded the claims, the claims could proceed (if appropriate pleaded) under the Federal Water Pollution Act, thereby preserving § 1331 jurisdiction. *Illinois v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984). Thus no answer to my particular question is forthcoming from the *Milwaukee II* 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.

For example, in *National Audubon Society v. Department of Water*²⁷⁵ 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 case 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.²⁷⁶ Nevertheless, the court held that the plaintiff “failed to demonstrate” that the federal-common-law right would apply under this particular set of facts.²⁷⁷ Further, it held that this failure to demonstrate the applicability of the right was a jurisdictional defect.²⁷⁸ In effect, the court required the plaintiff to make a showing that the federal common law was applicable in order to vest § 1331 jurisdiction. Again, the Holmes test cannot explain such a dismissal, as plaintiffs in these suits clearly allege federal causes of action.

3. *Federal common law of foreign relations*

Lastly, I consider cases seeking to ground § 1331 jurisdiction upon the federal common law of foreign relations. In *Banco Nacional de Cuba v. Sabbatino*,²⁷⁹ the Supreme Court held that the federal common law of foreign relations must provide the governing standard for international law issues to protect the uniquely federal interest in conducting foreign affairs from potentially parochial and divergent judgments of the several states.²⁸⁰ Although the federal common law of foreign relations applies in numerous contexts,²⁸¹ it seldom²⁸²

²⁷⁵ 869 F.2d 1196 (9th Cir. 1988).

²⁷⁶ *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.”).

²⁷⁷ *Id.* at 1204.

²⁷⁸ *Id.* at 1205.

²⁷⁹ 376 U.S. 398 (1964).

²⁸⁰ *Id.* at 424-26.

²⁸¹ Lumen N. Mulligan, Note, *No Longer Safe at Home: Preventing the Misuse of Federal Common Law of Foreign Relations as a Defense Tactic in Private Transnational Litigation*, 100 MICH. L. REV. 2408, 2440–41 (2002) (“federal common law of foreign relations . . . governs . . . [cases] applying the act of state doctrine; adjudicating the enforceability of foreign non-judicial decrees within the United States; subjecting a foreign sovereign’s public policies to judicial evaluation; applying customary international law; and resolving diplomatic, military and immigration issues not governed by congressional or executive branch action.”) (citing cases).

²⁸² But some exceptionally rare instances do arise where customary international common law creates both a right and a cause of action. See *The Paquete Habana*, 175 U.S. 677 (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).

creates a cause of action.²⁸³ It either arises as a defense,²⁸⁴ thus not subject to § 1331 jurisdiction,²⁸⁵ or it is embedded in a state law cause of action in a *Smith*-style case.²⁸⁶

In these *Smith*-style, federal-common-law-of-foreign-relation cases when the court refuses to recognize a right it dismisses on jurisdictional grounds.²⁸⁷ 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, which was lacking.²⁸⁸ Nevertheless, these courts use the term differently than it is used in the statutory and constitutional context. Recall, that the term substantial, as used in the constitutional and statutory context, means that the right at issue is more than merely colorable, central to the litigation, and contested by the parties.²⁸⁹ In *Smith*-style, federal-common-law-of-foreign-relation cases, however, the courts equate the assertion of a substantial right with both alleging a substantial right and making a showing that the case falls within the scope of the right.²⁹⁰

²⁸³ See Mulligan, *supra* note 281, at 2419.

²⁸⁴ 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).

²⁸⁵ See *supra* part II.A (discussing the well-pleaded complaint rule).

²⁸⁶ See, e.g., *banc 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 Foods 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. Southern Peru Copper Corp.*, 113 F.3d 540 (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).

²⁸⁷ *Venezuela*, 287 F.3d at 199 (in the context of seeking a writ of mandamus to reverse district court's jurisdictional remand); *Patrickson*, 251 F.3d at 804; *Pacheco de Perez*, 139 F.3d at 1377–78; *Marathon Oil*, 115 F.3d at 320.

²⁸⁸ 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).

²⁸⁹ See *supra* parts III.A.5.a and B.3; see also *supra* notes 177–82 and accompanying text.

²⁹⁰ See, e.g., *Patrickson*, 251 F.3d at 799–804; *Pacheco de Perez*, 139 F.3d at 1377; *Marathon Oil Co.*, 115 F.3d at 320.

*Marathon Oil Co. v. Ruhrgas A.G.*²⁹¹ is illustrative on this point. In this case, defendant in support of removal asserted that plaintiff’s state-law cause of action raised a substantial issue of federal law, which was governed by the federal common law of foreign relations.²⁹² Defendant relied upon circuit precedent,²⁹³ which held that the federal common law of foreign relations governs suits in which a foreign nation, who is not a party to the suit, asserts that the case strikes 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.²⁹⁴ 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.²⁹⁵ 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.²⁹⁶ That is, the case was jurisdictionally dismissed for a failure to make a showing, as opposed to 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 have no jurisdictional import.²⁹⁷ Nevertheless, this rule—that § 1331 jurisdiction in *Smith*-style, federal-common-law-of-foreign-relations cases rests upon the assertion of a substantial right and the presentation of sufficient factual allegations—is the consistently applied rule in federal-common-law-of-foreign-relations cases.²⁹⁸

In closing this reinterpretation, I have attempted to shed light upon the Court’s § 1331 canon 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 origin of the cause of action,²⁹⁹ the existence of a federal cause of action is neither a necessary³⁰⁰ nor

²⁹¹ 115 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).

²⁹² *Id.* at 320.

²⁹³ *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997).

²⁹⁴ *Marathon Oil*, 115 F.3d at 320.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

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

²⁹⁸ See, e.g., *Patrickson*, 251 F.3d at 799–804; *Pacheco de Perez*, 139 F.3d at 1377; *Marathon Oil Co.*, 115 F.3d at 320.

²⁹⁹ The classic presentation of the Holmes test was made in 1916. See *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.) (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.

sufficient³⁰¹ 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 my reinterpretation of the doctrine when it held that “[t]he federal nature of the right to be established is decisive [on the jurisdictional question,] not the source of the authority to establish it.”³⁰² The origin of plaintiff’s cause of action under my analysis remains important only insofar as it determines the strength with which the federal right must be asserted.

Pursuant to this re-characterization, the Court’s § 1331 doctrine may be captured by three distinct standards, not two as the predominate view holds, which afford more precise application than references to kaleidoscopic common sense³⁰³ 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 to a non-judicially created federal cause of action. Under the second standard, § 1331 lies when a plaintiff alleges a substantial assertion to a federal statutory or constitutional right coupled with a state-law cause of action so long as the vesting of jurisdiction in any particular instance comports with congressional intent. Finally, under the third standard, § 1331 jurisdiction lies when plaintiff asserts a substantial assertion of a pure-federal-common-law right and a cause of action, which is coupled with a showing to support the application of the federal-common-law right.

IV. CONGRESSIONAL INTENT AND SECTION 1331

This re-characterization of the § 1331 canon not only yields a series of clarity-enhancing jurisdictional standards, these standards suggest a unifying principle. This unified balancing principle asserts that § 1331 jurisdiction is best understood as a function of viability of the federal right plaintiff asserts that is set to varying degrees in relation to the indicia of congressional permission to bring such claims in federal court, which is often expressed by the creation of a statutory cause of action. These two components, 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, plaintiff’s assertion of a federal right may be quite weak.

³⁰⁰ See, e.g., *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308 (2005); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

³⁰¹ See, e.g., *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979); *Baker v. Carr*, 369 U.S. 186, 187, 218-229 (1962); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 507 (1900).

³⁰² 288 U.S. 476, 483 (1933).

³⁰³ See *Gully v. First Nat’l Bank in Meridian*, 299 U.S. 109, 117-18 (1936).

Conversely, when there are little other congressional indicia of an intent to vest § 1331 jurisdiction, plaintiff must make a strong allegation of a federal right in order for § 1331 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 these three jurisdictional standards to one statutory grant of federal question jurisdiction. The unified balancing principle, then, constitutes a rejection of both assumptions of the predominant view (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 peripheries, 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.³⁰⁴ Thus, the lower federal courts require a statutory font to hear any case, including a federal question case.³⁰⁵ Moreover, federal question jurisdiction “masks a welter of issues regarding the interrelation of federal and state authority and the proper

³⁰⁴ See, e.g., 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 (“Congress—let alone the separation of powers—might be doubly offended by the unauthorized exercise of judicial power. . . . After all, the 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.”); 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.”); Friedman, *supra* note 11, at 24 (“[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.”); MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 83 (2d ed. 1990) (stating that federal courts can hear cases only if Constitution has authorized courts to hear such cases and Congress has vested that power in federal courts); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25 (1980) (“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 83.

³⁰⁵ *Id.*

management of the federal judicial system.”³⁰⁶ Given that Congress is a preeminent actor in regards to federalism questions,³⁰⁷ at least in regard to the intersection of federalism and the control of the federal courts’ jurisdiction,³⁰⁸ a course that sails a closer tact to congressional intent in the vesting of § 1331 jurisdiction than the predominant view espouses³⁰⁹ would foster foundational separation of powers norms.

But as the reinterpretation the Court’s jurisdictional doctrine above illustrates, plaintiffs must make further allegations of congressional intent to vest

³⁰⁶ *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8 (1983) (footnote omitted); see also *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986) (“[D]eterminations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system”).

³⁰⁷ 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 Gillian E. Metzger, *Congress, Article IV and Interstate Relations*, 120 HARV. L. REV. 1468, 1476 (2007) (“assigning 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) (arguing, in regard to Congress’s powers under the Fourteenth Amendment, that “[b]ecause 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”); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEXAS L. REV. 1321 (2001) (arguing that separation of powers doctrine protects states’ interest in Congress by rendering the passage of federal legislation difficult); Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (arguing that political parties adequately represent states’ interests in Congress); Jesse H. Choper, *The Scope of National Powers Vis-à-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977) (arguing that states may fully protect their own interests in Congress and that the federal courts should focus on individual rights). Of course, process federalism has its critics. See, e.g., 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); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEXAS L. REV. 1459 (2001) (arguing that process federalism does not adequately protect states’ interests and thus the federal courts must play an active role in regard).

³⁰⁸ See *Snyder v. Harris*, 394 U.S. 332, 341-42 (1969) (Constitution places the power to “expand the jurisdiction of [the lower federal] courts . . . specifically . . . in the Congress, not in the courts.”); 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.”); Mishkin, *supra* note 4, 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.”).

³⁰⁹ See *supra* note 11.

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,³¹⁰ federal power jurisdiction could well swallow many suits that are traditionally considered exclusive state-court territory.³¹¹ But such an approach would run afoul of principles of federalism, which the Court imputes to Congress as a default legislative intention.³¹² 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 plaintiff may file her complaint—state court, federal court, or both—must be forthcoming.³¹³ The answer I offer to this question is that the courts may find these extra indicia of congressional intent by way of plaintiffs allegations of federal rights and causes of action.

Under this view, then, Congress controls federal question jurisdiction not only by the creation of a jurisdictional statute, such as § 1331, but also by creating rights and causes of action.³¹⁴ Each component, right and cause of action, lends

³¹⁰ 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. 4987 (1874) (statement of Senator Carpenter) (equating the statutory and constitutional grants of federal question jurisdiction); Friedman, *supra* note 11, at 21 (same); Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 723 (1986) (same).

³¹¹ 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 (2007) (arguing that in light of English jurisdictional principles, the *Osborn v. United States* 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, a reading which would very much limit the scope of Article III to those I argue pertain to § 1331).

³¹² 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).

³¹³ See Friedman, *supra* note 13, at 1216 (“A central task of the law of federal jurisdiction is allocating cases between state and federal courts.”); 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.”); 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....”).

³¹⁴ 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; [while] 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*, 53 KAN. L. REV. ___ (forthcoming 2008) available at <http://ssrn.com/abstract=970731> at 29

strength to plaintiff's assertion that congressional intent supports vesting jurisdiction in any given case. Thus, congressional creation of rights, in most cases,³¹⁵ 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.³¹⁶ 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 creates § 1331 jurisdiction.³¹⁷ 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

(arguing that “[t]he 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 have numerous practical differences. *Id.* at 30–45. But the narrower purposes of this article, focusing just on the vesting of § 1331 jurisdiction, those issues are not as pressing.

³¹⁵ But Congress can create rights without vesting the federal courts with jurisdiction. For instance, several courts have noted that Telephone Consumer Protection Act, 47 U.S.C. § 227, vests jurisdiction exclusively in the state courts, pursuant to clear congressional command. See *Murphey v. Lanier*, 204 F.3d 911, 913–914 (9th Cir. 2000) (listing cases). But such acts are exceptional. See also 15 U.S.C. § 2310(d) (limiting most Magnuson-Moss Act claims to state court).

³¹⁶ See, e.g., Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEXAS 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.”); John F. Manning, *Textualism as a Nondelegation Doctrine*, 47 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.”); Henry Hart, *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); 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.”).

³¹⁷ See Wasserman, *Merits supra* note 314, at 677–78.

amounts to a finding that Congress has determined that plaintiff is “an appropriate party to invoke the power of the [federal] courts” in the matter at hand.³¹⁸

Of course, the opposite is also true. If Congress has not created a right or a cause of action, 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 in many issues, 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,³¹⁹ 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.³²⁰ Further, 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 1875.³²¹ That is, Congress retains 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.

B. *Three Instantiations of One Principle*

Finally, the unified balancing principle, with its focus upon legislative intent, offers a strong explanatory thesis that reconciles the Court’s use of three competing standards to vest § 1331 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 to a federal right. I review these three standards in turn.

Consider the use of the colorable assertion standard in the context of legislatively created rights and causes of action first. When a plaintiff makes an allegation of a congressionally created cause of action, plaintiff’s allegations of a federal right need only be colorable to vest under § 1331.³²² That is to say, the strong allegation 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 to a federal right in order for the

³¹⁸ Davis v. Passman, 442 U.S. 228, 239 (1979).

³¹⁹ See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

³²⁰ See, e.g., 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) (discussing the value of judicial federalism and the role of state courts in resisting national tyranny); James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J 1003 (2003) (same).

³²¹ See, e.g., Friedman, *supra* note 11, at 3.

³²² See *supra* parts III.A.1–3 and III.A.5.a.

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.³²³ Actions to enforce treaty rights similarly look to 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.³²⁴ Thus, the vesting of § 1331 cases under the more liberal colorable assertion standard where both the right and the cause of action are legislatively crafted constitutes sound policy in terms of the unified balancing principle's congressional intent analysis.

Constitutional cases, by contrast, present a *prima facie* difficulty under this analysis, because 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. First, the Court regularly engages in a strong presumption that Congress intends to vest actions to enforce constitutional rights in the federal courts.³²⁵ This finding of intent, when

³²³ See *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 812 n. 9 (1986); *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 Cty Sewerage Auth. v. Nat’l Sea Clammers Assn.*, 453 U.S. 1, 13 (1981) (“The key to the inquiry is the intent of the Legislature”); *Texas Industries, 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”); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 91 (1981) (“The ultimate question in cases such as this is whether Congress intended to create the private remedy”); *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., H. Miles Foy, *Some Reflections on Legislation, Adjudication, and Implied Private Rights of Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501 (1986); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Richard W. Creswell, *The Separation of Powers Implications of Implied Rights of Action*, 34 MERCER L. REV. 973 (1983); Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981).

³²⁴ See *supra* part III.A.4; cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326 rpt. n. 1 (“The Senate’s understanding of a treaty to which it gives consent is binding”).

³²⁵ 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. I.C.C.*, 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

coupled with a congressionally created cause of action to enforce the constitutional right, demonstrate sufficiently strong indicia of legislative intent to vest § 1331 jurisdiction under the colorable assertion standard. Instances where the Court takes jurisdiction over an assertion to 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.³²⁶ Just as an assertion of a statutory right when coupled with an assertion of an inferred statutory cause of action is sufficient indicia of legislative intent in the statutory realm to vest § 1331, an assertion to a constitutional right and an assertion to an inferred cause of action constitutes a strong showing of intent to vest § 1331 jurisdiction in the constitutional realm.³²⁷ Given this 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.

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. Michigan Academy 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.”); *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 111–12 (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.”); *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974) (federal statute will not be construed to preclude judicial review of constitutional challenges absent clear and convincing evidence of congressional intent).

³²⁶ *Id.*

³²⁷ See *supra* note 323. Not all jurists 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. University 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).

I turn next to the substantial rights standard, which governs cases where state-law supplies plaintiff's cause of action in which a federal right is imbedded. Because the plaintiff is not alleging a congressional cause of action, there is less indicia of congressional intent to vest § 1331 jurisdiction in these cases. Indeed, a plaintiff in such cases essentially concedes that there is not a congressional judgment that she is "an appropriate party to invoke the power of the [federal] courts" in the matter at hand.³²⁸ Rather, the existence of a federal right constitutes the sole marker of legislative approval to vest § 1331 jurisdiction.³²⁹ As a result, plaintiffs in these cases must make an allegation to a substantial federal right, under this second jurisdictional standard, in order to invoke sufficient indicia of congressional intent to vest § 1331 jurisdiction.³³⁰

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."³³¹ 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.

Finally, I turn to federal-common-law cases. These cases present the most challenging scenario for the vesting of § 1331 jurisdiction given a focus upon congressional intent. Plaintiffs in such cases generally lack strong indicia of congressional intent to vest § 1331 jurisdiction because they allege neither congressionally, or constitutionally, created rights nor 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.³³²

³²⁸ *Davis v. Passman*, 442 U.S. 228, 239 (1979).

³²⁹ See *supra* notes 316–17 and accompanying text (discussing that the creation of rights constitutes indicia of legislative intent to vest § 1331 jurisdiction).

³³⁰ See *supra* parts III.A.5.a and II.B.3.

³³¹ *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005); see also *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8 (1983). For thorough examples of lower courts conducting this congressional intent analysis, see *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 911 (7th Cir. 2007) (Easterbrook, J.); and *Eastman v. Marine Mechanical Corp.*, 438 F.3d 544, 553 (6th Cir. 2006).

³³² See, e.g., *Atherton v. Federal Deposit Insurance Corp.*, 519 U.S. 213, 218 (1997) ("'[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts."); 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 requirements protect state prerogatives because the states are

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.³³³ 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,³³⁴ the act of federal-common-law making without a statutory directive to do so creates a particularly troubling separation of powers issue unique to jurisdiction. 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 very analytical components required to vest

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.”).

³³³ 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); *Northwest Airlines, Inc., v. Trans. Workers Union of Am.*, 451 U.S. 77, 98 n.41 (1981) (same); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 531–32 (1988) (Stevens J., dissenting) (citation omitted) (“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.”); *Textile Workers Union of America 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, 512-513 (1954) (similar); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 979–81 (D.C. Cir.), *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.); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 766 (1989) (arguing that federal common law, as it is essentially a legislative function, violates separation of powers principles); 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.”).

³³⁴ Merrill, *supra* note 323, 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).

jurisdiction under the statute.³³⁵ 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.”³³⁶

Pure-federal-common-law suits raise substantial federalism concerns as well.³³⁷ Federal-common-law rights typically³³⁸ preempt state law in some fashion.³³⁹ But the Court consistently holds that Congress is the better institution to make these preemption judgments than are the federal courts.³⁴⁰ This

³³⁵ *Illinois v. Milwaukee*, 406 U.S. 91, 99–100 (1972); *Tidmarsh & Murray*, *supra* note 238, at 653 (“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 86.

³³⁶ *Snyder v. Harris*, 394 U.S. 332, 341–42 (1969); see also *Empire Healthchoice Assur., Inc. v. McVeigh*, — U.S. —, 126 S.Ct. 2121, 2135 (2006) (“We have no warrant to expand Congress’ jurisdictional grant ‘by judicial decree.’”); *Kokkonen v. Guardian Life Ins. Co. of America*, 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.”). 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 304 and 10.

³³⁷ See, e.g., *Clark*, *supra* note 307, 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”).

³³⁸ Federal common law may 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 Alabama*, 353 U.S. 448 (1957). 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). Another instance lies in the federal common law of Indian relations. See, e.g., *Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). In the case of Indian law, the field is so dominated by federal law, there is no state law to displace. *Id.* at 850–53.

³³⁹ See, e.g., *Atherton v. Federal Deposit Insurance Corp.*, 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); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964); Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 *Cal. L. Rev.* 451, 494–95 (2007) (“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 238, at 615 (“Federal common law displaces state law, and thus shifts the balance of power from state to federal government.”).

³⁴⁰ See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (that since 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);

institutional advantage flows from the fact that the states are represented there,³⁴¹ the actors involved are politically accountable³⁴² and the process for passing federal statutes offers several opportunities for the states to give input.³⁴³

A full-blown determination of whether the legislative flavor of federal common law is a constitutionally illegitimate³⁴⁴ or a necessary element of our constitutional scheme,³⁴⁵ 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”³⁴⁶ in this domain. It is not surprising, then, that the Court is more stingy in finding § 1331 jurisdiction in pure federal common law cases, employing the substantial-right-plus-sufficient-showing standard.³⁴⁷

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, some branches of federal common law, such as rulings under the Sherman Act, are crafted pursuant to explicit congressional command.³⁴⁸ As a result, these cases do not face the same separation of powers and federalism concerns that pure-federal-common-law cases do.³⁴⁹ Because these statutorily directed federal-common-law cases demonstrate strong indicia of congressional intent to vest §

Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) (holding “whether latent federal power should be exercised to displace state law is primarily a decision for Congress,” not the federal courts).

³⁴¹ See *supra* note 307.

³⁴² Vazquez, *supra* note 332, at 1273.

³⁴³ *Id.*

³⁴⁴ See Redish, *supra* note 333, at 766 (arguing that federal common law, as it is essentially a legislative function, violates separation of powers principles).

³⁴⁵ See D'Oench, Duhme & Co. v. Federal Deposit Ins. Co., 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.”); Monaghan, *supra* note 341, 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.”); Merrill, *supra* note 323.

³⁴⁶ Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959).

³⁴⁷ See *supra* part III.C.

³⁴⁸ See *supra* note 243–45 and accompanying text.

³⁴⁹ 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... [while] [t]hese same concerns... 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.”).

1331 jurisdiction, it makes sense, from a congressional intent perspective, that the Court applies the colorable assertion of a federal right standard in such cases.³⁵⁰ The Court takes a similar approach in federal common Indian law cases, in part, because there are no federalism concerns lurking in such cases.³⁵¹

By contrast, a congressional intent justification to vest § 1331 jurisdiction over pure-federal-common-law cases is more attenuated. Perhaps the best argument is that the Constitution requires some limited form of federal common law³⁵² and congressional intent to comport with the Constitution is presumed.³⁵³ Given this less weighty legislative intent justification for vesting § 1331 here, it follows from a congressional intent perspective, that the Court applies a more stringent jurisdictional standard to pure-federal-common-law cases.

The unified balancing principle, which seeks congressional intent to vest § 1331 by balancing allegations of federal rights against allegations of causes of action, provides a strong retort to the assumptions of the predominant view. First, 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.³⁵⁴ 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.³⁵⁵

This scheme assumes, of course, that the Court actually engages in some interpretive exercise designed to ascertain legislative intent when it vests § 1331

³⁵⁰ See, e.g., *Texas Indus. v. Radcliff Materials*, 451 U.S. 630 (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).

³⁵¹ *Nat'l Farmers Union Ins. Co. 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 of N. Y. v. Oneida County*, 414 U.S. 661, 675, 677 (1974) (straddling the fence, in an Indian law case, 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 For the same reasons, we think the complaint before us satisfies the additional requirement formulated in some cases that the complaint reveal a ‘dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.’”).

³⁵² See *supra* note 345.

³⁵³ 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).

³⁵⁴ See *supra* notes 10–13.

³⁵⁵ See *supra* notes 14–18.

jurisdiction.³⁵⁶ Professor Friedman, however, persuasively argues that the Court's § 1331 jurisprudence has not been focused upon Congressional intent pursuant to traditional statutory construction rules.³⁵⁷ This article, however, is an attempt to find legislative intent, not pursuant to traditional rules of statutory construction, as 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. 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.³⁵⁸ 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 object that this reinterpretation strays too far from the process the Court was actually engaging in when deciding these many federal question jurisdiction cases to be an accurate depiction of the law as it was crafted. 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."³⁵⁹

V. CONCLUSION

This article contends that the unified balancing principle can bring much need clarity to the Court's § 1331 jurisprudence. According to this view, § 1331 jurisdiction is best understood as a function of viability of the federal right plaintiff asserts that is set to varying degrees in relation to the indicia of

³⁵⁶ 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.")

³⁵⁷ See Friedman, *supra* note 11, 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.")

³⁵⁸ 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).

³⁵⁹ PLATO, REPUBLIC at 414b p. 91 (trans. G.M.A. Grube, rev. C.D.C. Reeve) (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.)

congressional permission to bring such claims 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.

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 to 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 plaintiff asserts a federal cause of action created as a matter of federal common law and 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 the replacement of inaccurate stock phrases, such as the Holmes test, with a focus upon legislative intent and these three standards, I contend, would be a boon for both courts and litigants who must grapple with tough questions of § 1331 jurisdiction.