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Jurisdiction by Cross-Reference

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JURISDICTION BY CROSS-REFERENCE

LUMEN N. MULLIGAN*

ABSTRACT

State and federal law often cross-reference each other to provide a rule of decision. The difficulties attendant to these cross-referenced schemes are brought to the fore most clearly when a federal court must determine whether such bodies of law create federal question jurisdiction. Indeed, the federal courts have issued scores of seemingly inconsistent opinions on these cross-referential cases. In this Article, I offer an ordering principle for these apparently varied, cross-referential jurisdictional cases. I argue that the federal courts only take federal question jurisdiction over cross-referenced claims when they, from a departmental perspective, maintain declaratory authority over the cross-referenced law. I defend this thesis by extensively exploring cross-referenced regimes in numerous modes. I also contend that this cross-referential ordering principle offers significant insights into the nature of federal question claims more generally. Namely, I assert that, contrary to the predominant view, the federal courts do not stand ready to hear cases in which the judiciary as a whole is deployed merely as a fact-finding forum under federal question jurisdiction. Further, I contend that this view of federal question jurisdiction comports with the original understanding of that font of jurisdiction, as well as principles of judicial independence, and that the Court's tendency to vest federal question jurisdiction upon mere formal distinctions in these contexts often leads to separation-of-powers difficulties. As such, I advocate that jurisdiction over all cross-referenced regimes proceed on functionalist lines.

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I. INTRODUCTION

Although we often conceive of state and federal claims as distinct species, these animals have been interbreeding for some time. As a result, state law often cross-references federal law as the rule of decision and vice versa. While this cross-referencing creates quandaries of all stripes, these difficulties are perhaps most acute in those cases where a federal court must determine whether such cross-referenced regimes create federal question, as opposed to diversity, subject matter jurisdiction. This difficulty often leads to apparently inconsistent jurisprudence. For

example, state judicial incorporation of federal standards as the rule of decision, under *Michigan v. Long*,¹ most often results in federal question jurisdiction, while state incorporation of a federal standard as an element of a state cause of action, in so-called hybrid actions, infrequently results in federal question jurisdiction.² Federal incorporation of state law also produces equally divergent jurisdictional opinions. As *Shoshone Mining Co. v. Rutter*³ and attempts at enacting protective jurisdiction⁴ illustrate, Congress may not merely cross-reference state law and thereby create federal question jurisdiction; yet near analogous cross-referencing of state law as the rule of decision in the federal common law context⁵ results in federal question jurisdiction.⁶ Equally puzzling, the cross-referencing of state law under the Miller Act⁷ creates federal question jurisdiction,⁸ while the nearly identical use of state law under the Tucker Act⁹ does not.¹⁰ Similarly inconsistent, the courts find that the incorporation of state law as the rule of decision in federal enclaves creates federal question jurisdiction,¹¹ while near analogous incorporation of state standards into

1. 463 U.S. 1032, 1040–41 (1983).

2. See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312–14 (2005).

3. 177 U.S. 505, 506–07 (1900).

4. See, e.g., *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

5. See, e.g., *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (“[F]ederal courts should incorporate state law as the federal rule of decision unless application of the particular state law in question would frustrate specific objectives of the federal programs.” (internal quotation marks omitted)).

6. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (“conclud[ing] that § 1331 jurisdiction will support claims founded upon federal common law as well as those of statutory origin”).

7. 40 U.S.C. §§ 3131–3134 (2006) (allowing subcontractors to recover on a bond put up by the prime government contractor).

8. See, e.g., *United States ex rel. Skip Kirchdorfer, Inc. v. M.J. Kelley Corp.*, 995 F.2d 656, 659 (6th Cir. 1993) (“[A]ll federal district courts have jurisdiction over Miller Act claims, because they present a federal question.”); *Cont'l Cas. Co. v. Allsop Lumber Co.*, 336 F.2d 445, 449 (8th Cir. 1964) (“The defense further argues that . . . federal court jurisdiction [lies in this Miller Act case] because it requires that the action be brought in the name of the United States . . . and that, therefore, no federal question is presented here. This defense argument may have some appeal but at this date it does not persuade us.”).

9. 28 U.S.C. §§ 1346(a)(2), 1491 (2006) (waiving sovereign immunity for contract claims against the United States by nonbonded contractors or claims of implied contract).

10. See, e.g., *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 986 n.6 (9th Cir. 2006) (“Contrary to Plaintiffs’ assertions, where a case falls under Tucker Act jurisdiction, federal question jurisdiction cannot serve as an alternative basis for jurisdiction.”); *Eagle-Picher Indus., Inc. v. United States*, 901 F.2d 1530, 1532 (10th Cir. 1990) (similar); *A.E. Finley & Assocs., Inc. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990) (similar); *Graham v. Henegar*, 640 F.2d 732, 734 & n.6 (5th Cir. Unit A Mar. 1981) (similar). Other circuits, however, do find 28 U.S.C. § 1331 jurisdiction under the Tucker Act in some circumstances. See, e.g., *W. Sec. Co. v. Derwinski*, 937 F.2d 1276, 1280–81 (7th Cir. 1991); *A.E. Finley & Assocs. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990); *Bor-Son Bldg. Corp. v. Heller*, 572 F.2d 174, 182 n.14 (8th Cir. 1978).

11. See, e.g., *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (“Federal

federal law under the Federal Tort Claims Act¹² does not create federal question jurisdiction.¹³

These cross-referential puzzles have not escaped the academic eye. Scholars have explored extensively whether state common law cross-references to federal law raise federal question jurisdiction,¹⁴ whether state constitutional cross-references to federal rules of decision present federal questions,¹⁵ whether Congress may enact so-called protective jurisdiction,¹⁶ and the like. By and large, however, these efforts have focused on only one type of cross-reference at a time, eschewing a treatment of cross-referencing writ large. I aim to tackle this broader project.

In this Article, I offer an ordering principle for these cross-referential, jurisdictional cases—namely, that the federal courts only take federal question jurisdiction over cross-referenced claims when they, from a departmental perspective, maintain declaratory authority over the cross-referenced law. By declaratory authority, I mean that the forum court is empowered to authoritatively establish the content of the cross-referenced law.¹⁷ Declaratory authority is to be contrasted, then, to those situations,

courts have federal question jurisdiction over tort claims that arise on ‘federal enclaves.’”).

12. 28 U.S.C. § 1346(b) (waiving sovereign immunity for tort claims against the United States and incorporating state law as the rule of decision).

13. See, e.g., *CNA v. United States*, 535 F.3d 132, 140 (3d Cir. 2008); *Ortiz v. United States*, 595 F.2d 65, 69 n.6 (1st Cir. 1979).

14. See, e.g., John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145 (2006) (empirically surveying lower federal court practice in this area); 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 (1985) (discussing the propriety of such hybrid law cases arising under § 1331); Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1786–93 (1998) (same); John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What “Arise Under” Federal Law?*, 76 TEX. L. REV. 1829, 1839–43 (1998) (same); Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction Over State Law Claims Post-Merrell Dow*, 115 HARV. L. REV. 2272 (2002) (same); see also *infra* note 179 (listing cases and articles on point).

15. See, e.g., Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114 (2009) (discussing federal question jurisdiction to address state-law questions); Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1934–47 (2003) (discussing the role of “characterization” of law as state or federal in this context); Kermit Roosevelt III, *Light From Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888 (2003) (discussing this question in the context of the adequate and independent state grounds doctrine); see also Martin H. Redish, *Supreme Court Review of State Court “Federal” Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985) (arguing in favor of federal question jurisdiction for such cases only on certiorari); Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL’Y 127 (1989) (similar).

16. See *infra* note 67 (listing scholarly treatment of protective jurisdiction).

17. See *infra* notes 45–47 and accompanying text (further defining my use of declaratory authority).

like cases heard in diversity, in which the forum court lacks the power to authoritatively establish the content of the law at issue.¹⁸ I elucidate this principle by finding that cross-referencing regimes deploy cross-references of differing strengths. Under the taxonomy I advocate, a cross-reference may be mandatory, discretionary, or metadiscretionary. Deploying this classification scheme, I contend that the federal courts do not take federal question jurisdiction over cases in which Congress creates mandatory cross-references to state law. They only take federal question jurisdiction over cases in which the federal courts, from a departmental perspective, possess declaratory power over the question of law presented. State-law cross-references to federal law work in a mirror-like fashion, taking federal question jurisdiction only when the cross-reference is mandatory, but reach the same result of preserving federal declaratory authority.

I further argue that this cross-referential ordering principle offers significant insights into the nature of federal question claims more generally. First, on judicial independence grounds, federal courts under federal question jurisdiction, contrary to the dominant view famously espoused by Professor Mishkin,¹⁹ do not stand ready to hear cases in which the judiciary as a whole is deployed merely as a fact-finding forum. Second, as these cross-referential cases lay bare, the Court's tendency is to vest federal question jurisdiction upon mere formal distinctions, which often leads to significant separation-of-powers difficulties.²⁰ As such, I advocate that jurisdiction over all cross-referenced regimes proceed on functionalist lines.

I begin, in Part II, by laying the analytical foundation for this discussion. I define the notion of cross-referencing with more precision and present the varying strengths with which a cross-reference may be made. With these tools at hand, in Part III, I establish my primary claim—that the federal courts only take federal question jurisdiction over cross-referenced cases in which they maintain declaratory authority. I proceed in this Part by categorizing jurisdictional rulings by strength of cross-reference, addressing mandatory, discretionary, and metadiscretionary

18. See *infra* notes 50–52 and accompanying text (further defining my use of lack of declaratory authority).

19. See Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 167–74 (1953) (arguing that the federal courts in federal question jurisdiction should hear merely fact-bound "claims" even if all of the issues of federal law in the particular case are settled).

20. As Professor Vázquez recently noted, "[i]t would be odd to say that federal jurisdiction would exist when Congress delegates to the courts the power to preempt some state law, but not when Congress itself specifies the extent of preemption." Carlos M. Vázquez, *The Federal "Claim" in the District Courts: Osborn, Verlinden, and Protective Jurisdiction*, 95 CALIF. L. REV. 1731, 1761 (2007).

cross-references in turn. In so doing, I explore both federal cross-references to state law and state-law cross-references to federal law. I contend that the federal courts routinely refuse federal question jurisdiction over congressional, mandatory cross-references to state law, yet will take jurisdiction over suits in which the courts make discretionary or metadiscretionary cross-references to state law. I further note that the federal courts will take federal question jurisdiction over state-law cross-references to federal rules only when the cross-reference is nondiscretionary. Both practices, I contend, preserve the declaratory power of the federal courts over the cross-referenced legal question.

In Part IV, I address the broader implications of this finding that the federal courts require declaratory power to vest federal question jurisdiction in cross-referential cases. First, I address how this requirement of declaratory power, which conforms to the original understanding of federal question jurisdiction and with norms of judicial independence, runs contrary to the predominantly held notion that federal courts should be open to purely fact-bound claims in federal question jurisdiction. Second, I critique the Court's overly formalistic reasoning in the cross-referenced context because it raises significant separation-of-powers concerns vis-à-vis congressional control over federal court jurisdiction. I conclude by advocating for a functionalist perspective of cross-referenced regimes. While aiming to remain agnostic upon the propriety of any particular type of cross-referenced scheme, I argue that the courts should not vest federal question jurisdiction upon purely formalistic grounds and assume that the pragmatic ills of assumed extrajudicial approaches, such as protective jurisdiction, will be avoided.

II. THE MIXING AND MATCHING OF STATE AND FEDERAL LAW

In this Part, I offer a more detailed explanation of the notions I deploy to analyze cross-referenced regimes. I begin with an exposition on how cross-referencing operates. I turn next to a classification of the varying strengths by which cross-references are made. With these tools at hand, in Part III, I turn to an investigation of federal question jurisdiction in the cross-referenced context.

A. *The Idea of Cross-Referencing*

To understand how cross-referencing works, one must take in the technical distinctions between the concepts of right and cause of action. At the common law, under the then-extant writ pleading system, the concepts

of right and cause of action (or what is sometimes referred to as “remedy” or a “right of action”) were thought to be immutably linked—one did not exist without the other.²¹ As Justice Harlan noted, “contemporary modes of jurisprudential thought . . . appeared to link ‘rights’ and ‘remedies’ in a 1:1 correlation”²² Given this congruity, in times past the jurists would use the terms cause of action, right, and remedy interchangeably, especially in jurisdictional analyses.

This traditional jurisprudence of congruity, however, had by the 1970s given way to a new regime,²³ with the Court explicitly differentiating rights from the ability to enforce them by way of a cause of action.²⁴ By the end of the decade, the Court in *Davis v. Passman*²⁵ squarely held that the notions of right and cause of action constituted distinct analytic concepts.

Under the now-prevailing view, a right is an obligation owed by the defendant to which the plaintiff is an intended beneficiary.²⁶ Further, to qualify as a right, an obligation must be mandatory, not merely hortatory,²⁷ and the language at issue must not be “too vague and amorphous” or

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

22. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 401 n.3 (1971) (Harlan, J., concurring); see also Zeigler, *supra* note 21, at 72 (“[C]ourts 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.”).

23. Zeigler, *supra* note 21, at 83–104. Zeigler notes this as a sea change. *But see* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1241–45 (2001) (noting how the two-track approach has developed over many decades).

24. Zeigler, *supra* note 21, at 85–86; see also *Cort v. Ash*, 422 U.S. 66, 74–85 (1975) (noting that the corporate action in question was in violation of a federal criminal statute but questioning whether plaintiffs had a cause of action to privately enforce the prohibition); *Sec. Investor Prot. Corp. v. Barbour*, 421 U.S. 412, 420–23 (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); *Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 457–58 (1974) (acknowledging the existence of rights and duties under the Amtrak Act but questioning whether respondent had a cause of action to enforce them).

25. 442 U.S. 228, 238–39 (1979).

26. *Id.* (distinguishing rights from causes of actions and holding that, as in *Barbour*, being an intended beneficiary of a statute may create rights even if it does not create a cause of action); *id.* at 241 (construing rights as obligations designed to benefit individuals, even if the right holder lacks a cause of action to enforce them).

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

“beyond the competence of the judiciary to enforce.”²⁸ This three-part test (i.e., mandatory obligation, clear statement, and enforceability)²⁹ remains the standard by which the Court determines when a right exists.³⁰

A cause of action is the distinct determination of whether the plaintiff falls into a class of litigants empowered to enforce a specified right in court.³¹ The concept of cause of action, then, is necessarily related to the concept of a right insofar as plaintiffs must have rights before they can be persons empowered to enforce them. But the concept of cause is not the equivalent of a right itself under the 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—not by the individuals themselves.³² That is to say, Congress may vest individuals with rights but not vest them with causes of action to enforce those rights by way of a private suit.

These distinctions between rights and causes of action arise frequently in the cross-referencing context. State and federal law may cross-reference each other in three contexts.³³ First, state statutes may directly incorporate

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

29. 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, 560–62 (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 Zeigler, supra* note 21, at 83–104 (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 mandatory obligation and clear statement.

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

31. *Davis v. Passman*, 442 U.S. 228, 239 (1979); *see also id.* at 240 n.18 (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 . . .”).

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

33. *See Preis, supra* note 14, at 159–61 (noting three ways by which such cross-referenced claims may enter federal court); *Redish, supra* note 15, at 899–900 (noting four ways in which federal law finds its way into state court; the first means, the joinder of a federal claim to a state claim, is not a cross-reference and hence not relevant here). In a mild variation from Professors Preis and Redish, I am treating common law cross-referencing and statutory cross-referencing as distinct categories.

federal rights as an element of the state-law causes of action,³⁴ or a federal statute may incorporate state law as the substantive right for certain federal causes of actions.³⁵ Second, the courts may construe state constitutional rights, which are nominally independent of federal law, as consistent with federal interpretations of analogous federal rights.³⁶ Similarly, the federal courts at times interpret the federal constitution as cross-referencing state-law rights and causes of action.³⁷ And third, in common-law claims, state common law may provide plaintiffs with a cause of action, in a manner akin to negligence per se or breach of contract, for the violation of a federal right that lacks a federal cause of action.³⁸ Similarly, federal common law causes of action often incorporate state-law rights as the rule of decision.³⁹

One could arguably expand the universe of cross-referenced regimes even farther, but for various reasons I choose not to do so here. First, I do not include federal preemption as a species of cross-referencing, even when the preemption vests federal question jurisdiction over an otherwise state-law claim, because in such instances there is no attempt to incorporate state law as a part of federal law.⁴⁰ As a result, in preemption cases, it is the federal right, in the procedural posture of a defense, that provides the basis for federal question jurisdiction.⁴¹ Similarly, I do not treat federal claims brought in state court as a matter of concurrent jurisdiction as examples of cross-referencing because such instances do not find state law incorporating federal regimes, but rather state courts applying federal regimes. Finally, I do not address the Rules of Decision

34. *See, e.g.*, CAL. CIV. CODE § 54.1(a)(3) (West 2006) (“‘Full and equal access,’ for purposes of this section in its application to transportation, means access that meets the standards of Titles II and III of the Americans with Disabilities Act of 1990 (Public Law 101-336)”); *see also infra* notes 176, 244 (providing more examples).

35. The Federal Tort Claims Act provides a prime example. *See* 28 U.S.C. § 1346(b) (2006).

36. *See, e.g.*, *State v. Manussier*, 921 P.2d 473, 482 (Wash. 1996) (“This court has consistently construed the federal and state equal protection clauses identically and considered claims arising under their scope as one issue.”).

37. *See infra* Part III.C.1 (discussing enclave jurisdiction).

38. *See, e.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005).

39. *See, e.g.*, *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (holding that state law is presumed to provide the rule of decision in federal common law cases).

40. *See, e.g.*, 28 U.S.C. § 1442(a)(1) (2006) (granting removal jurisdiction for federal officer defendants with a federal-law defense to a state-law action); 28 U.S.C. § 1604 (2006) (creating a foreign sovereign jurisdictional defense to state-law actions subject to exceptions in § 1605); *see also infra* note 146 (discussing the treatment of sovereign immunity as a “jurisdictional defense”).

41. *See, e.g.*, *Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (holding that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602–11 (2006), takes jurisdiction as a federal question, even over state law actions, because the immunity defense will necessarily arise in every such suit).

Act, which requires the federal courts to apply state law in all cases excepting those in which federal law specifically applies.⁴² This Article's focus is on the scope of federal question jurisdiction. Although the Act may apply to cases heard in federal question jurisdiction,⁴³ it is seldom referenced in this context, excepting issues arising in pendent jurisdiction.⁴⁴

B. Cross-Referencing with Varying Degrees of Force

These three modes of cross-referencing—statutory, constitutional, and common law—are each susceptible to three strengths of incorporation.⁴⁵ In the first category of cases, cross-referenced law governs in the forum court of necessity because some rule of law renders the issue beyond the lawmaking competence of the forum court.⁴⁶ Put differently, when a rule of law is applied by a mandatory cross-reference, the forum court lacks declaratory power over the content of the cross-referenced rule.⁴⁷ The archetypal example of state law applying in a mandatory fashion in federal court (although not in the cross-referenced context) is the use of state law under the *Erie* doctrine.⁴⁸ I label this type of cross-referencing “mandatory.”

There is an important caveat applicable here for federal, mandatory cross-references to state law. Although I label this category of cross-references mandatory, this does not mean state law would apply *über alles*. As with the *Erie* doctrine in diversity cases, all cases of mandatory cross-references to state law are subject to federal-interest preemption. If a cross-referential application of state law would conflict with the Constitution, a federal statute,⁴⁹ or important federal interests,⁵⁰ federal

42. 28 U.S.C. § 1652 (2006).

43. See *Watson v. McCabe*, 527 F.2d 286, 288 (6th Cir. 1975) (holding that the Rules of Decision Act is not limited to any particular font of jurisdiction).

44. See Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 2004–06 (1991) (noting that the Act's scope reaches federal question jurisdiction, but that the presence of federal law on point in this font of jurisdiction, excepting pendent claims, limits its use).

45. See Paul J. Mishkin, *The Variousness of “Federal Law”*: *Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 798–804 (1957) (providing definitive discussion of this topic); see also *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591–94 (1973) (citing Mishkin and adopting his dichotomy). Mishkin is speaking only to state law in federal court, Mishkin, *supra*, at 798–804, while I am expanding the concept to include federal law in state court.

46. Mishkin, *supra* note 45, at 799.

47. See *infra* notes 59–61 and accompanying text.

48. See *Little Lake Misere*, 412 U.S. at 591; Mishkin, *supra* note 45, at 799.

49. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any [diversity] case is the law of

law properly preempts a cross-reference to state law even in a “mandatory” setting. Thus, a mandatory cross-reference is one in which the forum court lacks the power to deviate from the cross-referenced law unless it is preempted. Another unique feature of federal, mandatory cross-references to state law is that in mandatory cross-referenced settings, the state law to be applied is that of the state in which the federal district sits, as opposed to a cross-reference to the general common law or the like.⁵¹

The two remaining categories of cross-reference both involve some element of judicial choice. In the second category, cross-referenced state law governs in federal court, and analogously cross-referenced federal law governs in state court, because it was incorporated into the forum court’s law interstitially as a matter of judicial discretion.⁵² In these cases then, the forum court possesses the judicial competence to choose a rule of decision and in exercising this power adopts the cross-referenced law as a matter of discretion.⁵³ In other words, in such instances the forum court is empowered to declare the content of the cross-referenced law.⁵⁴ I label these cross-references “discretionary.”

The last category is composed of instances, like discretionary cross-references, where state or federal law is cross-referenced as a matter of judicial discretion, but the incorporation is systemic and pervasive—not interstitial. Such is the case, for example, when state courts link a state constitutional provision permanently and inextricably to the federal analysis of an analogous provision.⁵⁵ Such a cross-reference is not coextensive with mandatory cross-references, because in these cases the lack of declaratory power to deviate from the cross-referenced law is not imposed by a nonjudicial body.⁵⁶ Yet, in all other respects, the forum court

the State.”).

50. See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538 (1958) (holding that federal interest preempts state law in an *Erie* case); see also Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1665 (2008).

51. See *infra* notes 59–62 and accompanying text.

52. Mishkin, *supra* note 45, at 799–800.

53. *Id.* at 802; see also RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 627 (6th ed. 2009) [hereinafter HART AND WECHSLER] (deploying the competency and discretion terminology).

54. See *infra* notes 59–61 and accompanying text.

55. See, e.g., *State v. Manussier*, 921 P.2d 473, 482 (Wash. 1996) (“This court has consistently construed the federal and state equal protection clauses identically and considered claims arising under their scope as one issue.”).

56. See, e.g., *California v. Greenwood*, 486 U.S. 35, 43 (1988) (“Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.”); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (holding that a

treats the cross-reference as if it were a mandatory one.⁵⁷ In these instances, the courts systemically cross-reference the law at issue unless preempted, and in the case of federal cross-references to state-law rights, the forum state supplies the sole source of the cross-referenced law. Thus, in these instances, there was a moment of discretion, perhaps best described as metadiscretion, characteristic of discretionary cases, followed by a practice of no discretion, characteristic of mandatory cases. I, therefore, label these cross-references “metadiscretionary.”

At first blush, these distinctions between mandatory or discretionary cross-references may seem of purely pedantic interest. Indeed, the Court has so opined on occasion.⁵⁸ Professor Young, however, in a recent article convincingly argues to the contrary, providing three consequences that rest upon these distinctions.⁵⁹ First, in mandatory applications of state law, federal courts remain bound by state court interpretation of state law (i.e., the federal courts lack declaratory power).⁶⁰ His second point is the mirror image, noting that in discretionary cross-references to state law, the federal courts are free to declare the content of state law unfettered by state court rulings.⁶¹ And third, Professor Young argues that in discretionary cross-

state possesses a “sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution”).

57. Professor Young refers to this distinction as the “repeat application problem.” Young, *supra* note 50, at 1646–48. He argues that the federal courts are prohibited from making a federal common law rule that deploys, what I term, a metadiscretionary selection of state-law rights. *Id.* at 1650. While remaining agnostic on this question for now, I seek to deploy this concept of “one-shot” discretion more broadly than federal common law, noting its use in enclave jurisdiction and in *Michigan v. Long*-type cases.

58. *See, e.g., O’Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (“The issue in the present case is whether the California rule of decision is to be applied to the issue of imputation or displaced, and if it *is* applied it is of only theoretical interest whether the basis for that application is California’s own sovereign power or federal adoption of California’s disposition.”); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 n.3 (1988).

We refer here to the displacement of state law, although it is possible to analyze it as the displacement of federal-law reference to state law for the rule of decision. Some of our cases appear to regard the area in which a uniquely federal interest exists as being entirely governed by federal law, with federal law deigning to borrow or incorporate or adopt state law except where a significant conflict with federal policy exists. We see nothing to be gained by expanding the theoretical scope of the federal pre-emption beyond its practical effect, and so adopt the more modest terminology. If the distinction between displacement of state law and displacement of federal law’s incorporation of state law ever makes a practical difference, it at least does not do so in the present case.

Id. (citations and internal quotation marks omitted).

59. Young, *supra* note 50, at 1651 (rejecting the position advanced in *Boyle*, 487 U.S. at 507 n.3).

60. Young, *supra* note 50, at 1651

61. *Id.*

references to state law, the federal courts are free to apply the law of any state, not just the law of the state in which the federal district court sits.⁶²

In this Article, I aim to make a fourth and broader point: namely, that this distinction between strengths of cross-references has jurisdictional consequences. That is to say, not only does mandatory cross-referencing of state law in federal-court cases bring important substantive results,⁶³ mandatory cross-references to state-law rights will not support federal question jurisdiction in federal court.⁶⁴ Similarly, I argue that discretionary cross-referencing of federal rights into state-law causes of action will not support federal question jurisdiction, because the federal courts lack declaratory authority over the legal issues presented when these types of cross-references are deployed.

III. CROSS-REFERENCING AND DECLARATORY POWER

I turn now to making the case that the federal courts hear cross-referenced claims in federal question jurisdiction only when the courts, at least from a departmental perspective, retain declaratory authority over the issue of substantive rights, as opposed to a mere cause of action. In so doing, I look first to mandatory cross-references, concluding that the federal courts refuse federal question jurisdiction over congressionally mandated cross-references to state law rights (i.e., cases where the federal courts would lack declaratory authority over the right), yet accept federal question jurisdiction over mandatory state-law cross-references to federal rights (i.e., cases in which the federal courts possess declaratory authority). I then explore discretionary cross-references, where I find the mirror-image phenomenon. The federal courts find federal question jurisdiction when federal law renders a discretionary cross-reference to state-law rights, yet they decline federal question jurisdiction when state law discretionarily cross-references federal rights. Finally, I assert that in the metadiscretionary context, the Court breaks with these symmetrical results, yet it takes federal question jurisdiction in a fashion that

62. *Id.*

63. Compare *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (exemplifying Mishkin's category one cases, holding the federal courts incapable of applying federal substantive law in diversity cases), with *Dzikowski v. N. Trust Bank of Fla., N.A. (In re Prudential of Fla. Leasing, Inc.)*, 478 F.3d 1291, 1298 (11th Cir. 2007) (in a category two case construing gaps in 11 U.S.C. § 550(d), noting that state law is presumed to apply but nevertheless exercising the court's power to fashion a uniform federal rule of decision).

64. To be clear, my point is not that mandatory applications of state law can vest federal jurisdiction of any stripe. Such usage of federal law arises in diversity jurisdiction, cases in which the United States is a party, etc. My point is limited to vesting federal question jurisdiction.

maximizes federal judicial authority to declare the content of the cross-referenced rights. The following table displays this new taxonomy:

	<i>FEDERAL LAW CROSS-REFERENCE TO STATE LAW</i>	<i>STATE LAW CROSS-REFERENCE TO FEDERAL LAW</i>
MANDATORY CROSS-REFERENCE	No Federal Court Declaratory Power No Federal Question Jurisdiction <u>Examples</u> <ul style="list-style-type: none"> • Protective Jurisdiction • <i>Shoshone Mining Co. v. Rutter</i> 	Federal Court Declaratory Power Federal Question Jurisdiction <u>Examples</u> <ul style="list-style-type: none"> • California's ADA • Hybrid (e.g., <i>Grable & Sons</i>)
META-DISCRETIONARY CROSS-REFERENCE	Federal Court Declaratory Power Federal Question Jurisdiction <u>Examples</u> <ul style="list-style-type: none"> • Enclave Jurisdiction • Federal Common Law Type II 	Federal Court Declaratory Power Federal Question Jurisdiction <u>Example</u> <ul style="list-style-type: none"> • <i>Michigan v. Long</i> Presumption
DISCRETIONARY CROSS-REFERENCE	Federal Court Declaratory Power Federal Question Jurisdiction <u>Examples</u> <ul style="list-style-type: none"> • Tucker Act • Miller Act • Federal Common Law Type I 	No Federal Court Declaratory Power No Federal Question Jurisdiction <u>Examples</u> <ul style="list-style-type: none"> • <i>Michigan v. Long</i> Plain Statement • State analogues to FED. R. CIV. P.

A. Mandatory Cross-References

In this section, I review the Court's jurisdictional treatment of mandatory cross-referencing regimes. A mandatory cross-reference, recall, is one in which the forum court is constrained to apply the cross-referenced law by a nonjudicially imposed rule, unless the cross-referenced law is preempted.⁶⁵ I begin with congressionally mandated cross-references to state-law rights under the guise of protective and *Shoshone*-style jurisdiction, contending that the Court routinely rejects federal question jurisdiction here unless the cross-reference to state-law rights is subject to a federal defense. I then turn to state-law mandatory incorporation of federal rights, concluding that the federal courts take federal question jurisdiction to hear such claims. I further conclude that this taking of federal question jurisdiction maps directly onto the courts' ability to declare the content of the cross-referenced law at issue.

65. See *supra* Part II.B (defining mandatory cross-references).

1. *Protective Jurisdiction*

I begin my review of federal question jurisdiction over congressionally mandated cross-references to state law with protective jurisdiction. Protective jurisdiction is a classification of jurisdictional statutes⁶⁶ encompassing any number of congressional attempts to deploy Article III federal question jurisdiction to authorize the federal courts to hear (a) state-law causes of action, (b) coupled with state-law rights, (c) absent a federal defense, (d) between nondiverse parties, (e) without falling into jurisdiction that is supplemental to a valid federal claim.⁶⁷ Although scholars have put many glosses upon the notion of protective jurisdiction, the unifying theme is the idea that a protective jurisdictional statute would allow federal courts to hear these nondiverse, state-law claims and also satisfy Article III federal question jurisdiction because the jurisdictional statute itself provides the necessary federal “ingredient” under *Osborn v. Bank of the United States*.⁶⁸ The proposed justification for such a power rests upon a greater-power-includes-the-lesser-power argument. That is, if Congress has the greater power to preempt state law with substantive

66. See, e.g., Labor Management Relations Act of 1947 § 301(a), 29 U.S.C. § 185(a) (2006) (potentially creating jurisdiction over state-law claims in the absence of diversity); Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (potentially creating jurisdiction over state-law claims in the absence of diversity).

67. See Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 549–50 (1983) (defining protective jurisdiction). There are two leading theories of protective jurisdiction. First, we have Professor Mishkin’s, in which he contends that Congress may vest jurisdiction over state-law claims if done as part of a broader federal program. Mishkin, *supra* note 19, at 195–96. Second, we have Professor Wechsler, who contends that so long as Congress could preempt state law by substantive legislation pursuant to Article I, it may deploy the lesser power to vest federal jurisdiction over state-law claims. Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948). In this piece, I need not dip too deeply into the debates swirling around protective jurisdiction. For those seeking more information, there is a wealth of literature here. See, e.g., Goldberg-Ambrose, *supra*; James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1926 (2004); Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389 (2010); Vázquez, *supra* note 20; Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CALIF. L. REV. 1775 (2007); Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933 (1982).

68. 22 U.S. 738, 822–23 (1824); see also *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 599 (1949) (Jackson, J., plurality opinion) (advancing a protective jurisdiction theory and noting that “[t]he only way in which any law of the United States contributed to the case was in opening the district courts to the trustee, under Art. I powers of Congress, just as the present statute, under the same Article, opens those courts to residents of the District of Columbia”); Goldberg-Ambrose, *supra* note 67, at 546–47 (“The concept of protective jurisdiction tends to arise in situations in which Congress has authorized a federal forum, the accepted minimum requirements for a case to arise under federal law are not met, and no other basis for federal jurisdiction can be found under Article III of the Constitution.”).

federal law, either standing alone or as part of an overarching federal regulatory project,⁶⁹ then Congress has the lesser power, so the argument goes, to avoid preemption by merely assigning state law claims to federal jurisdiction.⁷⁰

Protective jurisdiction, then, is a classic example of federal law cross-referencing state law. Indeed, pursuant to this basic notion of protective jurisdiction, should a case arise in protective jurisdiction, the applicable federal statute would require that the claim be governed under state law.⁷¹ Moreover, such a deployment of state law would function as a mandatory cross-reference, as the courts would lack the discretion to deviate from the application of state law.⁷² Indeed, several Justices have noted that the application of state law in protective jurisdiction cases would be governed under an *Erie*-doctrine-like, choice-of-law regime mandating application of the law of the forum state.⁷³ Recall, under the *Erie* doctrine, the federal courts lack declaratory authority over state law.⁷⁴ Thus, protective jurisdiction, cast into the analytical components employed here, is a federal, statutory, mandatory cross-reference of both state-law rights and causes of action, which seeks to arise in federal court under federal question jurisdiction.

Although protective jurisdiction has often attracted academic supporters,⁷⁵ this jurisdictional-statute-only view has failed to accrue much

69. See Mishkin, *supra* note 19, at 157–60.

70. See Wechsler, *supra* note 67, at 224–25.

71. See *Mesa v. California*, 489 U.S. 121, 136 (1989) (protective jurisdiction would involve only state law); *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Burton, J., concurring) (advancing a protective jurisdiction theory and noting that “I do not subscribe to the conclusion of the Court that the substantive law to be applied in a suit under § 301 is federal law”); *id.* at 476 (Frankfurter, J., dissenting) (assuming that state law would govern in protective jurisdiction cases pursuant to the Mishkin and Wechsler theories); *Tidewater*, 337 U.S. at 596–97 (Jackson, J., plurality opinion) (proposing that the courts may constitutionally take jurisdiction under what contemporary scholars would style a protective jurisdictional theory because the “*Beeler* and *Austrian* cases . . . [held] that the Congress had power to confer on the district courts jurisdiction of nondiversity suits involving only state law questions”).

72. See *Lincoln Mills*, 353 U.S. at 469–70 (Frankfurter, J., dissenting) (“Since I do not agree with the Court’s conclusion that federal substantive law is to govern in actions under § 301, I am forced to consider . . . the constitutionality of a grant of jurisdiction to federal courts over contracts that came into being entirely by virtue of state substantive law, a jurisdiction not based on diversity of citizenship, yet one in which a federal court would, as in diversity cases, act in effect merely as another court of the State in which it sits.”); *supra* notes 46–48 and accompanying text (defining mandatory use of state law).

73. See *Tidewater*, 337 U.S. at 608 & n.6 (Rutledge, J., concurring) (noting that, under Justice Jackson’s protective jurisdiction view, choice of law would be governed under *Erie* doctrine); *id.* at 650–51 (Frankfurter, J., dissenting) (similar).

74. See, e.g., *Comm’r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (holding that the federal courts are bound by the state-law opinions of the state supreme courts in *Erie* cases).

75. See *supra* note 67.

case law authority. First, all agree that § 1331 is not susceptible to a protective jurisdiction interpretation.⁷⁶ In 1875, Congress passed the first general grant of federal question jurisdiction now codified in 28 U.S.C. § 1331.⁷⁷ Even though the language of § 1331 parallels that of Article III of the Constitution, the Court interprets § 1331 as granting a much narrower scope of federal question jurisdiction than the Constitution permits.⁷⁸ As a result, all § 1331 jurisdictional cases are subject to the well-pleaded complaint rule.⁷⁹ Following this rule, only federal issues raised in a plaintiff's complaint, not anticipated defenses, establish federal question jurisdiction.⁸⁰ Moreover, the majority of federal question cases,⁸¹ according to this standard view, meet § 1331's well-pleaded complaint requirement because federal law creates the plaintiff's cause of action.⁸² This position is generally referred to as the Holmes test. A cross-reference to state-law causes of action and state-law rights fails to comport with the Holmes test because the cause of action is not federal. Thus, if Congress

76. See *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1290 (11th Cir. 2003) (Tjoflat, J., dissenting) (“The theory of protective jurisdiction applies only within the context of a special jurisdictional statute; no one has ever argued that section 1331 itself amounts to a grant of jurisdiction to entertain state law claims on particular matters of federal concern.”).

77. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2006)). This statute has not always been codified here. Nevertheless, I do not employ the cumbersome “predecessor statute to § 1331” locution when referring to cases dealing with the Act as codified in a different location. Instead, I simply refer to this Act as § 1331, even if at a previous time it was codified at a different location. This approach is sound as, excepting statutory amounts in controversy, the Act has been essentially unchanged since 1875. See, e.g., Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369 (1980) (striking out the minimum amount in controversy requirement of \$10,000); Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (1958) (raising the minimum amount in controversy requirement from \$3,000 to \$10,000). Finally, following most scholars, I exclude the short-lived general grant of federal question jurisdiction passed at the end of President John Adams's term and treat the 1875 Act as the first general federal question grant.

78. *Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494–95 (1983). The Constitution prescribes the limits of subject matter jurisdiction for the federal courts. U.S. CONST. art. III, § 2, cl. 1. As a matter of constitutional law, the scope of federal question jurisdiction, jurisdiction “arising under the Constitution, laws, or treaties of the United States,” *id.*, is quite broad. See *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 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 Pharms., Inc. v. Thompson*, 478 U.S. 804, 807 (1986).

79. 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, 599 (1987).

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

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

82. *Am. 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.”).

wishes to pursue a protective jurisdictional theory of jurisdiction, it must pass a statute auxiliary to § 1331.⁸³

As to Article III federal question jurisdiction, protective jurisdiction has failed to find broad support at the Court. As a matter of constitutional law, the scope of federal question jurisdiction—jurisdiction “arising under the Constitution, laws, or treaties of the United States”⁸⁴ as embodied in Article III—is quite broad.⁸⁵ Famously, Chief Justice Marshall wrote for the Court in *Osborn* that the existence of any federal “ingredient” in a case is sufficient to satisfy Article III federal question jurisdiction.⁸⁶ Under the conventional reading of the ingredient test, Article III jurisdiction lies so long as it is possible, even if not probable, that a question of federal law will arise at some point during the suit.⁸⁷ In *Osborn* itself, the federally chartered status of the bank provided the necessary federal ingredient to vest Article III jurisdiction.⁸⁸

Although Professor Mishkin traces protective jurisdiction to *Osborn*,⁸⁹ most commentators place Justice Jackson’s plurality opinion in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,⁹⁰ in which he offered a

83. See, e.g., *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Burton, J., concurring) (treating § 301 of the LMRA as a protective jurisdiction statute).

84. 28 U.S.C. § 1331 (2006).

85. See *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 822–23 (1824) (holding that any federal “ingredient” is sufficient to satisfy the Constitution’s federal question jurisdiction parameters).

86. *Id.*

87. See, e.g., *Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492–93 (1983); MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 86 (2d ed. 1990).

88. *Osborn*, 22 U.S. at 822–23. Two other competing interpretations of *Osborn* are prominent as well. Professor Mishkin argues that *Osborn* sanctions the theory of protective jurisdiction, the view that a mere federal jurisdictional statute provides a sufficient federal ingredient to vest Article III jurisdiction over state-law rights coupled with a state-law cause of action when part of an overarching federal program. Mishkin, *supra* note 19, at 187–89. Professor Bellia, in two powerful pieces, offers a third interpretation. Bellia, *supra* note 21, at 800–12 (2004) (arguing that Article III is best interpreted in light of writ-pleading concepts and that this insight produces important ramifications for understanding Article III federal question jurisdiction under *Osborn*, standing doctrine, and inferred-cause-of-action doctrine); see also Anthony J. Bellia Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 *DUKE L.J.* 263, 332–40 (2007). He contends that, from an originalist perspective, Article III federal question jurisdiction must be understood within the context of common law writ pleading prevalent at the country’s founding. Bellia, *supra* note 21, at 802 (“By ‘ingredient,’ Marshall did not mean something that might arise in connection with the litigation of a cause of action, but rather an essential component of a cause of action.”). Professor Bellia argues that federal corporate status was an “ingredient” in *Osborn* because, under common law writ pleading, the bank would have to plead its capacity to sue or be sued, a question of federal law, in every case to which it was a party. *Id.* at 804–05 (At common law, “if the plaintiff failed to allege sufficient facts in the bill demonstrating a right to institute the proceeding, the defendant could demur. . . . And it was the federal law defining the Bank’s capacities that established those facts.”).

89. Mishkin, *supra* note 19, at 187–89.

90. 337 U.S. 582 (1949).

species of protective jurisdiction⁹¹ as the basis for taking jurisdiction over state-law claims between nonconstitutionally diverse citizens,⁹² as the first judicial support for protective jurisdiction. The other six Justices in *Tidewater*, however, dissented from Justice Jackson's view, arguing that a mere jurisdictional statute is not a sufficient federal ingredient to vest Article III federal question jurisdiction.⁹³

Similarly, in *Textile Workers Union of America v. Lincoln Mills of Alabama*,⁹⁴ the Court faced the question of taking federal jurisdiction over contract claims under section 301 of the Labor Management Relations Act.⁹⁵ The Court's majority opinion claimed to avoid the protective jurisdiction issue by holding that section 301 authorized the creation of federal common law, thus ostensibly providing a basis for federal question jurisdiction.⁹⁶ Two members of the Court, however, opined that federal question jurisdiction lay under a protective jurisdiction theory.⁹⁷ Justice Frankfurter vigorously objected, arguing that such jurisdiction lacked any federal ingredient, but rather manifested a constitutionally impermissible distrust of state courts⁹⁸ and emasculated the jurisdictional limits of Article

91. *Id.* at 588–600 (Jackson, J., plurality opinion) (arguing, akin to Professor Wechsler, that because Congress has the Article I power to govern the District of Columbia, it has the power to vest federal jurisdiction over state-law claims involving District of Columbia citizens).

92. In question in *Tidewater* was whether Article III supported jurisdiction over a state-law claim between a citizen of Maryland and a citizen of the District of Columbia. *Id.* at 583. Such an action is prima facie not supportable under diversity jurisdiction because the District of Columbia is not a state nor is it a foreign nation, the statuses required by diversity. U.S. CONST. art. III, § 2 (“The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

93. *Tidewater*, 337 U.S. at 607 (Rutledge, J., concurring, joined by Murphy, J.) (“The opinion of Mr. Justice Jackson . . . finds that Congress has power to add to the Article III jurisdiction of federal district courts such further jurisdiction as Congress may think ‘necessary and proper,’ Const., Art. I, § 8, cl. 18, to implement its power of ‘exclusive Legislation,’ Const., Art. I, § 8, cl. 17, over the District of Columbia . . . From this reasoning I dissent.”); *id.* at 626 (Vinson, C.J., dissenting, joined by Douglas, J.) (“I agree with the views expressed by . . . Mr. Justice Rutledge which relate to the power of Congress under Art. I of the Constitution to vest federal district courts with jurisdiction over suits between citizens of States and the District of Columbia . . .”); *id.* at 650 (Frankfurter, J., dissenting, joined by Reed, J.) (same).

94. 353 U.S. 448 (1957).

95. Labor Management Relations Act of 1947 § 301, 29 U.S.C. § 185 (2006).

96. *Lincoln Mills*, 353 U.S. at 456–57.

97. *Id.* at 460 (Burton, J., concurring, joined by Harlan, J.) (“I agree with Judge Magruder in *International Brotherhood v. W. L. Mead, Inc.*, 230 F.2d 576, that some federal rights may necessarily be involved in a § 301 case, and hence that the constitutionality of § 301 can be upheld as a congressional grant to Federal District Courts of what has been called ‘protective jurisdiction.’”).

98. *Id.* at 474–75 (Frankfurter, J., dissenting) (“‘Protective jurisdiction,’ once the label is discarded, cannot be justified under any view of the allowable scope to be given to Article III. . . . ‘Protective jurisdiction’ cannot generate an independent source for adjudication outside of the Article III sanctions and what Congress has defined. The theory must have as its sole justification a belief in the inadequacy of state tribunals in determining state law. The Constitution reflects such a belief in the

III.⁹⁹ Moreover, protective jurisdiction has fared poorly in more recent cases, garnering only two votes of support from the members of the Court in the last twenty years.¹⁰⁰

Despite academic support, the Court has never adopted the theory as a holding.¹⁰¹ Indeed, most members of the Court consider protective jurisdiction an archetypal overextension of federal question jurisdiction.¹⁰² Pursuant to this view, then, a federal, statutory, mandatory cross-reference of both a state-law right and cause of action—with its concomitant commitment to an *Erie*-like choice of law regime in which the federal courts lack declaratory authority over substantive law—will not support Article III federal question jurisdiction.

2. Shoshone-Style Cross-References

In addition to congressional attempts to enact mandatory cross-references to state-law rights and causes of action, Congress has on occasion sought to create federal question jurisdiction over statutory claims containing a federal cause of action coupled with a mandatory cross-reference to a state-law right. Although a straightforward application of the Holmes test would find federal question jurisdiction in such cases, due to the federal origin of the cause of action, the Court has declined to take § 1331 jurisdiction over such cases. Again we find this refusal to take

specific situation within which the Diversity Clause was confined. The intention to remedy such supposed defects was exhausted in this provision of Article III.”)

99. *Id.* at 474 (Frankfurter, J., dissenting).

100. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 435, 436 & n.11 (1995) (Ginsburg, J., concurring) (rejecting protective jurisdiction as the basis for taking jurisdiction over personal injury claims existing in cases removed under the 1988 amendments to the Federal Tort Claims Act, 28 U.S.C. § 2679(d)(1)–(3) (the Westfall Act), even if the defendant employee was eventually held not to have been acting within the scope of her employment); *Mesa v. California*, 489 U.S. 121, 136 (1989) (“In *Verlinden*, we discussed the distinction between ‘jurisdictional statutes’ and ‘the federal law under which [an] action arises, for Art. III purposes,’ and recognized that pure jurisdictional statutes which seek ‘to do nothing more than grant jurisdiction over a particular class of cases’ cannot support Art. III ‘arising under’ jurisdiction.” (citing *Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 496 (1983))); *id.* at 137 (“We have, in the past, not found the need to adopt a theory of ‘protective jurisdiction’ to support Art. III ‘arising under’ jurisdiction, *Verlinden*, *supra*, at 491 n.17, and we do not see any need for doing so here.”); *Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 496 (1983) (unanimous opinion). *But see Mesa*, 489 U.S. at 140 (Brennan, J., concurring, joined by Marshall, J.) (noting that removal to federal court of purely state-law criminal cases might be proper under different circumstances).

101. *See ERWIN CHERMERSKY, FEDERAL JURISDICTION* 282 (5th ed. 2007) (asserting that protective jurisdiction is “primarily” of interest to scholars).

102. 13D CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3565 (3d ed. 2008) (“[I]t is difficult to believe that the Court would accept the commentators’ proposals for protective jurisdiction. To do so would wreak havoc on the long-accepted understanding of Article III as a limitation on the jurisdiction of federal courts.”).

jurisdiction paired with the notion that the federal courts would lack declaratory authority over the substantive law at issue.

The leading case is *Shoshone Mining Co. v. Rutter*,¹⁰³ where the Court refused to take statutory federal question jurisdiction over a federal statute in which Congress created a cause of action to adjudicate competing claims to mining rights.¹⁰⁴ The act in *Shoshone* granted a federal cause of action to enforce state and territorial property rights, which is to say that Congress enacted a mandatory cross-reference to state-law property rights coupled with a federal cause of action.¹⁰⁵ Indeed, the Court specifically held that the rule of decision in these cases would be provided by a mandatory cross-reference to state law, noting that “[t]he recognition by Congress of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of Federal law.”¹⁰⁶ The Court further held that statutory federal question jurisdiction did not arise here because “the right of possession may not involve any question under the . . . laws of the United States, but simply a determination of local rules . . . or state statutes, or . . . a mere matter of fact.”¹⁰⁷ That is to say, the Court declined statutory federal question jurisdiction because it lacked the power to construct state law and refused to be deployed as a “mere” determiner of state law and a fact finder.¹⁰⁸

103. 177 U.S. 505 (1900).

104. *Id.* at 513.

105. *Id.* at 508.

106. *Id.*

107. *Id.*

108. *Shoshone* is not an isolated case. *See, e.g.,* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 317 n.5 (2005) (recognizing *Shoshone* as an exception, though a limited one, to the Holmes test); Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15, 29 (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); Gully v. First Nat'l Bank, 299 U.S. 109, 114 (1936) (“Today, even more clearly than in the past, the federal nature of the right to be established is decisive—not the source of the authority to establish it.” (internal quotations omitted)); Puerto Rico v. Russell & Co., 288 U.S. 476, 483 (1933) (“Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff’s right to sue is derived from federal law”); Shulthis v. McDougal, 225 U.S. 561, 569–70 (1912) (holding that equitable quiet title actions, although a congressionally approved cause of action, lack statutory federal question jurisdiction when the right to the land in question is controlled by state law); Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 735 (2d Cir. 2007) (holding that the federal courts lacked § 1331 jurisdiction because the Individuals with Disabilities Education Act empowered plaintiff to sue but the rights at issue were entirely a matter of state law); City Nat'l Bank v. Edmisten, 681 F.2d 942, 945–46 (4th Cir. 1982) (holding that the National Bank Act “is not a sufficient basis for federal question jurisdiction simply because it incorporates state law” when the act makes usury, as defined by local state law, illegal, and the nondiverse parties were only contesting the meaning of North Carolina’s usury law); Standage Ventures, Inc. v. Arizona, 499 F.2d 248, 250 (9th Cir. 1974) (holding no federal question arises where “the real substance of the controversy . . . turns entirely upon disputed questions

Although the holdings in the *Shoshone* line of cases are limited to statutory federal question jurisdiction,¹⁰⁹ the *Shoshone* Court offers dicta relating to Article III federal question jurisdiction.¹¹⁰ In rebutting a counterargument from counsel that *Osborn*, an Article III decision, grounds jurisdiction in the case, the Court contrasted the necessary federal ingredient sufficient to ground Article III jurisdiction in *Osborn*, the Bank's status as a federally chartered entity,¹¹¹ with a federal statute creating a federal cause of action and deploying a mandatory cross-reference to state-law rights.

A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute.¹¹²

The Court is opining—albeit in dicta—that a federal, statutory, mandatory cross-reference to a state-law right, even if coupled with a federal cause of action, will not vest Article III federal question jurisdiction because there is no substantive federal right for it to declare.¹¹³

Shoshone's dicta is in line with the Court's holdings that Article III federal question jurisdiction vests over state-law causes of action coupled with state-law rights when brought by federally chartered entities. The Court held in *Osborn*, and more recently affirmed in *American National Red Cross v. S.G.*,¹¹⁴ that a suit involving a federally chartered corporation that takes its capacity to sue or be sued from federal law raises an Article III federal question.¹¹⁵ While such claims do not arise under § 1331,¹¹⁶

of law and fact relating to compliance with state law, and not at all upon the meaning or effect of the federal statute itself"). In previous work, I have noted other areas where the federal courts refuse statutory federal question jurisdiction over claims that lack a substantive federal right, even when coupled with a federal cause of action. See Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1690–91, 1706–07 (2008) (noting that federal courts refuse to take jurisdiction when a federal cause of action is coupled with a federal right that is merely procedural); *id.* at 1689–90 (noting that federal courts similarly refuse to take jurisdiction when a federal cause of action is coupled with a federal right that is frivolous).

109. See *Shoshone*, 177 U.S. at 506.

110. *Id.* at 509–10.

111. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 823–28 (1824).

112. *Shoshone*, 177 U.S. at 510.

113. See *infra* notes 340–51 and accompanying text (arguing that this dicta presents a sound argument on functionalist grounds).

114. 505 U.S. 247 (1992).

115. *Osborn*, 22 U.S. at 817–18, 823 (holding the following language from the bank's charter

under the traditional interpretation, an Article III federal question arises in such suits because potentially the entity’s “capacity to sue or be sued, its capacity to enter into contracts, or a similar issue . . . would require interpretation and application of the . . . federal chartering statute.”¹¹⁷ This potential for the exercise of federal court declaratory power over federal substantive rights, then, distinguishes the *Shoshone* line of cases, because there are no potential substantive issues of federal rights at issue in those suits.¹¹⁸

The distinctions between *Osborn*, *American National Red Cross*, and *Shoshone* are even more transparent from an original-meaning perspective. The original meaning of Article III’s grants of jurisdiction is best conceived against the backdrop of the then-existing procedure of writ pleading.¹¹⁹ From this vantage, it is clear that *Osborn*’s use of the term federal “ingredient” was a term of art, referencing nineteenth-century pleading practice.¹²⁰ With this understanding at hand, it is evident that “ingredient” did not reference the mere possibility that a federal issue might arise, as the traditional view ascribes,¹²¹ but rather the necessity of such an occurrence.¹²² Indeed, under common law writ pleading, the Bank—in every case—would have to plead its capacity to sue or be sued, a question of federal law, in order to avoid dismissal.¹²³ Under this view, then, Article III requires the presence of a substantive issue of federal

sufficient to raise a federal ingredient under Article III: “made able and capable in law, to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States” (internal quotation marks omitted). The Court has consistently so held. *See Am. Nat’l Red Cross*, 505 U.S. at 264–65; *Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492 (1983); *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 485 (1933); *Bankers Trust Co. v. Tex. & Pac. Ry. Co.*, 241 U.S. 295, 305–06 (1916); *Pac. R.R. Removal Cases*, 115 U.S. 1, 11–14 (1885); *see also* Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 FLA. ST. U. L. REV. 317, 330–37 (2009) (providing an overview of federal question jurisdiction for federally chartered corporations).

116. *See Am. Nat’l Red Cross*, 505 U.S. at 258.

117. Lund, *supra* note 115, at 331.

118. *See supra* note 112 and accompanying text (noting lack of substantive federal issue).

119. *See Bellia, supra* note 21, at 800–12 (arguing that Article III is best interpreted in light of writ-pleading concepts and that this insight produces important ramifications for understanding Article III federal question jurisdiction under *Osborn*, standing doctrine, and inferred-cause-of-action doctrine).

120. *See id.* at 801.

121. *See* Lund, *supra* note 115, at 331.

122. *See Bellia, supra* note 21, at 802 (“By ‘ingredient,’ Marshall did not mean something that might arise in connection with the litigation of a cause of action, but rather an essential component of a cause of action.”).

123. *Id.* at 804–05 (At common law, “if the plaintiff failed to allege sufficient facts in the bill demonstrating a right to institute the proceeding, the defendant could demur. . . . And it was the federal law defining the Bank’s capacities that established those facts.”).

right, over which the federal courts have declaratory power,¹²⁴ in order to vest Article III federal question jurisdiction. Such a necessary treatment of a federal issue is a far cry from the *Shoshone* line of cases, where the courts face no substantive issues of federal rights.¹²⁵

3. *Waiving Sovereign Immunity to State-Law Suits*

In yet another variation on this cross-referencing theme, Congress may by statute waive sovereign immunity and vest the federal courts with federal question jurisdiction over mandatory cross-references to state-law causes of action coupled with state-law rights brought against the United States or other governmental entities. These classes of cases raise significant issues given that, from the analytical perspective deployed in this Article, they appear to be nearly identical to protective jurisdiction cases. The Court, however, has taken federal question jurisdiction in these cases because it views them as raising federal substantive defenses, thus triggering at least some substantive legal issues subject to the federal courts' declaratory power.

Two statutes illustrate this point well. The Federal Tort Claims Act (FTCA),¹²⁶ for example, waives the federal government's sovereign immunity for certain vicarious liability tort claims resulting from federal employees' actions.¹²⁷ Similarly, the Foreign Sovereign Immunity Act (FSIA) extends immunity defenses to foreign governments subject to seven exceptions.¹²⁸ Both acts mandatorily cross-reference state-law causes of actions and rights. Thus, when immunity is not extended, the FTCA and FSIA aim to render the government defendants subject to liability as if they were private entities.¹²⁹ Furthering the goal of treating governments like a private entity, both acts require the application of state law to the claims brought.¹³⁰ The starting point in this regard under the

124. *See* *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 822 (1824) (“[T]he title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction.”).

125. *See supra* note 112 and accompanying text (noting lack of substantive federal issue).

126. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2401–02, 2411–12, 2671–80 (2006).

127. *See* *Richards v. United States*, 369 U.S. 1, 6 (1962) (holding that the FTCA removes sovereign immunity).

128. 28 U.S.C. § 1606 (2006).

129. *Id.* (“[A]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances”); *see also* 28 U.S.C. § 1346(b) (2006) (nearly identical language for FTCA cases).

130. The Court has spoken to this issue under the FSIA. *See* *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (holding that, absent federal interest

FTCA is the text of 28 U.S.C. § 1346(b), the FTCA's jurisdictional statute, which states that the United States shall be vicariously liable in tort for certain acts of its employees "if a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred."¹³¹ In applying this provision, and similar provisions under the FSIA,¹³² the Court holds that the FTCA "requires application of the whole law of the State where the act or omission occurred."¹³³

These cross-references to state law in FTCA and FSIA cases, moreover, are of a mandatory nature. Although the federal courts possess background constitutional power to fashion rules of liability for the claims against the United States,¹³⁴ the FTCA creates a statutory bar to the use of that power. As such, the Court holds "that federal courts should not create interstitial federal common law [in FTCA suits because] . . . the Congress has directed that a whole body of state law shall apply."¹³⁵ Under the

preemption, federal common law does not apply in FSIA cases); *Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983) ("We now turn to the core question presented by this case: whether Congress exceeded the scope of Art. III of the Constitution by granting federal courts subject-matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where the rule of decision may be provided by state law."); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173 (5th Cir. 1994) ("State law, not federal common law, governs whether an officer's or employee's action is within the scope of employment in determining the applicability of the FSIA."). The Supreme Court has been remarkably consistent in holding that § 1346(b)'s reference to the "law of the place" means the law of the State. *See, e.g.*, *Miree v. DeKalb Cnty.*, 433 U.S. 25, 29 n.4 (1977); *United States v. Muniz*, 374 U.S. 150, 153 (1963); *Richards*, 369 U.S. at 6–7, 11; *Rayonier Inc. v. United States*, 352 U.S. 315, 318 (1957). The courts of appeals are similarly consistent. *See, e.g.*, *DeJesus v. U.S. Dept. of Veterans Affairs*, 479 F.3d 271, 279 (3d Cir. 2007) ("Because the liability of the United States under the FTCA is determined by the law of the state where the allegedly tortious act occurred, . . . we will look to the state courts to determine how to resolve the underlying legal issues."); *Young v. United States*, 71 F.3d 1238, 1242 (6th Cir. 1995) ("[L]iability on the part of the federal government under the [FTCA] is determined in accordance with the law of the state where the event giving rise to liability occurred.").

131. 28 U.S.C. § 1346(b).

132. *See, e.g.*, *Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 24 (D.D.C. 2005) (listing cases).

133. *Richards*, 369 U.S. at 11 (holding that state law controls choice-of-law issues, as well as substantive tort law, in FTCA cases). I am putting aside complicated questions of which law applies under the FTCA if a tort occurs in Indian Country or in a federal enclave. *See, e.g.*, J. Matthew Martin, *Federal Malpractice in Indian Country and the "Law of the Place": A Re-Examination of Williams v. United States Under Existing Law of the Eastern Band of Cherokee Indians*, 29 CAMPBELL L. REV. 483 (2007) (arguing that tribal law should apply in FTCA cases when torts occur in Indian Country).

134. *See, e.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (holding that federal courts are empowered to create federal common law governing the rights and obligations of the United States).

135. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105 n.8 (1971); *Canipe v. Nat'l Loss Control Serv. Corp.*, 736 F.2d 1055, 1059–60 (5th Cir. 1984) ("[I]t is reasonably well recognized that the federal government is liable under the FTCA only if the applicable state law would place liability upon a private actor in like circumstances."); *Birnbaum v. United States*, 588 F.2d 319, 327–28 (2d Cir. 1978) ("Moreover, by adopting the 'law of the place' as the source for rules of decision under the Federal

FTCA, then, the federal courts are strictly bound to apply state law¹³⁶ as the controlling substantive law¹³⁷ as a matter of statutory command, not judicial interstitial choice.¹³⁸ Further illustrating that the FTCA imposes a mandatory cross-reference to state law, many federal courts hold that the application of state law in FTCA cases affords even less leeway for the occasional adoption of a federal rule of decision than is found under the *Erie* doctrine.¹³⁹ The federal courts find a similar lack of federal common lawmaking authority under the FSIA.¹⁴⁰ As such, the FSIA's and FTCA's

Tort Claims Act, Congress expressly negated any possible inference that federal courts were to exercise any 'common law-making' power to fashion torts under the Act in the interest of national uniformity."). One district court decision holds to the contrary, but the vast weight of authority suggests this holding is in error. *See* *S. Pac. Transp. Co. v. United States*, 462 F. Supp. 1193, 1210 (E.D. Cal. 1978) (holding that the view that "the FTCA requires the application of state law operative of its own force . . . is erroneous; instead, the Act provides for the application of state law incorporated into federal law as the federal rule of decision").

136. *See, e.g.,* *Bravo v. United States*, 532 F.3d 1154, 1164 (11th Cir. 2008) ("[W]e are bound to decide the issue the way the Florida courts would have . . ."); *Arpin v. United States*, 521 F.3d 769, 776 (7th Cir. 2008) ("It is also true . . . that in a suit under the [FTCA] . . . the damages rules of the state whose law governs the substantive issues in the case bind the federal court; damages law is substantive law."); *Goodman v. United States*, 2 F.3d 291, 292 (8th Cir. 1993) ("In this FTCA case, we are, of course, bound to apply the law of the state in which the acts complained of occurred.>").

137. *FDIC v. Meyer*, 510 U.S. 471, 478 (1994) (holding that claims of federal constitutional violations are not cognizable under the FTCA because under the FTCA, state law provides the sole font of substantive law).

138. The Court has only once contemplated the application of federal common law as the rule of decision in an FTCA case. *See* *Smith v. United States*, 507 U.S. 197, 201–02 (1993). *Smith* is unique, however, in that the alleged torts occurred in Antarctica, where state law does not govern and, arguably, no sovereign's law applies. *Id.* The Court, however, avoided this difficulty by holding that Antarctica was a foreign country within the meaning of the FTCA's foreign-country exception to tort liability. *Id.* at 203–04.

139. *See* *Cibula v. United States*, 551 F.3d 316, 321 (4th Cir. 2009) ("Thus, because the FTCA contains an explicit instruction by Congress regarding which law to use, courts should not engage in their normal *Erie* analysis to make that determination." (citing *Smith v. United States*, 507 U.S. 197, 201 (1993))); *Bravo*, 532 F.3d at 1164 (in a FTCA case, holding itself bound by rulings from the Florida Third District Court of Appeal contrary to practice under *Erie* in which state intermediate appellate rulings are persuasive but not binding under *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967)); *Ware v. United States*, 971 F. Supp. 1442, 1473 (M.D. Fla. 1997) ("[FTCA suits] do not implicate the same concerns of *Erie*. Because a FTCA plaintiff may not bring suit in any other forum but federal district court, there is no danger of forum shopping. Nor are federalism concerns implicated. States are not granted residual power under the Constitution to implement laws governing suits against the federal government."). Additionally, federal courts in FTCA cases squarely prohibit federal common law making, *see supra* note 135, whereas federal courts retain some common law making power under *Erie*. *See, e.g.,* *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (fashioning a federal common law rule of *res judicata* under the *Erie* doctrine). There are a handful of district court cases, however, that equate *Erie* doctrine's use of state law with FTCA insofar as both employ the Rules of Decision Act, 28 U.S.C. § 1652 (2005). *See* *Mills v. U.S. Dept. of Health & Human Servs.*, Civ. No. 08-3409, 2008 WL 5189140, at *2 (E.D. Pa. Dec. 9, 2008); *Rahimi v. United States*, 474 F. Supp. 2d 825, 827 (N.D. Tex. 2006); *Straley v. United States*, 887 F. Supp. 728, 734 (D.N.J. 1995).

140. *See, e.g.,* *Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983) ("We now turn

cross-references to state law are best viewed as being imposed mandatorily.¹⁴¹

Despite the mandatory nature of the cross-reference to state-law causes of action and rights under the FTCA, confusion continues to reign in regard to the basis, both statutory and constitutional, for jurisdiction under the FTCA.¹⁴² Many lower federal courts, for example, hold that FTCA cases take jurisdiction under both § 1346(b), the FTCA's jurisdictional statute, and § 1331, the general federal question jurisdictional statute.¹⁴³

The more sound view, however, is that jurisdiction to hear FTCA claims does “*not* come from the general grant of federal-question jurisdiction of 28 U.S.C. § 1331.”¹⁴⁴ Standard application of the well-pleaded complaint rule bars § 1331 jurisdiction over FTCA suits. The FTCA is merely a limited waiver of sovereign immunity to state-law claims.¹⁴⁵ Although the waiver of immunity is of a jurisdictional dimension, it is best viewed, procedurally speaking, as a defense.¹⁴⁶ As a

to the core question presented by this case: whether Congress exceeded the scope of Art. III of the Constitution by granting federal courts subject-matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where the rule of decision may be provided by state law.”); *see also* First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 622 n.11 (1983) (holding that, absent federal interest preemption, federal common law does not apply in FSIA cases); *Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 24 (D.D.C. 2005) (listing cases).

141. *See* *Horn v. HT Assocs.*, Civ. No. 09-3362, 2010 WL 1530624, at *5 (D.N.J. Apr. 15, 2010) (“There is no evidence, manifest or otherwise, that Congress intended to supplant state tort law by enacting the FTCA. . . . Far from altering or superseding state tort law, the statute incorporates the substantive law of the state where the injury occurred for the purposes of determining liability.” (citations omitted)).

142. *See generally* 13D WRIGHT ET AL., *supra* note 102, § 3563 n.26 (“There is debate about whether suits under the Federal Tort Claims Act . . . are federal question cases or whether . . . they come under the constitutional grant of judicial power to ‘Controversies to which the United States shall be a party.’”).

143. *See, e.g.*, *Luna v. United States*, 454 F.3d 631, 635 (7th Cir. 2006) (“The Navy characterizes this as a question of subject-matter jurisdiction. It is not. The district court had subject-matter jurisdiction because Luna brought her claim under the FTCA, which is to say she presented the district court with a federal question. *See* 28 U.S.C. § 1331.”); *Nationwide Mut. Ins. Co. v. Liberatore*, 408 F.3d 1158, 1161–62 (9th Cir. 2005) (similar); *Meyers v. Trinity Med. Ctr.*, 983 F.2d 905, 906 (8th Cir. 1993); *Fla. E. Coast Ry. Co. v. United States*, 519 F.2d 1184, 1194 (5th Cir. 1975); *U.S. Marine, Inc. v. United States*, Civ. No. 08-2571, 2010 WL 1403958, at *4 (E.D. La. Apr. 1, 2010) (“The Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 2671 et seq. (Federal Tort Claims Act).”); *Hankes v. United States*, No. 08-CV-333-JHP-TLW, 2010 WL 2196561, at *1 (N.D. Okla. May 27, 2010) (similar).

144. *CNA v. United States*, 535 F.3d 132, 140 (3d Cir. 2008); *see also* *Gilberg v. Stepan Co.*, 24 F. Supp. 2d 325, 346 (D.N.J. 1998) (“When Congress granted the federal courts original (and exclusive) jurisdiction over Federal Tort Claims Act (“FTCA”) actions, it did so under 28 U.S.C. § 1346(b)(1), *not* section 1331.”).

145. *United States v. Orleans*, 425 U.S. 807, 813 (1976) (“The Federal Tort Claims Act is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment.”).

146. The Court regularly treats federal sovereign immunity as a defense. *See, e.g.*, *United States v.*

result, the existence, or lack thereof, of a federal sovereign immunity defense, even if addressed by the plaintiff in the complaint, will not vest § 1331 jurisdiction.¹⁴⁷ As such, a claim that the FTCA bars, or allows, a suit should not survive a well-pleaded complaint rule challenge to § 1331 jurisdiction.¹⁴⁸

Even if one finds that the jurisdictional nature of the FTCA renders the well-pleaded complaint rule inapplicable,¹⁴⁹ FTCA cases should not arise under § 1331 doctrine. The traditional determinant for taking § 1331 jurisdiction is the Holmes test (i.e., § 1331 vests because federal law creates the plaintiff's cause of action).¹⁵⁰ FTCA claims raise state-law causes of action, not federal ones, against the United States,¹⁵¹ which will

Interstate Commerce Comm'n, 337 U.S. 426, 462 (1949) ("The *defense* of sovereign immunity, moreover, cannot be avoided by directing that the suit proceed only against the Interstate Commerce Commission." (emphasis added)); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (discussing sovereign immunity *defense* and jurisdiction). The courts of appeals have aptly labeled these jurisdictional defenses. *See, e.g., Hydrogen Tech. Corp. v. United States*, 831 F.2d 1155, 1162 n.6 (1st Cir. 1987) ("It is well-established law that . . . jurisdictional defenses cannot be waived by the parties and may be raised for the first time on appeal or even raised by a court sua sponte."); *see also Roberts v. United States*, 887 F.2d 899, 900 (9th Cir. 1989) (similar).

147. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10–11 (1983) (holding that the presence of federal immunity defense, even if pleaded on face of complaint, is not sufficient to bring a claim within § 1331 jurisdiction).

148. *See, e.g., Gilberg v. Stepan Co.*, 24 F. Supp. 2d 325, 346–47 (D.N.J. 1998) ("Nor would such a claim fall within 28 U.S.C. § 1331's grant of jurisdiction . . . because the federal agency or employee could raise an immunity defense under the FTCA's exclusive remedy provision. Under the 'well-pleaded complaint' rule, a claimant's cause of action does not 'arise under' the laws of the United States merely because it might implicate a federal immunity defense."); *see also Sanchez v. Beacon Info. Tech. & Staffing & Serv., LLC*, No. EP-08-CV-332-KC, 2009 WL 4877705, at *3 (W.D. Tex. Dec. 10, 2009) (similar).

149. For example, there is some confusion regarding whether the exceptions to the FTCA's waiver of immunity, codified at 28 U.S.C. § 2680, constitute jurisdictional issues or affirmative defenses for the government. Two circuits view this as a defense. *See Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992) ("Because an exception to the FTCA's general waiver of immunity, although jurisdictional on its face, is analogous to an affirmative defense, we believe . . . the burden [lies] on the United States as the party which benefits from the defense."); *Stewart v. United States*, 199 F.2d 517, 520 (7th Cir. 1952) (holding that the exceptions to the waiver of sovereign immunity in the FTCA are affirmative defenses that must be raised and proven by the government). Three circuits have adopted a contrary holding. *See Sharp v. United States*, 401 F.3d 440, 443 n.1 (6th Cir. 2005) (noting that *Prescott* may conflict with *United States v. Gaubert*, 499 U.S. 315 (1991), and declining to address whether the plaintiff or the Government has the burden of proving the FTCA's discretionary function exception); *Kiehn v. United States*, 984 F.2d 1100, 1105 n.7 (10th Cir. 1993) (same); *Autery v. United States*, 992 F.2d 1523, 1526 n.6 (11th Cir. 1993) (same).

150. *Am. 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.")

151. *See, e.g., CNA v. United States*, 535 F.3d 132, 143 n7 (3d Cir. 2008) ("[Section] 1346(b)(1) grants federal courts jurisdiction and also allows plaintiffs to bring state-law causes of action . . ."); *Irving v. United States*, 162 F.3d 154, 185 (1st Cir. 1998) ("[T]he basis for Irving's state-law cause of action and FTCA claim, was the failure of the compliance officers to inspect . . ."); *Dorking Genetics v. United States*, 76 F.3d 1261, 1266 (2d Cir. 1996) ("The FTCA does not create new causes of action,

not arise under the Holmes test. Section 1331 jurisdiction over federal common law causes of action that adopt a state-law right is inapposite here.¹⁵² Nor do FTCA cases raise federal rights for plaintiffs; thus, even under a *Smith* test approach to § 1331 jurisdiction, FTCA cases would not raise a federal question.¹⁵³

A proponent of § 1331 jurisdiction over FTCA cases might retort that, despite the wealth of authority to the contrary, FTCA cases create federal causes of action, thus triggering jurisdiction under the Holmes test. Such an advocate could rely upon the Court's occasional references to the FTCA as creating a federal cause of action.¹⁵⁴ Under this construction, then, the FTCA would create a federal cause of action that is coupled with state-law tort rights supplying the substantive rights at issue.¹⁵⁵ Therefore, one might conclude that § 1331 jurisdiction lies under the Holmes test, as the cause of action is federal. Such a proposition, however, is barred by the *Shoshone* line of cases,¹⁵⁶ given that under the FTCA, just as in *Shoshone*, the entire set of substantive rights to be determined by the federal courts would be controlled by state law, leaving them without declaratory authority over the plaintiff's substantive claim.¹⁵⁷ As such, there appears no sound basis for § 1331 jurisdiction over FTCA or FSIA cases.

The existence of constitutional federal question jurisdiction more easily lies under both the FSIA and the FTCA. There are two potential fonts of federal jurisdiction for FTCA cases: "Controversies to which the United

but only waives immunity under [enumerated] circumstances . . ."); *Johnson v. Sawyer*, 47 F.3d 716, 725 (5th Cir. 1995) ("[T]he district court recognized that 'an FTCA claim must be based on a state law cause of action.'").

152. See *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.").

153. See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312–13 (2005) (reaffirming that the courts may take *Smith*-style jurisdiction); Mulligan, *supra* note 108, at 1725 ("[T]he primary determinate for the vesting of § 1331 jurisdiction is the status of the federal right asserted."); *infra* note 179 (discussing *Smith*-style jurisdiction).

154. See *Loeffler v. Frank*, 486 U.S. 549, 562 (1988) (explaining that § 2679(a) limits the scope of waivers "in the context of suits for which [Congress] provided a *cause of action* under the FTCA" (emphasis added)); see also *FDIC v. Meyer*, 510 U.S. 471, 477 (1994) (quoting this language from *Loeffler* and speaking in terms of statutory elements of an FTCA claim); *Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 576 (D.C. Cir. 2003) (discussing statutory elements of FTCA claims); *Dorking Genetics*, 76 F.3d at 1264 (discussing statutory elements of FTCA claims); Fred Blanton, *Jurisdictional Problems of the Federal Tort Claims Act*, 13 U. PITT. L. REV. 511, 513–15 (1952) (arguing that federal law creates the plaintiffs' cause of action in FTCA cases).

155. See *supra* notes 130–37 and accompanying text (discussing the application of state law as the substantive rule of decision in FTCA cases).

156. See *supra* Part III.A.2 (discussing *Shoshone* cases).

157. See *supra* notes 130–37 and accompanying text (discussing the application of state law as the substantive rule of decision in FTCA cases).

States shall be a Party” and “Cases . . . arising under . . . the Laws of the United States.”¹⁵⁸ Given that state law controls in FTCA cases and that the federal government is always a party defendant in FTCA cases, one might conclude that the former constitutional grant of jurisdiction is the unquestionable starting point. But the Court has not always agreed with this reading.

In 1933, the Court, in *Williams v. United States*, held that suits against the government did not fall within the meaning of controversies to which the United States shall be a party.¹⁵⁹ The Court based this interpretation of the “party clause” upon the text of the Judiciary Act of 1789,¹⁶⁰ which granted jurisdiction only for suits in which the United States was plaintiff, and Eleventh Amendment jurisprudence, which constitutionalizes state sovereign immunity broadly.¹⁶¹ From this vantage point, the Court held that “controversies to which the United States may by statute be made a party defendant, at least as a general rule, lie wholly outside the scope of the judicial power vested by Art. III in the constitutional courts.”¹⁶² This holding was destined for the jurisprudential scrap heap, however. In fact, most commentators find this portion of *Williams* overturned by the plurality opinion in *Glidden Co. v. Zdanok*.¹⁶³

158. U.S. CONST. art. III, § 2.

159. *Williams v. United States*, 289 U.S. 553, 577 (1933).

160. *Id.*; Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (“And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars.”).

161. See 13D WRIGHT ET AL., *supra* note 102, § 3524 (providing general overview of Eleventh Amendment jurisprudence).

162. *Williams*, 289 U.S. at 577 (discussing the first judiciary act and two landmark Eleventh Amendment cases: *Hans v. Louisiana*, 134 U.S. 1 (1890), and *Chisholm v. Georgia*, 2 U.S. 419 (1793)). This had not been the Court’s view prior. See *Minnesota v. Hitchcock*, 185 U.S. 373, 384 (1902) (A suit against a federal officer and agency “is a controversy to which the United States may be regarded as a party. . . . It is, of course, under that clause, a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant.”). There is also an argument that this portion of *Williams* is dicta. See *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 640 n.20 (1949) (Vinson, C.J., dissenting) (advancing this argument).

163. 370 U.S. 530, 564 (1962) (Harlan, J., plurality opinion) (“Article III’s extension of judicial competence over controversies to which the United States is a party [is] ineffective to confer jurisdiction over suits to which it is a defendant [only when Congress has not waived immunity]. . . . But once the consent is given, the postulate is satisfied, and there remains no [Article III] barrier to justiciability.”). But Justice Harlan was speaking only for three of the seven Justices who heard the case. See *id.* at 585 (Clark, J., concurring) (“I cannot agree to the unnecessary overruling of . . . *Williams* . . .”). Despite the lack of a majority opinion overruling *Williams*, all the lower courts and commentators agree that *Glidden* overruled *Williams*. See, e.g., *Jan’s Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1306 n.5 (Fed. Cir. 2008); *Kanar v. U.S.* 118 F.3d 527, 529 (7th Cir. 1997) (“No one today doubts that Article III courts may entertain suits against the United States seeking money

Despite the fact that *Glidden* overturned *Williams*, for the thirty years that it remained good law, *Williams* pushed jurists to find another basis for constitutional jurisdiction over cases, like FTCA suits, in which the United States was a party defendant—a path that led many to conclude that jurisdiction for such cases arises as federal questions. This issue bubbled to the surface in 1949 with some members of the Court in *Tidewater* taking a hard line and espousing that there was no basis, federal question or otherwise, under Article III to find constitutional jurisdiction in such cases.¹⁶⁴ Nevertheless, a majority of the Justices in *Tidewater* opined that suits against the United States, like FTCA suits, arise under constitutional federal question jurisdiction.¹⁶⁵

The basis for this position, at least as offered by Chief Justice Vinson, is that statutory waiving of sovereign immunity, a prerequisite to any suit against the United States, necessarily calls for the application of federal law.¹⁶⁶ Under Chief Justice Vinson's view, the waiver issue is viewed as a defense¹⁶⁷ to a state-law cause of action that will necessarily arise in every action.¹⁶⁸ Further, the immunity defense is subject to the declaratory authority of the federal courts. The Court in *Verlinden B. V. v. Central*

damages *Williams* . . . [was] repudiated in *Glidden*"); *Ortiz v. United States*, 595 F.2d 65, 69 & n.6 (1st Cir. 1979) (similar); see also 14 WRIGHT ET AL., *supra* note 102, § 3654 & n.72 ("[I]n the 1962 case of *Glidden Company v. Zdanok*, the Court rejected the *Williams* analysis"); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1546 n.117 (1986) (similar); Alfred Hill, *In Defense of our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 540 n.264 (2001) (similar).

164. *Tidewater*, 337 U.S. at 594 n.22 (Jackson, J., plurality opinion) ("The suggestion here that claims against the United States, adjudicated . . . solely by virtue of the waiver of sovereign immunity and the jurisdiction granted . . . [by statute], may be cases arising 'under the laws of the United States' is both erroneous and self-defeating. . . . *Williams* . . . holds clearly to the contrary, stating . . . that controversies to which the United States may by statute be made a party defendant lie wholly outside the scope of the judicial power vested by Art. III" (internal citations and quotation marks omitted)).

165. *Id.* at 610 (Rutledge, J. concurring, joined by Murphy, J.) ("We need not today determine the nature of district court jurisdiction of suits against the United States. Suffice it to say that, if such suits are not 'Controversies to which the United States shall be a Party,' they are presumptively within the purview of the federal-question jurisdiction"); *id.* at 641 n.21 (Vinson, C.J., dissenting, joined by Douglas, J.) ("Whether or not the dictum in *Williams* . . . that suits against the United States are not within the Art. III phrase, 'Controversies to which the United States shall be a Party,' proves correct, . . . such actions seem to be clearly within the Art. III federal question jurisdiction."); *id.* at 649 (Frankfurter, J., dissenting, joined by Reed, J.) (reasoning that the following constitutionally arise under federal law: "Congress can authorize the making of contracts; it can therefore authorize suit thereon in any district court. Congress can establish post offices; it can therefore authorize suits against the United States for the negligent killing of a child by a post-office truck.").

166. *Tidewater*, 337 U.S. at 641 n.21 (Vinson, C.J., dissenting).

167. See *supra* note 146 (discussing sovereign immunity as a defense).

168. *Tidewater*, 337 U.S. at 642 n.21 (Vinson, C.J., dissenting).

*Bank of Nigeria*¹⁶⁹ similarly found, in the context of waivers of sovereign immunity for foreign states under the FSIA, that the necessity of addressing the waiver question in each case established Article III federal question jurisdiction over state-law causes of action.¹⁷⁰ Although this solution is not universally satisfying,¹⁷¹ this addition of a federally controlled defense is sufficient, at least on its face, to distinguish the immunity waiver cases from protective jurisdiction, even though both sets of cases deploy mandatory cross-references to state-law causes of action and rights. This view, that suits against the United States arise under constitutional federal question jurisdiction, has also been espoused by eminent commentators such as Professors Mishkin¹⁷² and Wright.¹⁷³ Moreover, this view continues to hold sway, many years after *Glidden* overturned the *Williams* decision.¹⁷⁴ We see, therefore, that congressionally imposed, mandatory cross-references to state-law rights may give rise to federal question jurisdiction, but only when the courts retain declaratory authority over some other aspect of the suit such as a defense.¹⁷⁵

4. State-Law Mandatory Cross-References to Federal Law

I turn now to state-law mandatory cross-references to federal rights. Here I contend the courts take federal question jurisdiction when the cross-

169. 461 U.S. 480, 493 (1983) (“The [FSIA] must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity . . .”).

170. *Id.*; 13D WRIGHT ET AL., *supra* note 102, § 3563 n.26 (considering the Court’s treatment of Article III federal question jurisdiction under the FSIA in *Verlinden* as similar to its treatment of Article III jurisdiction under the FTCA).

171. See Seinfeld, *supra* note 67, at 1423, 1434 (describing protective jurisdiction as a cousin of the Court’s treatment of sovereign immunity and Article III arising under jurisdiction in *Verlinden*).

172. Mishkin, *supra* note 19, at 193 (noting as part of his discussion of protective jurisdiction that “if one accepts the doctrine that suits against the Government are not ‘controversies to which the United States [is] a party’ within Article III, this narrower rationale of *Osborn* would then explain federal question jurisdiction over cases under the Federal Tort Claims Act, which makes a specific reference to state law for the operative rules” (footnote omitted)).

173. CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 34 (3d ed. 1976) (“It is also not clear why a suit against the United States, authorized by federal statute, is not a case arising under the Constitution, laws, or treaties of the United States.”).

174. See, e.g., *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 442 (1995) (Souter, J., dissenting) (“[T]he ‘substitution of the United States as defendant . . . establishes federal-question jurisdiction . . .’”; Finley v. United States, 490 U.S. 545, 560 n.7 (1989) (Stevens, J., dissenting) (“Federal jurisdiction is supported not only by the fact that [this FTCA] case is one arising under a law of the United States, but also that it is a controversy to which the United States is a party.”)).

175. Cf. *Mesa v. California*, 489 U.S. 121, 129 (1989) (holding that federal question jurisdiction arises under 28 U.S.C. § 1442 for federal officers defending against state-law claims only when the federal officer raises a federal-law defense).

reference is mandatory. Although this produces a model in which state-law cross-references vest federal question jurisdiction in a mirror-image fashion to federal-law cross-references to state law, these modes of cross-referencing both correlate federal question jurisdiction with federal court declaratory authority.

State law frequently cross-references federal law in a mandatory fashion. Some statutes create state-law causes of action that mandatorily cross-reference federal rights.¹⁷⁶ State common law causes of action often mandatorily cross-reference federal statutory¹⁷⁷ and constitutional¹⁷⁸ rights. These types of cross-references have caused the courts and scholars jurisdictional fits for decades.¹⁷⁹

176. *See, e.g.*, CAL. CIV. CODE § 54.1(d) (West 2007) (cross-referencing rights created by the Americans with Disabilities Act); CONN. GEN. STAT. § 31-51q (2003) (creating cause of action against employers who discipline or discharge an employee for exercising First Amendment rights); S.C. CODE ANN. § 16-17-560 (2003) (similar cross-reference to federal constitutional rights); *see also* GA. CODE ANN. § 16-14-3(9)(A) (Supp. 2010) (defining racketeering by cross-reference to federal statutes); TENN. CODE ANN. § 53-10-101(a) (2008) (defining prohibited narcotics by cross-reference to federal statute).

177. *See, e.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 311–12 (2005) (applying IRS standard in a quiet title action); *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 805–07 (1986) (seeking to use federal FDA standard in a negligence per se action); *Vinnick v. Delta Airlines, Inc.*, 113 Cal. Rptr. 2d 471, 481 (Ct. App. 2001) (“[The] negligence per se standard can be applied to a violation of federal standards”); *Coker v. Wal-Mart Stores, Inc.*, 642 So. 2d 774, 776, 778 (Fla. Dist. Ct. App. 1994) (holding that a violation of the federal Gun Control Act can amount to negligence per se); *Lohmann ex rel. Lohmann v. Norfolk & W. Ry. Co.*, 948 S.W.2d 659, 672 (Mo. Ct. App. 1997) (noting that the plaintiff could argue “negligence per se in failing to comply with federal regulations”). *But see* *Lugo v. St. Nicholas Assocs.*, 772 N.Y.S.2d 449, 454–55 (Sup. Ct. 2003) (“[T]he ADA does not create a private cause of action for damages for its violation. If mere proof of a violation of the ADA were to establish negligence per se, plaintiff would effectively be afforded a private cause of action that the ADA does not recognize. The court accordingly holds that proof of a violation of the ADA may only constitute evidence of negligence, not negligence per se.”).

178. *See, e.g.*, *Ex parte Duvall*, 782 So. 2d 244, 246, 248 (Ala. 2000) (holding state law torts of assault, unlawful arrest, false imprisonment, and conspiracy barred as a matter of law because the police officer met the Fourth Amendment’s probable cause standard when detaining the plaintiff); *Susag v. City of Lake Forest*, 115 Cal. Rptr. 2d 269, 278–79 (Ct. App. 2002) (holding that the plaintiff’s state law claims of battery, intentional infliction of emotional distress, and false imprisonment failed as a matter of law because the plaintiff “did not meet his burden of producing evidence showing [the defendants] used physical force against or exerted authority over him that resulted in a ‘seizure’ under the Fourth Amendment”); *Renk v. City of Pittsburgh*, 641 A.2d 289, 293 (Pa. 1994) (noting that a plaintiff alleging false imprisonment must show that a defendant’s actions were unlawful, which often amounts to whether a defendant acting under color of law had probable cause).

179. *See, e.g.*, *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.) (Holmes test is a rule of inclusion); *see also* *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) (same and quoting *T.B. Harms*); Fitzgerald, *supra* note 23, at 1241–45 (describing the Court’s “two-track” approach to § 1331 jurisdiction); Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on “Arising Under” Jurisdiction*, 82 IND. L.J. 309, 324–28 (2007) (arguing that the *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), line of cases employs a different test

The Court, however, recently clarified the law here in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*.¹⁸⁰ In *Grable & Sons*, the IRS seized real property belonging to Grable & Sons to satisfy a federal tax deficiency and sold the property to Darue Engineering.¹⁸¹ Five years later, Grable & Sons sued Darue Engineering in state court to quiet title, a state-law cause of action.¹⁸² Grable & Sons asserted that Darue Engineering's title was invalid because the IRS had conveyed the seizure notice to Grable & Sons in violation of provisions of the Internal Revenue Code governing such actions.¹⁸³ The Supreme Court affirmed § 1331 jurisdiction in the case because the plaintiff's state-law cause of action necessarily depended upon a claim of a substantive federal right.¹⁸⁴ The Court elaborated on this holding, ruling that § 1331 jurisdiction will exist if the plaintiff asserts a "substantial" and "serious" claim to a federally created right,¹⁸⁵ the federal right is the central and predominant question in the case,¹⁸⁶ the legal content of the federal right invoked is actually contested by the parties,¹⁸⁷ and taking jurisdiction in the case comports with congressional intent regarding the division of labor between the state and federal courts.¹⁸⁸ Worthy of note, this test under *Grable &*

than the Holmes line of cases); Oakley, *supra* note 14, at 1837–43 (describing the distinction between Category-I and Category-II jurisdiction).

180. 545 U.S. 308 (2005).

181. *Id.* at 310–11.

182. *Id.* at 311.

183. *Id.* (Grable maintained that the IRS failed to comply with the notice procedures of 26 U.S.C. § 6335(a) (2006)).

184. 545 U.S. at 316.

185. *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.").

186. *Id.*

187. *Id.*

188. To be clear, the Court treats the substantial right factor as necessary, but not sufficient, for finding § 1331 jurisdiction. *Id.* at 318–19. It also requires a finding that jurisdiction "is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331." *Id.* at 313–14. For lower court examples of this specific finding of congressional intent, see *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194–96 (2d Cir. 2005) (applying *Grable & Sons* and taking jurisdiction over a state-law contract claim that required construction of federal cable television law because taking this jurisdiction would not upset the flow of litigation in state and federal courts); *Municipality of San Juan v. Corporación Para El Fomento Económico De La Ciudad Capital*, 415 F.3d 145, 148 n.6 (1st Cir. 2005) (applying *Grable & Sons* and taking jurisdiction over state-law contract claim that required construction of HUD regulations); *see also* Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1793 (1992) (arguing that federal question jurisdiction over hybrid claims should lie to "increase the level of state-federal judicial interchange in the shaping and development of the relevant federal statute"); Note, *Mr. Smith Goes to Federal Court*, *supra* note 14, at 2292 (arguing that by incorporating federal law, "a

Sons is, in essence, a means of maintaining statutory federal question jurisdiction only in those cases in which the federal courts will be called upon to exercise declaratory authority over the federal question—jurisdiction does not lie when the case is fact bound or rides entirely upon the construction of state law.¹⁸⁹

Despite the dynamic nature of § 1331 doctrine in this area, the Court has consistently held that there is Article III jurisdiction to hear state statutory claims that mandatorily cross-reference federal law, as well as jurisdiction in the Court itself on certiorari under § 1257.¹⁹⁰ This taking of jurisdiction coincides with the retention of declaratory power over the question of federal law embedded in the state-law cause of action.¹⁹¹ Thus, the Court recognizes that these mandatory invocations of federal law present opportunities to exercise declaratory power over the cross-referenced law, justifying the vesting of at least Article III jurisdiction.

B. Discretionary Cross-References

In this section, I take up discretionary cross-references. Recall that a discretionary cross-reference is one that does not bind the forum court to application of the cross-referenced law, but rather deploys the cross-reference as part of the forum court's rule-creating endeavor.¹⁹² Here I assert that the federal courts continue to vest federal question jurisdiction in a manner that correlates with their declaratory authority over the cross-referenced law, but in a fashion that creates a mirror image to the taking of jurisdiction when a mandatory cross-reference is at issue. Thus, the federal courts take federal question jurisdiction over federal discretionary cross-references to state-law rights because these are instances where the federal

state might be understood to have waived its claim to exclusive jurisdiction over a violation of the hybrid law").

189. See, e.g., *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700–01 (2006) (The court refused § 1331 jurisdiction under *Grable* because "*Grable* presented a nearly 'pure issue of law,' In contrast, *Empire's* reimbursement claim . . . is fact-bound and situation-specific.").

190. See *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 214–17 (1934) (holding that a state, statutory, mandatory cross-reference to the federal Safety Appliance Act did not arise under § 1331, but that there was Article III jurisdiction to hear such claims as well as jurisdiction under the Supreme Court's jurisdictional statute).

191. See *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 816 n.14 (1986), where the Court held that a cross-reference to federal law in a state common law action did not arise under § 1331 but held that "[p]etitioner's concern about the uniformity of interpretation, moreover, is considerably mitigated by the fact that, even if there is no original district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action." *Id.* (citing *Moore*).

192. See *supra* Part II.B (defining discretionary cross-references).

courts are empowered to exercise declaratory authority to eschew the state-law rule. Conversely, the federal courts will not take federal question jurisdiction over state-law discretionary references to federal-law rights because such opinions would not produce binding holdings as to the cross-referenced law.

1. *Tucker Act*

I begin my examination of federal discretionary cross-references to state-law rights with the Tucker Act.¹⁹³ Under the Tucker Act, the Court of Federal Claims has exclusive, original jurisdiction of any civil action or claim against the United States, exceeding \$10,000, founded either upon federal law or upon any express or implied-in-fact contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.¹⁹⁴ Under the so-called Mini-Tucker Act,¹⁹⁵ the federal district courts have original jurisdiction, concurrent with the Court of Federal Claims, for similar claims of less than \$10,000.¹⁹⁶ (I will refer to the Tucker and Mini-Tucker Acts collectively as the Tucker Acts.)

The cross-references to state law of contract under the Tucker Acts are discretionary. The courts consider the Tucker Acts themselves as merely jurisdictional, even though they both waive sovereign immunity, relying upon other bodies of law to create substantive rights.¹⁹⁷ Given that the Tucker Acts do not create substantive law, the cross-reference to state law plays a key role in these suits. Importantly, in terms of selecting rules of decision, the Tucker Acts, unlike the FTCA, do not provide that the United States is to be dealt with as if it were a “private person.”¹⁹⁸ In line with their statutory directive,¹⁹⁹ contract claims brought under the Tucker Acts are governed by federal common law,²⁰⁰ contrary to practice under the

193. 28 U.S.C. § 1491 (2006).

194. *Id.* The \$10,000 threshold is actually laid out in the Mini-Tucker Act. *See infra* note 196 and accompanying text.

195. 28 U.S.C. § 1346(a)(2) (2006).

196. *Id.*

197. *See, e.g.,* United States v. Testan, 424 U.S. 392, 400–02 (1976); *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1554 (Fed. Cir. 1994).

198. *Compare* 28 U.S.C. § 1346(b) (2006) (employing private person language), *with* § 1346(a) (lacking private person language). *See also* Malman v. United States, 207 F.2d 897, 898 (2d Cir. 1953) (making this distinction).

199. *See* Woodbury v. United States, 313 F.2d 291, 295 (9th Cir. 1963) (noting that lack of the “private person” language in the Tucker Acts supports the application of federal common law to contract claims under the Tucker Act).

200. *See* Nat’l Presto Indus., Inc. v. United States, 338 F.2d 99, 111 (Ct. Cl. 1964) (en banc) (“Federal courts can and should proceed under the Tucker Act . . . to develop and establish just and

FTCA.²⁰¹ Although these contract claims brought under the Tucker Acts are governed by federal common law, the federal courts often choose state-law contract rights as the rule of decision in such cases.²⁰² Thus, in Tucker Act cases, the courts often face a federal cause of action coupled with a state-law right.

At first blush, then, taking federal question jurisdiction in Tucker Act suits seems at odds with the *Shoshone* line of cases in which the Court does not take federal question jurisdiction.²⁰³ Both the Tucker Act cases and the *Shoshone* line of cases feature federal causes of action coupled with state-law rights. Nevertheless, cross-referencing under the Tucker Acts is best viewed as discretionary, rather than mandatory as is the case with the cross-reference in *Shoshone*,²⁰⁴ because the Court emphasizes the need to contemplate deviation from the state rule on a case-by-case basis

practical principles of contract law for the Federal Government.”); *see also* XTRA Lease, Inc. v. United States, 50 Fed. Cl. 612, 621 (2001) (In Tucker Act suits, “[d]ue to the absence of specific federal statutes that govern the interpretation of contracts, the courts have crafted a federal common law for government contracts.”); *Cegers v. United States*, 7 Cl. Ct. 615, 621 n.10 (1985) (“[T]he validity and construction of contracts to which the federal government is a party is controlled by federal law.”). The Court has made similar pronouncements regarding government contracts often, but not in the context of Tucker Act cases. *See, e.g.,* *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592–94 (1973); *United States v. Seckinger*, 397 U.S. 203, 209–10 (1970); *Nat’l Metro. Bank v. United States*, 323 U.S. 454, 456 (1945); *United States v. Cnty. of Allegheny*, 322 U.S. 174, 183 (1944); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943).

201. *See supra* notes 135–41 and accompanying text (discussing the lack of role for federal common law in FTCA cases).

202. *See, e.g.,* *Mobil Oil Exploration & Producing, Inc. v. United States*, 530 U.S. 604, 607 (2000) (“When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.” (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) (Souter, J., plurality opinion))); *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) (Souter, J., plurality opinion) (making the same statement in a Tucker Act suit in which the Court refused to apply sovereign-only rules to a government contract); *United States v. Bostwick*, 94 U.S. 53, 66 (1876) (“The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf.”); *Ginsberg v. Austin*, 968 F.2d 1198, 1200 (Fed. Cir. 1992) (Where federal law is not dispositive, courts should “look to general property and contract law principles as they are embodied in state law pronouncements.”); *Cal. Or. Broad., Inc. v. United States*, 74 Fed. Cl. 394, 399 (2006) (same in a Tucker Act suit). The Court takes this view of contract enforcement, that state law provides the rule of decision, in non-Tucker Act cases as well. *See* *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 691–92 (2006) (“In post-*Clearfield* decisions, and with the benefit of enlightened commentary, the Court has made clear that uniform federal law need not be applied to all questions in federal government litigation, even in cases involving government contracts. The prudent course, we have recognized, is often to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.” (citations and quotation marks omitted)); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979) (similar); *Clearfield Trust*, 318 U.S. at 369 (“The United States does business on business terms.” (quoting *United States v. Nat’l Exch. Bank*, 270 U.S. 527, 534 (1926))).

203. *See supra* notes 104–13 and accompanying text (discussing the *Shoshone* line of cases).

204. *See supra* notes 105–08 and accompanying text (discussing the mandatory nature of cross-reference in the *Shoshone* line of cases).

in Tucker Act suits (i.e., the federal courts retain declaratory authority over the cross-referenced law in Tucker Act cases).²⁰⁵ As such, contract claims under the Tucker Acts present scenarios where federal common law provides the cause of action and the courts deploy a discretionary cross-reference to state law to supply contractual rights, distinguishing these suits from the *Shoshone* line of rulings. Moreover, this recognition of declaratory authority over the cross-referenced law coincides with the courts taking federal question jurisdiction over the Tucker Acts. Thus, Justice Rutledge, concurring in *Tidewater*, stated that black-letter law supported the notion that Tucker Act suits arose under Article III federal question jurisdiction.²⁰⁶ And while there have been some differences of opinion regarding whether contractual claims against the United States may be brought in district court under § 1331²⁰⁷ or exclusively in the Court of Claims,²⁰⁸ there seems little doubt that the cases raise a species of statutory federal question jurisdiction.

205. See, e.g., *Winstar Corp.*, 518 U.S. at 860 (Souter, J., plurality opinion) (stating that the issue in this Tucker Act suit was whether to apply special rules not available to private parties at state law, thus illustrating that the Court had the authority to deviate if it so chose); *id.* at 919 (Scalia, J., concurring) (noting that he would keep the special sovereign defenses, further illustrating the authority of the Court to diverge from state law here); *id.* at 924, 937 (Rehnquist, C.J., dissenting in part) (noting he would apply special contract rules in this instance, again illustrating the Court's authority to deviate from state law).

206. *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 610 (1949) (Rutledge, J., concurring) ("Suffice it to say that, if such suits are not 'Controversies to which the United States shall be a Party,' they are presumptively within the purview of the federal-question jurisdiction This is, at least, the conventional view of district court jurisdiction under the Tucker Act."). *But see* *Jan's Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1305 (Fed. Cir. 2008) ("[T]he jurisdiction of the Court of Federal Claims . . . does not depend on the 'arising under' clause of Article III . . . but rather on a separate clause in Article III that authorizes jurisdiction over all 'controversies to which the United States is a party' . . ."). Given *Tidewater*, the better view is likely that Tucker Act cases arise under both constitutional provisions.

207. See *C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 903 F.2d 114, 119 (2d Cir. 1990) ("We hold that an action (regardless of the amount sought) may be commenced under § 1331 in the district court provided there is an independent waiver of sovereign immunity outside the Tucker Act."); see also *W. Sec. Co. v. Derwinski*, 937 F.2d 1276, 1280–81 (7th Cir. 1991) (similar); *Bor-Son Bldg. Corp. v. Heller*, 572 F.2d 174, 182 n.14 (8th Cir. 1978) (similar). The D.C. Circuit has noted the split, but declined to comment. See *Md. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1448 n.4 (D.C. Cir. 1985).

208. See *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 986 n.6 (9th Cir. 2006), *modified on other grounds*, 540 F.3d 916 (9th Cir. 2008); *A.E. Finley & Assocs. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990) ("[I]f an action rests within the exclusive jurisdiction of the Claims Court under the Tucker Act . . . the district court does not have jurisdiction regardless of other possible statutory bases."); *New Mexico v. Regan*, 745 F.2d 1318, 1321–22 (10th Cir. 1984); *Graham v. Henegar*, 640 F.2d 732, 734 & n.6 (5th Cir. 1981) (similar).

2. *Miller Act*

The courts provide a similar jurisdictional treatment for suits brought under the Miller Act. In large construction projects, the owner of the project typically enters into only one contract with a general contractor to complete the construction. This general contractor then contracts independently with subcontractors and suppliers in order to obtain appropriate tradespeople and get materials to the construction site. These subcontractors and suppliers, because they only contract with the general contractor, are not in contractual privity with the owner of the project. Therefore, they may only seek breach of contract remedies against the general contractor. In many circumstances, such as when the general contractor goes bankrupt, the inability to seek expectation damages on a breach of contract theory from the owner unduly frustrates these subcontractors and suppliers. Therefore, in the case of a private construction project, subcontractors and suppliers not made whole by a general contractor may place a lien, often called a mechanics lien, on the property itself and thus obtain expectation damages from the owner of the project.

This mechanics lien scheme will not suffice for public construction projects, however. At the federal level, sovereign immunity bars the placing of a lien upon federal construction projects.²⁰⁹ Moreover, a claim under the Tucker Acts would be unavailing because the subcontractors and suppliers lack contractual privity with the federal government. As a result, the Miller Act, which requires general contractors to post a payment bond at the beginning of construction to satisfy unpaid claims to suppliers and subcontractors,²¹⁰ was passed as a substitute remedy for materialmen and tradespeople to effectuate relief for breaches of contract by general contractors.²¹¹ Under the Act, subcontractors may sue the general contractor for breach and, because of the bond, be assured that the general contractor will not become judgment proof. The Miller Act directs that the federal district courts retain exclusive jurisdiction of these cases with the

209. *See, e.g.*, *United States ex rel. Hill v. Am. Sur. Co.*, 200 U.S. 197, 203 (1906) (“As against the United States, no lien can be provided upon its public buildings or grounds, and it was the purpose of this act to substitute the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual.”).

210. 40 U.S.C. § 3131 (2006).

211. *See, e.g.*, 40 U.S.C. § 3131(b)(2) (requiring posting of payment bond); *United States v. Munsey Trust Co.*, 332 U.S. 234, 241 (1947) (“But nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation. They cannot acquire a lien on public buildings, and as a substitute for that more customary protection, the various statutes were passed which require that a surety guarantee their payment.” (citations omitted)).

United States serving as the nominal plaintiff for the benefit of the injured subcontractor.²¹²

While the Miller Act indubitably creates a statutory federal cause of action,²¹³ the nature of the underlying contract right is the source of some confusion in Miller Act claims. Before 1974, the law appeared relatively settled that the Miller Act mandatorily cross-referenced state law to supply contract rights in such actions.²¹⁴ Under this regime, the federal courts did not take jurisdiction over Miller Act suits as a federal question, but rather found jurisdiction because the United States was a party plaintiff.²¹⁵

The Supreme Court introduced confusion to this consensus view in *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*²¹⁶ One issue in the case was whether the Miller Act provided for attorney's fees.²¹⁷ The Court held that it did not.²¹⁸ In so ruling, the Court stated that "[t]he Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law."²¹⁹ As a result of this language, some lower courts now hold that federal common law governs contractual rights under the Miller Act as opposed to a mandatory cross-reference to state law, thus applying cross-references to state law on a case-by-case fashion as a matter of

212. 40 U.S.C. § 3133(b)(3)(A) (2006); *Blanchard v. Terry & Wright, Inc.*, 331 F.2d 467, 469 (6th Cir. 1964) ("Exclusive jurisdiction in the District Court was expressly conferred by the Miller Act.").

213. 40 U.S.C. § 3133(b)(1) ("Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished . . . and that has not been paid in full . . . may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due.").

214. *See, e.g.*, *United States ex rel. Shields, Inc. v. Citizens & S. Nat'l Bank*, 367 F.2d 473, 477 (4th Cir. 1966) ("We agree that the substantive law of North Carolina must be applied in determining the respective rights of the parties. Even though jurisdiction is conferred by the Miller Act, the construction of that statute is not at issue and all acts relevant to the subcontract in question and its performance occurred in North Carolina."); *Wells Benz, Inc. v. United States ex rel. Mercury Elec. Co.*, 333 F.2d 89, 92 n.3 (9th Cir. 1964) (applying state contract law as the rule of decision in Miller Act case); *United States ex rel. Ascher Corp. v. Bradley-Dodson Co.*, 281 F.2d 676, 681 (8th Cir. 1960) (same); *Am. Auto Ins. Co. v. United States ex rel. Luce*, 269 F.2d 406, 411-12 (1st Cir. 1959) (same).

215. *See, e.g.*, *Cont'l Cas. Co. v. Allsop Lumber Co.*, 336 F.2d 445, 449 (8th Cir. 1964) (holding that amount in controversy requirement of \$10,000 then required under both 28 U.S.C. §§ 1331 & 1332 was inapplicable because "the Miller Act provides another and different basis for federal court jurisdiction because it requires that the action be brought in the name of the United States"); *United States ex rel. Sligh v. Fullerton Const. Co.*, 296 F. Supp. 518, 522 (D.S.C. 1968) (similar), *aff'd*, 407 F.2d 1339 (4th Cir. 1969); *United States ex rel. Betts v. Cont'l Cas. Co.*, 224 F. Supp. 857, 860 (W.D. Pa. 1964) (similar); 6A WRIGHT ET AL., *supra* note 102, § 1551 n.8 (citing pre-*F.D. Rich* cases for the proposition that Miller Act suits take federal jurisdiction because the United States is a party).

216. 417 U.S. 116 (1974).

217. *Id.* at 126.

218. *Id.* at 121.

219. *Id.* at 127.

discretion.²²⁰ Other lower courts limit *F. D. Rich* to Miller Act procedural issues, while continuing to view the cross-reference to contractual rights as governed by mandatory application of state law. Under this view, for “actions brought under the Miller Act, issues not involving construction of the [Miller] Act [itself], such as ordinary contract issues, will be resolved by the law of the state where contract is performed.”²²¹

Tellingly for this study, this circuit split on whether the federal courts possess declaratory authority over the cross-referenced state-law rights under the Miller Act coincides with the courts’ division on whether Miller Act cases arise under federal question jurisdiction. If the Miller Act is best viewed as a statutory directive to create a federal common law of contractual rights, and the cross-references to state contract rights are merely discretionary, then it follows that Miller Act cases arise as federal questions.²²² If, however, the cross-reference to state contractual rights under the Miller Act is a mandatory one, in which the federal courts lack

220. *See, e.g.*, *United States ex rel. Lighting & Power Servs., Inc. v. Interface Constr. Corp.*, 553 F.3d 1150, 1153 (8th Cir. 2009) (quoting *F. D. Rich* and holding that federal law governs the substantive contractual rights at issue in a Miller Act case); *id.* at 1155 (exclusively citing Missouri contract law on contractual interpretation issue in a Miller Act case); *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 764 (10th Cir. 1997) (noting, after applying state law as a matter of discretion, that “we clearly, and repeatedly, [have] stated prejudgment interest awards on Miller Act claims are governed by federal law, not state law”). The Ninth Circuit provides a cogent exegesis in this regard:

Although the Supreme Court found in *F. D. Rich* that resort to state law [regarding attorney’s fees] would conflict with federal policies toward awarding attorneys’ fees, the Court has also held that when no such policy conflict exists, the federal courts may look to state law in fashioning substantive federal rules. This is particularly appropriate where, as here, the applicable state law reflects general contract principles.

United States ex rel. A. V. DeBlasio Constr., Inc. v. Mountain States Constr. Co., 588 F.2d 259, 262 n.1 (9th Cir. 1978) (citations omitted) (citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), as authority to create federal common law by incorporating state contract law).

221. *United States ex rel. Endicott Enters. Inc. v. Star Brite Constr. Co.*, 848 F. Supp. 1161, 1168 (D. Del. 1994); *see also United States ex rel. Pertun Constr. Co. v. Harvesters Grp., Inc.*, 918 F.2d 915, 919 (11th Cir. 1990) (“Although this action was brought under the Miller Act, the effect and validity of the contractual clause purportedly limiting the subcontractor’s remedy for delay is governed by the law of Florida, the state in which the agreement was executed and was to be performed.”); *United States ex rel. M-CO Constr., Inc. v. Shipco Gen., Inc.*, 814 F.2d 1011, 1015 (5th Cir. 1987) (“In a Miller Act case, state law determines the amount of damages a subcontractor may receive.”); *United States ex rel. Benefit of Aucoin Elec. Supply Co. v. Safeco Ins. Co. of Am.*, 555 F.2d 535, 541 (5th Cir. 1977) (“In this aspect [whether there was a material breach], Texas law would be applicable. The issue does not involve any construction of the Miller Act, to which federal law would apply, but involves performance in Texas of a contract made in Texas.”); *United States ex rel. Greenmoor, Inc. v. Travelers Cas. & Sur. Co. of Am.*, Civ. No. 06-234, 2007 WL 2071651, at *3 (W.D. Pa. July 13, 2007) (“Congress provided that the United States district courts have ‘exclusive federal question jurisdiction’ for actions under the Miller Act. . . . [H]owever, the underlying breach of contract claims that form the basis of the Miller Act claim will be determined on the basis of state law.”).

222. *See, e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91, 99–100 (1972) (concluding that federal question “jurisdiction will support claims founded upon federal common law”).

declaratory authority, Miller Act cases would fall directly into the jurisdictional bar imposed by the *Shoshone* line of cases because they would seek federal question jurisdiction over a federal statutory cause of action coupled with a mandatory cross-reference to state-law rights.²²³ As a result of adopting a mandatory view of the cross-reference to state law under the Miller Act, courts would, in cases lacking diversity, be forced to rely upon the United States as a party to provide jurisdiction for Miller Act cases.²²⁴ This finding further supports the notion that federal question jurisdiction requires that the federal courts retain declaratory power over the substantive rights of the case at issue.

3. Federal Common Law Type I

Federal courts often cross-reference state law in federal common law suits as well. I define federal common law, pursuant to the standard view,²²⁵ as “federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional commands.”²²⁶ The federal courts cross-reference in these cases in the following manner. If the issue of federal common law empowers a plaintiff to bring suit,²²⁷ then the courts find that federal law creates the cause of action.²²⁸ The content of the right, however, need not necessarily be federal.²²⁹ Thus, the federal courts may rely upon pre-*Erie*

223. See *supra* Part III.A.2 (discussing *Shoshone*).

224. This is the case because United States as a party jurisdiction does not require that the governing law be federal. See *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973) (“The federal jurisdictional grant over suits brought by the United States is not in itself a mandate for applying federal law in all circumstances. This principle follows from *Erie* itself, where, although the federal courts had jurisdiction over diversity cases, we held that the federal courts did not possess the power to develop a concomitant body of general federal law.”).

225. See Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 590–94 (2006) (presenting this as the standard definition).

226. HART AND WECHSLER, *supra* note 53, at 607. There are at least three competing views of federal common law. See, e.g., Tidmarsh & Murray, *supra* note 225, at 590–94 (discussing three definitions of federal common law). The narrowest view finds that federal common law is merely a listing of those enclaves where the Court has employed the use of federal common law in the past. *Id.* On the broad side, federal common law is thought by some to include “any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional.” Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (emphasis omitted).

227. Much federal common law does not create a cause of action, but rather creates a defense, a rule of preclusion, or the like. See *Taylor v. Sturgell*, 553 U.S. 880 (2008) (creating federal common law of preclusion); *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988) (creating federal common law government contractor defense).

228. See *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 (1991).

229. *Id.* at 98.

federal common law to provide the right,²³⁰ or craft a federal right afresh.²³¹ But often the federal courts rely upon a discretionary cross-reference to state-law rights in crafting a rule to couple to the federal cause of action.²³² Such discretionary cross-references differ from mandatory and metadiscretionary cross-references²³³ insofar as the court is not bound to apply the law of the state in which the federal court sits, but rather the court views the cross-reference as one to the common law as a generality.²³⁴ Nor is the federal court bound to adopt state law at all in this context. Rather, the federal courts truly are crafting rights here,²³⁵ relying upon the cross-reference to state law as more an informative act—a search for best practices²³⁶—rather than a search for binding precedent.²³⁷ Or put

230. *See, e.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (“[W]hile the federal law merchant, developed for about a century under the regime of *Swift v. Tyson* . . . represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.”); *see also* *Francis v. S. Pac. Co.*, 333 U.S. 445, 448–50 (1948) (applying the federal law defined in the pre-*Erie* cases as to liability of railroads to those riding on free passes); *Nat’l Metro. Bank v. United States*, 323 U.S. 454, 457 (1945) (similar).

231. *See Boyle*, 487 U.S. 500 (creating federal common law government contractor defense).

232. *See, e.g.*, *Taylor*, 553 U.S. at 893 & n.6 (cross-referencing general state law preclusion principles, as embodied in Restatements, to create federal common law of preclusion); *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947) (“It is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law.”); *Studio Frames Ltd. v. Standard Fire Ins. Co.*, 483 F.3d 239, 245 (4th Cir. 2007) (cross-referencing the general principles of state insurance law); *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 236 (4th Cir. 2006) (cross-referencing general common law of contracts to provide the federal rule of decision in federal common law of contracts); *Ruttenberg v. U.S. Life Ins. Co.*, 413 F.3d 652, 659 (7th Cir. 2005) (cross-referencing general contract law principles as rule of decision in federal common law case); *InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003) (applying “federal common law[, which] incorporates general principles of contract . . . law”).

233. *See infra* Part III.C.2 (discussing metadiscretionary cross-references to state-law rights in the federal common law context).

234. *See, e.g.*, *First Interstate Bank v. Small Bus. Admin.*, 868 F.2d 340, 343 n.3 (9th Cir. 1989) (cross-referencing the general principles of contract law found in the RESTATEMENT (SECOND) OF CONTRACTS instead of the particular law of the forum state); *Young, supra* note 50, at 1651 (arguing that purely discretionary incorporation of state law is not bound by the rules of the forum state).

235. *See, e.g.*, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957) (“But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.”); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–67 (1943) (holding that once federal competence is recognized, “it is for the federal courts to fashion the governing rule according to their own standards”); *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 471–72 (1942) (Jackson, J., concurring) (similar).

236. *See, e.g.*, *Free v. Bland*, 369 U.S. 663, 669–70 (1962) (refusing to cross-reference state law because it produced poor consequences by unduly restricting the use of marital funds in purchasing government bonds).

237. *Cf. Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (holding in the context of state cross-references to federal law that “[i]f a state court chooses merely to rely on federal precedents as it

differently, the federal courts, in federal common law type I cases deploying discretionary cross-references to state law, are fully exercising their declaratory authority to craft legal norms.²³⁸

Coinciding with this interpretive power, one finds that discretionary cross-references to state-law rights arise under federal question jurisdiction. These cases, then, are akin to Tucker Act suits insofar as they present federal causes of action coupled with discretionary cross-references to state-law rights. Federal common law type I cases, like Tucker Act cases, often need not rely upon federal question jurisdiction to enter federal court.²³⁹ There are, however, certain categories of suits that

would on the precedents of all other jurisdictions, then . . . the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached”).

238. This exercise of authority is often equated with legislative function. *See, e.g.,* O’Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994) (holding that the weighing of factors in the proposed creation of federal common law is more appropriately a legislative function); *Nw. Airlines, Inc. v. Trans. Workers Union*, 451 U.S. 77, 98 n.41 (1981) (same); *see also* *Boyle v. United Techs. Corp.*, 487 U.S. 500, 531–32 (1988) (Stevens J., dissenting) (“But when we are asked to create an entirely new doctrine—to answer ‘questions of policy on which Congress has not spoken’—we have a special duty to identify the proper decisionmaker before trying to make the proper decision. When the novel question of policy involves a balancing of the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual—whether in the social welfare context, the civil service context, or the military procurement context—I feel very deeply that we should defer to the expertise of the Congress.” (citation omitted)); *Lincoln Mills*, 353 U.S. at 457 (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, 511–13 (1954) (similar); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 979–81 (D.C. Cir. 2005) (Sentelle, J., concurring) (arguing that creating a federal common law reporter’s privilege is essentially a legislative task), *cert. denied*, 545 U.S. 1150 (2005), *modified*, 438 F.3d 1141 (D.C. Cir. 2006); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11 (1975) (“Thus, when a federal court announces a federal rule of decision in an area of plenary congressional competence, it exercises an initiative normally left to Congress, ousts state law, and yet acts without the political checks on national power created by state representation in Congress.”); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 766–67 (1989) (arguing that federal common law, as it is essentially a legislative function, violates separation of powers principles).

239. Federal common law cases fall roughly into six categories. Tidmarsh & Murray, *supra* note 225, at 594. These categories are (1) cases affecting the rights and obligations of the United States, *see, e.g.,* *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (involving “[t]he rights and duties of the United States on commercial paper which it issues”); (2) cases involving interstate controversies, *see, e.g.,* *Washington v. Oregon*, 297 U.S. 517, 518–19 (1936) (involving Oregon’s diversion of the Walla Walla River to the alleged detriment of the residents of Washington); (3) cases that call upon the court to make substantive judgments regarding international relations, *see, e.g.,* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (involving a contract for the purchase of Cuban sugar between American and Cuban companies); (4) cases arising in admiralty, *see, e.g.,* *Am. Dredging Co. v. Miller*, 510 U.S. 443, 445 (1994) (involving a personal injury action brought by seaman injured on the job); (5) cases creating federal defenses to state-law claims, *see, e.g.,* *Boyle v. United Techs. Corp.*, 487 U.S. 500, 502 (1988) (involving a suit brought after a military helicopter pilot was killed in a helicopter crash during a military training exercise); and (6) cases where the *Erie* doctrine requires the adoption of a federal rule of decision, *see, e.g.,* *Semtek Int’l Inc. v.*

would not be heard in federal court without federal question jurisdiction. For example, the rights and obligations of the United States, which are governed by federal common law, can apply in cases in which the United States is not a party and thus arise under § 1331.²⁴⁰ Interstate controversies, which are governed by federal common law, can arise in a suit that does not feature two states directly litigating against each other and thus arise under § 1331.²⁴¹ Finally, plaintiffs may seek to enforce a right created by the federal common law of foreign relations and use § 1331 as the basis for federal jurisdiction.²⁴² It is settled law that such federal common law type I suits, which coincide with a full-throated use of the courts' declaratory authority, do raise both statutory and Article III federal questions.²⁴³

4. *State-Law Discretionary Cross-References to Federal Law*

As is the case with mandatory cross-references, the federal courts take a mirror-image approach to vesting discretionary state-law cross-references to federal rights, holding that federal jurisdiction does not arise in these cases. As with the discussions above, this lack of federal question jurisdiction coincides with a lack of declaratory authority.

State courts often interpret state law by a discretionary cross-reference to analogous federal rights. This discretionary cross-referencing frequently

Lockheed Martin Corp., 531 U.S. 497, 499 (2001) (involving the preclusive effect of federal dismissal). Many of these groupings are inapposite to this discussion as they do not rely upon federal question jurisdictional authority to enter federal court. For example, cases affecting the rights and obligations of the United States typically feature the United States as a party and take jurisdiction under 28 U.S.C. §§ 1345–1347, 1491 (2006). Interstate controversies, which typically feature two or more states suing each other, arise under the Supreme Court's exclusive and original jurisdiction pursuant to 28 U.S.C. § 1251(a) (2006). Most admiralty cases arise under 28 U.S.C. § 1333 (2006). Finally, the creation of a substantive rule of decision under the *Erie* doctrine, by definition, must arise under diversity jurisdiction. *See* 28 U.S.C. § 1332 (2006).

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

241. *See, e.g.,* Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972) (involving an action brought by the state of Illinois against four Wisconsin cities and two sewerage commissions).

242. *Cf. Dole Food Co. v. Patrickson*, 538 U.S. 468, 471 (2003) (defendant corporation sought removal to federal court “arguing that the federal common law of foreign relations provided federal-question jurisdiction under § 1331”); *see also* 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 (2002) (discussing federal question jurisdiction over federal common law of foreign affairs suits).

243. *See, e.g., City of Milwaukee*, 406 U.S. at 99–100 (concluding that “§ 1331 jurisdiction will support claims founded upon federal common law”).

comes into play in constructing state statutes.²⁴⁴ Additionally, the state courts often discretionarily cross-reference federal constitutional law in interpreting their state constitutions.²⁴⁵ In both settings, the courts are coupling state-law causes of action with a discretionary cross-reference to a federal law right. Moreover, these discretionary cross-references, unlike mandatory or metadiscretionary cross-references, are not quests for binding precedent to be found in federal law, but rather searches for informed practices.²⁴⁶ Thus, the state courts here, although cross-referencing federal rights, are fully exercising their prerogatives to retain control over the content of state law.²⁴⁷

This full expression of declaratory power by the state courts in these discretionary cross-references to federal law stands side-by-side with a lack of statutory or constitutional federal question jurisdiction. Indeed, such discretionary cross-references to federal law do not give rise to § 1331 jurisdiction.²⁴⁸ Nor will the Court take jurisdiction over such discretionary cross-references to federal law on certiorari from the state court systems.²⁴⁹ Moreover, the federal courts lack constitutional

244. *See, e.g.*, *Woodrow Wilson of Middletown, LLC v. Conn. Hous. Fin. Auth.*, 986 A.2d 271, 277 (Conn. 2010) (“[G]iven the similar purposes of both the federal and state agencies . . . the defendant . . . reasonably relied on 12 U.S.C. § 4108 and 24 C.F.R. § 248.141(c)(1) in interpreting the language of [Connecticut Code] § 8-253a(1)(B).”); *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky. 2005) (“This Court has consistently interpreted the civil rights provisions of KRS Chapter 344 consistent with the applicable federal anti-discrimination laws.”); *Tomlinson v. State*, 878 P.2d 311, 313–14 (Nev. 1994) (“To give all the subsections of NRS 52.255 independent meaning, we accept the State’s construction and interpret NRS 52.255 consistent with Federal Rule of Evidence 1004.”); *Daily Gazette Co. v. W. Va. Devel. Office*, 482 S.E.2d 180, 191 (W. Va. 1996) (“Though we recognize that the deliberative process privilege language of federal Exemption 5 differs from that of WVFOIA Exemption 8, we nevertheless interpret the latter to be consistent with the former.”); *see also Orme Sch. v. Reeves*, 802 P.2d 1000, 1003 (Ariz. 1990) (noting that “uniformity in interpretation of our rules and the federal rules is highly desirable”).

245. *See infra* note 288 (listing examples of discretionary state-law cross-references to federal equal protection doctrine).

246. *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 878 n.6 (Iowa 2009) (“Plaintiffs’ challenge . . . is based on the equal protection guarantee in the Iowa Constitution and does not implicate federal constitutional protections. Generally, we view the federal and state equal protection clauses as identical in scope, import, and purpose. At the same time, we have jealously guarded our right to . . . independently apply the federally formulated principles. Here again, we find federal precedent instructive in interpreting the Iowa Constitution, but we refuse to follow it blindly.” (citations and internal quotation marks omitted)).

247. The state supreme courts are the final binding authority on matters of state law; their decisions bind the federal courts in this regard. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 339 (1986); *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

248. *See, e.g.*, *Nuclear Eng’g Co. v. Scott*, 660 F.2d 241, 249 (7th Cir. 1981) (“[S]tate law incorporation of federal law does not . . . allow . . . state law claims to be construed as essentially federal in character.”); 13D WRIGHT ET AL., *supra* note 102, § 3563 nn.19–21 (same and listing cases).

249. *See, e.g.*, 16 WRIGHT ET AL., *supra* note 102, § 4031 (“It does not seem likely that the Court

jurisdiction here as well. Because the state court cross-references are truly interpretations of state law, the federal courts lack binding, declaratory power over the cross-referenced law.²⁵⁰ Thus, any construction of federal law the federal courts would render in such a discretionary cross-referenced case would be merely advisory, contrary to the dictates of Article III.²⁵¹

C. *Metadiscretionary Cross-References*

I turn finally to metadiscretionary cross-references. A metadiscretionary cross-reference is one in which the forum court is not constrained by a rule of law to apply the cross-referenced law, but it nevertheless treats the cross-reference as if it were so bound.²⁵² I begin with enclave jurisdiction, where the Court has held that there is a constitutional default rule that state law governs—that is, a metadiscretionary cross-reference to state law absent congressional action—and that federal question jurisdiction lies. Second, I look, once again, at federal common law cases, but in this instance focusing upon those cases that take federal question jurisdiction and presume the forum state's law applies absent preemption by federal interest (i.e., a metadiscretionary cross-reference). I end with a discussion of federal question jurisdiction over state metadiscretionary cross-references to federal law under *Michigan v. Long*.²⁵³ Here, once again, we find the overlapping of declaratory authority over the cross-referenced law and federal question jurisdiction.

could be persuaded that it has jurisdiction to review application of a state rule of civil procedure merely because the state rule is taken verbatim from a Federal Rule of Civil Procedure, not even if the state courts have made it clear that their overriding purpose is to establish perfect uniformity with the practice followed in the federal courts in their state.”).

250. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (“If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.”).

251. *Id.* at 1042 (“The jurisdictional concern is that we not ‘render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.’” (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945))).

252. *See supra* Part II.B (defining metadiscretionary cross-references).

253. 463 U.S. 1032 (1983).

1. *Enclave Jurisdiction*

First, I examine the cross-referencing of state law in federal enclaves. The Constitution grants Congress unfettered legislative jurisdiction over so-called federal enclaves, portions of land ceded by states to the federal government for the construction of federal installations.²⁵⁴ Congress governs these enclaves, even those subject to exclusive federal control, predominately by cross-reference to state law, having done so by statute in the case of criminal law²⁵⁵ and typically by constitutional presumption of cross-reference to state law in civil suits.²⁵⁶ I will focus upon civil law in this discussion because criminal law cases may rely upon the United States as a party to provide Article III jurisdiction, thereby abrogating the need for a federal question to support jurisdiction.²⁵⁷

The Court has announced three competing theories on the constitutional presumption in favor of cross-referencing state civil law in federal enclaves.²⁵⁸ Under the first theory, when real property becomes a federal enclave, the local law in effect at the time of the transfer to the federal government continues to apply until it is abrogated by federal

254. U.S. CONST. art. I, § 8, cl. 17 (permitting the federal government to set up enclaves within states, if the relevant state legislature grants consent). Due to the circumstances of the cessation of the land at issue, federal enclaves come in four varieties. The federal government may hold (1) exclusive authority over the area, (2) authority concurrently with the state, (3) authority limited to particular subjects, or (4) no authority, but rather hold property as a normal proprietor. *See* Goldberg-Ambrose, *supra* note 67, at 554 n.73.

255. *See, e.g.*, 18 U.S.C. § 13(a) (2006) (cross-referencing state criminal law as the operative law in federal enclaves).

256. *See* James Stewart & Co. v. Sadrakula, 309 U.S. 94, 99–100 (1940) (“The Constitution does not command that every vestige of the laws of the former sovereignty [in federal enclaves] must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred.”). There are, however, several areas of civil law where Congress has passed specific statutory regulation. *See, e.g.*, 16 U.S.C. § 457 (2006) (cross-referencing state wrongful death law into federal enclaves); Stephen E. Castlen & Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 123–24 (1997) (providing a comprehensive set of examples).

257. There is an argument to be made, also, especially in the case of statutory cross-referencing to state law in federal enclaves, that the cross-reference is of a discretionary nature, as opposed to metadiscretionary, because the federal courts retain interpretive power to veer from state precedent. *See* Goldberg-Ambrose, *supra* note 67, at 555–56. I believe this to be the case. Thus, one could properly categorize these statutory, enclave cross-references as discretionary. In this section, however, I am not focusing on those instances of statutory cases, but rather on those instances where Congress has not acted and the federal courts cross-reference state law by constitutional presumption.

258. *See* Kelly v. Lockheed Martin Servs. Grp., 25 F. Supp. 2d 1, 4 (D.P.R. 1998) (noting that the Supreme Court has not reconciled these competing holdings); Michael J. Malinowski, *Federal Enclaves and Local Law: Carving Out a Domestic Violence Exception to Exclusive Legislative Jurisdiction*, 100 YALE L.J. 189, 192–96 (1990) (providing an overview of the Court’s three theories of enclave jurisdiction).

law.²⁵⁹ Under this view, then, the cross-reference to state law is a static one, leaving the federal courts free to make postcessation interpretations of the incorporated law without reference to later in time developments in state law.²⁶⁰ Under the second theory, state law is incorporated at the time of cessation to the federal government, and subsequent changes in state law that are part of “the same basic scheme” as the state law at the time of transfer apply to the rule of decision.²⁶¹ Thus, the federal cross-reference to state law is not entirely static under this theory, but continues to develop, within areas extant at the time of the property transfer, as the state law develops.²⁶² Under the third theory, absent congressional action to the contrary, *all* state law of the state in which the federal enclave resides, regardless of when it was passed, is applicable within the enclave unless it interferes with the federal government’s constitutional legislative jurisdiction over the enclave.²⁶³ Although the Court has yet to rule on which theory takes precedence,²⁶⁴ this final view is most commonly adopted by the lower courts and likely most consistent with the Framers’ original intent.²⁶⁵

Civil jurisdiction in federal enclaves maps onto my analytical terms in the following manner. Under the majority view, the cross-reference to state law lacks a mandatory nature, insofar as the decision to cross-reference, at least in the first instance, was not legislatively imposed.²⁶⁶ Nevertheless, these cases lack important features of discretionary cross-references because the federal courts, absent preemption, do not have discretion to adopt any rule of decision other than the law of the state in which the federal enclave resides. Pursuant to the majority view, then, enclave jurisdiction constitutes a constitutional default rule creating a metadiscretionary²⁶⁷ cross-reference to state-law causes of action and rights, because one finds a onetime exercise of judicial discretion followed by a mandatory-like regime thereafter (i.e., excepting federal interest

259. See *Sadrakula*, 309 U.S. at 100; *Chicago, Rock Island & Pac. Ry. v. McGlinn*, 114 U.S. 542, 546 (1885).

260. See *Celli v. Shoell*, 40 F.3d 324, 328 n.4 (10th Cir. 1994).

261. *Paul v. United States*, 371 U.S. 245, 269 (1963).

262. See *Kelly*, 25 F. Supp. 2d at 4.

263. *Howard v. Comm’rs of the Sinking Fund of the City of Louisville*, 344 U.S. 624, 626–27 (1953).

264. See *Kelly*, 25 F. Supp. 2d at 4.

265. See *Castlen & Block*, *supra* note 256, at 123 (concluding that the third theory of enclave jurisdiction cross-referencing is most consistent with the Framers’ intent); *Malinowski*, *supra* note 258, at 195 (noting the third view as the most adopted approach).

266. See *supra* Part II.B (defining metadiscretionary cross-references).

267. See *supra* Part II.B.

preemption, the law of the forum state invariably applies).²⁶⁸ Coinciding with this exercise (albeit limited) of declaratory authority, the courts universally note that they have federal question jurisdiction over these claims.²⁶⁹

2. Federal Common Law Rights Type II

As discussed above, cross-referencing of state law often occurs in federal common law suits (i.e., cases relying upon a “federal rule[] of decision whose content cannot be directly traced by traditional methods of interpretation to federal statutory or constitutional commands”).²⁷⁰ Again, if the issue of federal common law empowers a plaintiff to bring suit,²⁷¹ then the Court finds that federal law creates the cause of action.²⁷²

While the content of the right may be federal,²⁷³ the courts quite often fill this void with a cross-reference to state law.²⁷⁴ Although these cross-references may be conducted discretionarily,²⁷⁵ the Court, at least since *United States v. Kimbell Foods, Inc.*,²⁷⁶ has favored a metadiscretionary approach. Under this view, absent a strong showing of federal interest preemption, the law of the forum state supplies the content of the right at issue.²⁷⁷ Moreover, this presumption-absent-preemption approach is especially strong in those instances where the rights of private parties, as opposed to the United States directly, are at issue.²⁷⁸ This strengthened

268. See *supra* Part II.B (noting that even in mandatory cross-referencing, just as in the use of state law under *Erie*, state law may be preempted by overriding federal interests).

269. See, e.g., *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250–51 (9th Cir. 2006) (holding that because the alleged tort of exposure to asbestos occurred on federal enclave, it invoked federal question jurisdiction under § 1331); *Celli v. Shoell*, 40 F.3d 324, 328 & n.4 (10th Cir. 1994) (similar).

270. HART AND WECHSLER, *supra* note 53, at 607; see also *supra* note 226.

271. See *supra* note 227.

272. See *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 (1991).

273. See *supra* notes 231–32 (citing cases).

274. See, e.g., *Harrell v. United States*, 13 F.3d 232, 235 (7th Cir. 1993) (“For a variety of reasons having mainly to do with the paucity of federal common law rules and the desirability of keeping the law as simple as possible, federal courts asked to make federal common law do so usually by adopting state law.”).

275. See *supra* Part III.B.3 (discussing federal common law and discretionary cross-references).

276. 440 U.S. 715 (1979).

277. See *Kimbell Foods*, 440 U.S. at 728 (holding that federal courts should “incorporat[e] [state law] as the federal rule of decision,” unless “application of [the particular] state law [in question] would frustrate specific objectives of the federal programs”); see also *Kamen*, 500 U.S. at 98 (describing this as a presumption); 19 WRIGHT ET AL., *supra* note 102, § 4518 n.17 (describing this presumption approach as the recent trend); *id.* § 4518 nn.31–32 (listing cases demonstrating federal interest needed to avoid cross-reference to state law); *id.* § 4518 n.33–38 (exhaustively listing cases cross-referencing state law as a matter of presumption).

278. *Kamen*, 500 U.S. at 98 (“The presumption that state law should be incorporated into federal

presumption, then, results in an especially mandatory-like cross-reference to state law in those cases where the presence of a federal question, because the United States or adversely situated states are not parties,²⁷⁹ provides the sole ground for federal jurisdiction.

As with enclave jurisdiction, federal common law cross-referencing under the *Kimbell Foods* approach is best described as metadiscretionary. Pursuant to this approach, the cross-reference to state law lacks a mandatory nature because the first-order choice of cross-referencing to state law remains one of judicial discretion.²⁸⁰ But these federal common law type II cases also lack the salient features of discretionary cross-references as the courts, excepting federal interest preemption, lack discretion to adopt any rule of decision other than the law of the state in which the federal enclave resides.²⁸¹ *Kimbell Foods*-type federal common law cases, then, create judicially crafted federal causes of action coupled with metadiscretionary²⁸² cross-references to state-law rights, to which the courts—focusing upon the first-order discretionary choice—take federal question jurisdiction.²⁸³

3. Michigan v. Long

Finally, I turn to the interplay of metadiscretionary cross-references by state courts to federal law and federal question jurisdiction. The Supreme Court, by statute, may only hear cases from the state courts that involve federal issues.²⁸⁴ Moreover, in granting certiorari, § 1257 limits the Court to the issues presented from these cases that are questions of federal law, because the state high courts are the authoritative expositors of state law.²⁸⁵ These relatively straightforward propositions have created difficulty, however, in cases where state law cross-references federal law.

common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.”).

279. See *supra* note 239 (discussing the use of federal common law under differing fonts of jurisdiction).

280. See *supra* Part II.B (defining mandatory cross-references).

281. See *supra* notes 48–51 and accompanying text (noting that even in mandatory cross-referencing, just as in the use of state law under *Erie*, state law may be preempted by overriding federal interests).

282. See *supra* Part II.B (defining metadiscretionary cross-references).

283. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 99–100 (1972) (a federal common law claim constitutes “a question arising under the laws of the United States” (quoting *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971))).

284. 28 U.S.C. § 1257(a) (2006).

285. See, e.g., *Johnson v. Fankell*, 520 U.S. 911, 914–16 (1997) (“Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one

Take equal protection jurisprudence, for example.²⁸⁶ Many states interpret state constitutional equal protection provisions, which are nominally distinct bodies of law from the Fourteenth Amendment, by applying federal equal protection analysis unerringly (i.e., in a metadiscretionary manner).²⁸⁷ Some states, while deploying the federal two-step equal protection analysis, insist that they do so only as a matter of discretion and that they are free to depart from federal precedent.²⁸⁸ A final group of states deploys a different analysis altogether.²⁸⁹ This third

rendered by the highest court of the state.”); *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981) (“We forthwith acknowledge . . . that this Court’s ‘only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.’ . . . It follows that the decision of the Supreme Judicial Court of Maine is subject to disturbance here only to the extent that it fails to honor federal rights and duties.” (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945))); *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 633 (1874) (questions of state property law are beyond the statutory authority of the Supreme Court to entertain).

286. There are many other areas of law facing the same problem. *See, e.g.*, *Keller v. State Bar of Cal.*, 496 U.S. 1, 10 (1990) (state law cross-referenced the First Amendment); *W. Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 132 (1987) (state law cross-referenced the Airport and Airway Improvement Act of 1982).

287. *See, e.g.*, *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. 2006) (holding that it applies the same analysis for both federal and state equal protection challenges); *Follansbee v. Plymouth Dist. Court*, 856 A.2d 740, 742 (N.H. 2004) (holding that state equal protection provisions are to be construed in harmony with federal equal protection); *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005) (noting that the court had “consistently held that the state equal protection guarantee is co-extensive with the equal protection provisions of the Fifth and Fourteenth Amendments of the U.S. Constitution”); *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 266 (Tex. 2002) (“[T]he federal analytical approach applies to equal protection challenges under the Texas Constitution.”); *State v. Manussier*, 921 P.2d 473, 482 (Wash. 1996) (“This court has consistently construed the federal and state equal protection clauses identically and considered claims arising under their scope as one issue.”); *Nankin v. Vill. of Shorewood*, 630 N.W.2d 141, 146 n.5 (Wis. 2001) (“This court applies the same interpretation to the state Equal Protection Clause as that given to the equivalent federal provision.” (quoting *Castellani v. Bailey*, 578 N.W.2d 166, 174 (Wis. 1998))).

288. *See, e.g.*, *Strauss v. Horton*, 207 P.3d 48, 130 (Cal. 2009) (“California’s equal protection doctrine has not been confined to that of federal Fourteenth Amendment jurisprudence: ‘[O]ur state equal protection provisions . . . are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable.’” (quoting *Serrano v. Priest*, 557 P.2d 929, 950 (Cal. 1976))); *City Recycling, Inc. v. State*, 778 A.2d 77, 87 (Conn. 2001) (“Although we previously have stated that the equal protection provision under our state constitution provides the same limitations as the federal equal protection provision . . . we note here . . . that this does not mean that ‘the state equal protection provision can never have an independent meaning from the equal protection provision in the federal constitution.’” (citations omitted)); *Varnum v. Brien*, 763 N.W.2d 862, 878 n.6 (Iowa 2009) (“Plaintiffs’ challenge . . . is based on the equal protection guarantee in the Iowa Constitution and does not implicate federal constitutional protections. Generally, we view the federal and state equal protection clauses as identical in scope, import, and purpose. At the same time, we have jealously guarded our right to . . . independently apply the federally formulated principles. Here again, we find federal precedent instructive in interpreting the Iowa Constitution, but we refuse to follow it blindly.” (citation and internal quotation marks omitted)).

289. *See, e.g.*, *Dep’t of Revenue v. Cosio*, 858 P.2d 621, 629 (Alaska 1993) (“Analysis under our state equal protection clause is considerably more fluid than under its federal counterpart. Instead of

category of cases clearly does not raise a federal question sufficient to vest the Supreme Court with statutory jurisdiction, even if the state court offered federal equal protection law as an alternative ground for its ruling, because state law provides an adequate and independent ground for the ruling.²⁹⁰

The first and second categories, however, raise more difficult jurisdictional questions because the state high courts in both instances are cross-referencing federal constitutional law. The Supreme Court took up this issue in *Michigan v. Long*.²⁹¹ In *Long*, the Michigan Supreme Court reversed a conviction on the reasoning that the police stop at issue could not be justified on Fourth Amendment, or analogous state constitutional, grounds.²⁹² In rendering the state-law holding, however, the Michigan high court relied almost exclusively upon cross-references to federal law.²⁹³ To make matters worse, it was not clear to the Supreme Court²⁹⁴ whether the Michigan Supreme Court's cross-references to federal law were made in a discretionary or metadiscretionary manner.²⁹⁵

The *Long* Court approached the issue in two stages. First, it held that its jurisdiction rested upon the force with which the cross-reference to federal law was made. Thus, when a state court merely discretionarily cross-references federal law, the Court lacks jurisdiction to hear the cross-

using three levels of scrutiny, we apply a sliding scale" (footnote omitted)); *Sibley v. Bd. of Supervisors of La. State Univ.*, 477 So. 2d 1094, 1107 (La. 1985) (holding that the federal three-tier system of constitutional scrutiny was an inappropriate model for the interpretation and application of the State's equal protection provision); *Twp. of Casco v. Sec'y of State*, 701 N.W.2d 102, 123 n.83 (Mich. 2005) ("It is important to note that the text of our state Equal Protection Clause is not entirely the same as its federal counterpart Therefore, it is insufficient for defendants to rely solely on federal case law regarding vote dilution, or Michigan cases interpreting the federal Equal Protection Clause, and then boldly announce that Const. 1963, art. 1, § 2 provides the same protections against vote dilution as U.S. Const., Am. XIV."); *Lewis v. Harris*, 908 A.2d 196, 212 n.13 (N.J. 2006) ("Our state equal protection analysis differs from the more rigid, three-tiered federal equal protection methodology."); *Baker v. State*, 744 A.2d 864, 878 (Vt. 1999) ("Accordingly, we conclude that this approach, rather than the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment, shall direct our inquiry under Article 7 [of the Vermont Constitution].").

290. The Supreme Court is empowered to make this determination, however. *See Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.").

291. 463 U.S. 1032 (1983).

292. *Id.* at 1036–37.

293. *Id.* at 1043–44.

294. *See Smith v. Massachusetts*, 543 U.S. 462, 467–68 (2005) (holding state court characterization of cross-references not binding on the Supreme Court); *Angel v. Bullington*, 330 U.S. 183, 189 (1947) ("But whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say."); *see also Fiore v. White*, 528 U.S. 23, 29 (1999) (certifying question to state high court).

295. *Long*, 463 U.S. at 1040–41.

referenced issue.²⁹⁶ The Court justified this rule, in part, upon Article III's prohibition upon issuing advisory opinions,²⁹⁷ thus holding that jurisdiction in federal question cases rides on the ability to authoritatively declare law. On the other hand, where the state cross-references to federal law are such that the state court "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did," then jurisdiction lies.²⁹⁸ That is to say, if the state court cross-referenced federal law either mandatorily or metadiscretionarily, the Court would take federal question jurisdiction precisely because the Supreme Court holds declaratory authority in such circumstances. Secondly, the Court held that, absent a clear statement from the state court to the contrary, it would presume that any cross-reference to federal law was a nondiscretionary one.²⁹⁹ Thus, the Court here focuses upon the mandatory aspect of metadiscretion, as opposed to the discretionary aspect, to ground federal question jurisdiction.

IV. LESSONS LEARNED BY MIXING IT UP

In the preceding Part, I argued that in cross-referenced regimes, federal question jurisdiction invariably coincides with federal judicial capacity to declare the content of the cross-referenced law. Thus, in the case of federal cross-references to state-law rights, federal question jurisdiction lies when the cross-reference is not mandatory. Conversely, in the case of state cross-references to federal law, federal question jurisdiction lies when the cross-reference to a federal-law right is not discretionary. Although these cross-referenced regimes are not the heartland of federal question jurisdiction cases, the findings made above, I contend, offer substantial insights into the nature of federal question jurisdiction more generally. First, these findings demonstrate, contrary to the standard view, that the federal courts will not stand ready to hear claims under federal question

296. *Id.* at 1041 ("If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.").

297. *Id.* at 1040 ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."); *id.* at 1042 ("The jurisdictional concern is that we not 'render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.'" (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945))).

298. *Id.* at 1044 (internal quotation marks omitted).

299. *Id.* at 1040-41.

jurisdiction without the concomitant power to declare law. This narrower conception of the scope of federal question jurisdiction, moreover, comports with the original understanding of Article III arising under jurisdiction and with the notion of juridical independence. Second, this review of the Court's handling of cross-referenced regimes demonstrates its propensity to rely upon formal distinctions that often lack functional differences to support federal question jurisdiction, which itself raises significant separation of powers difficulties.

A. No Federal Question Jurisdiction Without the Power to Declare Law

The first lesson to be learned from this study of cross-referenced cases is that the courts insist that federal question jurisdiction be linked, at least from a departmental perspective, with the power to declare the legal content of the law at issue. Professor Mishkin, in one of his many canonical pieces, argued that one of the primary purposes of federal question jurisdiction in the district court is to vindicate federal rights, which often require a hospitable forum to resolve factual issues without the need to resolve questions of law.³⁰⁰ Thus, he contended that federal question jurisdiction should be conceived of as jurisdiction over “federal claims,” not federal legal questions, so as to highlight this purely fact-finding purpose.³⁰¹ Professor Mishkin's view has come to be the standard jurisprudential position.³⁰² The argument advanced above, that the federal courts refuse federal question jurisdiction when they lack authoritative power to declare law, challenges the soundness of Professor Mishkin's claim.

Professor Mishkin's view is susceptible to two interpretations—one sweeping and one narrow—both of which run afoul of the Court's treatment of federal questions in the cross-referenced context. On the sweeping end, Professor Vázquez recently advocated that, following Professor Mishkin's “claim” approach to federal question jurisdiction, Congress should be empowered to couple federal causes of action to mandatory cross-references to state-law rights.³⁰³ Under this view, because

300. Mishkin, *supra* note 19, at 169–76.

301. *Id.* at 171.

302. *See, e.g.*, Hunter v. United Van Lines, 746 F.2d 635, 639 (9th Cir. 1984) (citing Mishkin as defining the purpose for federal question jurisdiction); Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515, 1515 (2007) (stating that Mishkin's views of federal question jurisdiction have dominated and transformed the area for fifty years).

303. Vázquez, *supra* note 20, at 1756–57 (arguing that despite the mere formal nature of the

one core purpose of federal question jurisdiction is to hear federal “claims” (i.e., only fact-bound suits), Congress may vest federal question jurisdiction over certain claims and simultaneously direct that the federal judiciary as a whole department lacks declaratory authority over the legal content of the cross-referenced rights at issue.³⁰⁴ By this, I mean that no federal court at any point in the litigation process would possess the power to declare authoritatively the cross-referenced law.

As I illustrated above, the Court uniformly rejects this conception of federal question jurisdiction. Indeed, the Court consistently rejects federal question jurisdiction unless it retains the discretionary or metadiscretionary power to declare the legal content of the cross-referenced legal norms.³⁰⁵ Even in the case of metadiscretionary cross-references, where the lower federal courts lack discretion (absent federal interest preemption) to avoid the law of the forum state, the federal courts rely upon the first-order discretionary choice of the department as a whole to provide the foundation for federal question jurisdiction.³⁰⁶ Thus, this sweeping formulation of Mishkin’s federal-claim approach to federal question jurisdiction lacks doctrinal footing on both the statutory and constitutional level.³⁰⁷ Put affirmatively, this study of cross-referenced regimes illustrates that federal question jurisdiction requires the presence of authority to declare the content of the cross-referenced law in the judicial department as a whole—even if, after questions of law become settled, the only live issues in the lower federal courts are fact-bound ones.

One could make a less sweeping presentation of Professor Mishkin’s federal-claim view, likely the better reading, that is compatible with the notion that, from a departmental perspective, federal question jurisdiction requires declaratory authority to lie somewhere with the federal courts in order for federal question jurisdiction to arise. On this view, so long as there is a federal right as an ingredient to the case, the federal courts

distinction, this “formal” change is enough to vest Article III jurisdiction).

304. *Id.* at 1763 (“[F]ederal claim analysis tells us that Congress can confer jurisdiction over a category of federal claims for the purpose of making available a more (or less) hospitable forum. It is for this reason that federal jurisdiction is appropriate when federal law creates the right of action even when the case presents no dispute about the meaning or application of federal law. The desire to provide a more (or less) hospitable forum would appear to justify federal jurisdiction as well when Congress has the constitutional power to legislate on the subject but has no objection to existing law with respect to both substance and procedure.”).

305. *Compare supra* Part III.A (arguing that congressional mandatory cross-references to state-law rights without any other federal ingredient, such as a defense, lack federal question jurisdiction), *with supra* Parts III.B & III.C (arguing that the presence of discretion in the cross-reference coincides with federal question jurisdiction).

306. *See supra* Part III.C.1–2 (discussing the same).

307. *See supra* Part III.A (discussing mandatory cross-references to state law).

should stand ready to vindicate federal rights even in purely fact-bound cases.³⁰⁸

At a statutory level, the Court's cross-referential holdings, however, do not fully square with this formulation of Mishkin's federal-claim view either. First, the district courts will not take § 1331 jurisdiction under *Grable & Sons* over a case where a state-law cause of action is coupled with a federal right unless the legal content of the federal right is at issue.³⁰⁹ That is, if the case rides merely on factual issues or state law, the federal courts will not take statutory federal question jurisdiction. Moreover, the Supreme Court would not likely hear such a case—one in which the parties were not contesting the content of federal law in a cross-referenced regime—on certiorari under § 1257, because the judgment in such a suit would rest upon adequate and independent state grounds.³¹⁰ The Court lacks statutory jurisdiction to review state-law issues in this posture.³¹¹ Thus, even this narrow version of Mishkin's view fails to hold on statutory grounds.

This is not to say that one could not formulate yet a third version of his position to account for the Court's recent cross-referential opinions.³¹² Rather, I assert that these cross-referential cases, with their insistence upon declaratory authority over the cross-referenced law as a condition of vesting federal question jurisdiction, illustrate that the federal courts, while not entirely discounting the utility of providing a welcoming forum for fact-only adjudication, do not see this function as the core purpose of federal question jurisdiction. The lesson is, I contend, that the federal courts find adjudicating the legal content of federal rights closer to the core purpose of federal question jurisdiction, and will hear fact-only claims in federal question jurisdiction only when congressional intent to

308. Mishkin, *supra* note 19, at 170 (contrasting the roles that the district courts and Supreme Court play in relation to federal question jurisdiction).

309. See Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 NW. U. L. REV. 175, 204 (2010) (noting that jurisdiction under *Grable & Sons* requires a live controversy regarding the legal content of the embedded federal right); see also *supra* notes 180–89 and accompanying text (discussing *Grable & Sons*).

310. See *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (“[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our [statutory] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.”).

311. See *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 633 (1874) (questions of state property law are beyond the statutory authority of the Supreme Court to entertain).

312. Mishkin, *supra* note 19, at 164 (contending that factors beyond a federal cause of action may well, as with diversity jurisdiction, have been sound bases for § 1331 jurisdiction).

do so is overwhelming.³¹³ And even then, federal courts will hear the claims only if the judicial department as a whole retains declaratory power over the rights at issue.³¹⁴

This finding that the courts only take federal question jurisdiction in cross-referenced regimes when they retain declaratory authority over the cross-referenced law comports with the original meaning of Article III arising under jurisdiction. The ratification-era Court held Article III arising under jurisdiction “to mean that a federal court may exercise jurisdiction over cases in which an actual federal law was determinative of a right or title asserted in the proceeding before it.”³¹⁵ Indeed, the early federal courts did not meet Article III’s “arising under” language in a vacuum. English jurisdictional law deployed the term “arising” from time to time, typically meaning that the action must rely upon the source of law from which it arises or the action must arise from a bounded physical territory.³¹⁶ Moreover, the English courts had a developed law regarding how parties could proceed in courts of limited jurisdiction, which placed the burden on plaintiffs to establish the jurisdiction of the court.³¹⁷ Early federal courts borrowed from this tradition to determine the meaning of Article III federal question jurisdiction.³¹⁸ In so doing, the Marshall Court, before issuing *Osborn*, settled upon the notion that Article III federal

313. This greater congressional intent is found in those instances where there is a federal cause of action coupled with a federal right. *See* Mulligan, *supra* note 108, at 1726 (“These two components—the federal right and cause of action—work in a teeter-totter manner in relation to congressional intent. That is to say, when there are other strong indicia of congressional intent to vest § 1331 jurisdiction such as the existence of a statutory cause of action, the plaintiff’s assertion of a federal right may be quite weak. Conversely, when there are few other congressional indicia of an intent to vest § 1331 jurisdiction, the plaintiff must make a stronger allegation of a federal right in order for § 1331 jurisdiction to lie.”).

314. The vesting of both a federal substantive right and a federal cause of action will ensure at least departmental interpretive authority. *See id.*

315. Anthony J. Bellia Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263, 269 (2007).

316. *See, e.g.*, Hyde v. Cogan, [1781] 99 Eng. Rep. 445 (K.B.) 450 (Buller, J.) (describing a claim based upon “the [statutory] clause upon which the case arises”); Millar v. Taylor, [1769] 98 Eng. Rep. 201 (K.B.) 212 (describing a remedy as “arising from” a statute); Beak v. Thyrrwhit, [1688] 87 Eng. Rep. 124 (K.B.) (holding that cases that “aris[e] upon the sea” must be tried in admiralty); 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 562 (T. Cunningham ed., 6th ed., Dublin, Luke White 1793) (“Inferior Courts are bounded, in their original Creation, to Causes arising within such limited jurisdiction . . .”).

317. *See* Bellia, *supra* note 315, at 273–76 (surveying the pre-Constitution, English practice).

318. *See id.* at 272; *see also* Turner v. Bank of N.-Am., 4 U.S. (4 Dall.) 8, 10–11 (1799) (construing diversity jurisdictional statute against the background of English jurisdictional law); Shedden v. Custis, 21 F. Cas. 1218, 1219 (C.C.D. Va. 1793) (No. 12,736) (Jay, Circuit Justice) (noting in a diversity case adopting English jurisdictional law that “[t]he English practice has been rightly stated by the defendant’s counsel, and those rules are more necessary to be observed here than there, on account of a difference of the general and state governments”).

question jurisdiction requires that “federal law created or protected the right or title” at issue.³¹⁹ As discussed above, this original-meaning interpretation of *Osborn* conforms to the view that taking federal question jurisdiction requires that the federal courts retain declaratory power over a substantive federal right in the case.³²⁰

Not only does the need for federal court declaratory power have an old pedigree, the Court’s insistence upon declaratory power in order to vest federal question jurisdiction speaks to the judiciary’s status as a coequal branch of government. The judiciary’s status as an independent and coequal branch of government is predicated, in part, upon its “duty . . . to say what the law is.”³²¹ Indeed, the ratification debates show that the purpose for federal question jurisdiction was to empower the judiciary to fulfill this key role as expositor of federal law.³²² More contemporary holdings from the Court also link judicial independence with declaratory authority in cases arising under federal question jurisdiction.

When federal judges exercise their federal-question jurisdiction under the “judicial Power” of Article III of the Constitution . . . the core of [the judicial] power is the federal courts’ independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law.³²³

319. Bellia, *supra* note 315, at 328. Professor Bellia predominantly relies upon two cases here. First, *Owings v. Norwood’s Lessee*, 9 U.S. (5 Cranch) 344, 347–48 (1809), in which the Court finds a lack of federal question jurisdiction to hear a property claim under the Treaty of Paris ending the Revolutionary War because the treaty merely promises to recognize state-law property rights—if the treaty had created the property rights, then the suit would arise under the treaty. Second, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821), in which the Court, in relation to the question of Article III federal question jurisdiction, held: “A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.” *Id.*

320. *See supra* notes 119–25 and accompanying text (discussing this original-meaning interpretation of *Osborn*).

321. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

322. *See, e.g.*, THE FEDERALIST NO. 22, at 143 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (The “true import [of the laws] as far as respects individuals, must . . . be ascertained by judicial determinations.”); BRUTUS XIII (Feb. 21, 1788), reprinted in THE COMPLETE ANTI-FEDERALIST 428 (Herbert J. Storing ed., 1981) (“The proper province of the judicial power, in any government, is, as I conceive, to declare what is the law of the land.”); Bellia, *supra* note 315, at 316 (commenting upon the ratification debates and concluding that “[t]hose who attributed some specific meaning to the Arising Under Clause described it as giving federal courts jurisdiction over cases calling for the enforcement or explication of federal laws”).

323. *Williams v. Taylor*, 529 U.S. 362, 378–79 (2000) (Stevens, J., concurring); *see also* *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 354 (2006) (quoting Justice Stevens’s *Williams* opinion); Michael P. Allen, *Congress and Terri Shiavo: A Primer on the American Constitutional Order?*, 108 W. VA. L.

As such, foisting federal question jurisdiction upon the courts without at least a departmental power to declare the underlying rights of the litigants would strike a blow against judicial independence and the courts' status as a coequal branch of government, by allowing Congress to strip them of this essential feature of judicial power in federal question cases—the power to declare what the law is.

This is not to say that the federal courts necessarily lack judicial independence altogether when, in diversity jurisdiction or the like, they lack the power to declare law.³²⁴ Rather, the power to declare the law is a feature of judicial independence,³²⁵ and of course there are others that apply with equal force in non-federal-question cases.³²⁶ But in federal question jurisdiction cases, the power to declare the law has significant separation-of-powers ramifications that bolster this element's importance. As Hamilton argued in Federalist 80: "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislature, may be ranked among the number."³²⁷ This means that the courts' power to declare the meaning of federal law represents an important check upon the power of Congress and the Executive to act extralegally.³²⁸ Diversity jurisdiction, however, is more rightly conceived of as a question of horizontal federalism, where the federal courts step in to provide a neutral forum.³²⁹ Thus, these separation-

REV. 309, 336 (2006) (describing the power to declare the law as a core judicial power); H. Jefferson Powell, *The Three Independences*, 38 U. RICH. L. REV. 603, 611–12 (2004) (arguing that one of the three strands of judicial independence in the American tradition is the independence of thought, which includes the power of expounding the law). Some argue, however, that issues like the power to declare the law are more properly conceived of as separation-of-powers issues. See Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL RTS. J. 1, 36–40 (1996) (noting that in American jurisprudence, the two issues, independence and separation of powers, tend to blend together).

324. See, e.g., *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (holding that the federal courts are bound by the state-law opinions of the state supreme courts in *Erie* cases).

325. Indeed, this power is one the federal courts thought they held even in diversity suits. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

326. See, e.g., Powell, *supra* note 323 (discussing three strands of judicial independence in the American tradition: position, decision, and thought).

327. See THE FEDERALIST NO. 80, *supra* note 322, at 535 (Alexander Hamilton).

328. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (deploying this declaratory power to reign in unconstitutional congressional action).

329. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553–54 (2005) ("[T]he purpose of the diversity requirement . . . is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants."); see also Stephen C. Yeazell, *Overhearing Part of a Conversation: Shutts as a Moment in a Long Dialogue*, 74 UMKC L. REV. 779, 783 (2006) (presenting the anti-bias position as the traditional view of the purpose for diversity jurisdiction and critiquing it).

of-powers concerns vis-à-vis judicial independence are not as pressing here.

B. Formalism and the Federal Question

In addition to the insight that federal question jurisdiction requires judicial department declaratory authority, these cross-referential cases highlight the Court's proclivity toward formalism in its federal question jurisdiction doctrine. Whether the federal courts ought, across all contexts, to proceed in a formalist or functionalist manner is a long-standing debate among jurists.³³⁰ This general debate has found especial purchase in jurisdictional discussions as the Court "indulges the old 'habit' of legal formalism" often in its jurisdictional rulings.³³¹ These cross-referential cases illustrate this old habit in spades.

I follow Professor Idleman's jurisdiction-specific definitions of formalism and functionalism here.³³² By formalism, then, I mean judicial reasoning that is especially structural and categorical in its jurisdictional analysis.³³³ Such an approach eschews balancing multiple interests on a case-by-case basis in determining whether jurisdiction lies in favor of holding that all suits bearing certain deductively determined attributes fall within the courts' jurisdictional scope. As a result, it is typically asserted that formalist jurisdictional decisions lead to bright line rules. Functionalist jurisdictional reasoning, by contrast, seeks to balance any number of case-specific factors in determining whether jurisdiction lies³³⁴ (e.g., docket control, fairness to litigants, federalism concerns, congressional intent, as well as structural concerns). As such, functionalist jurisdictional opinions tend to be more pragmatic and circumstantial in

330. See, e.g., Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 201 ("Scholars and jurists have engaged in a long-standing debate concerning the general propriety of formalist and functionalist approaches to constitutional interpretation . . .").

331. Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 978 (2009); see also Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 132 (1998) (commenting upon an empirical study of jurisdictional opinions finding that the Court often falls into formalism); Stephen I. Vladeck, *The Increasingly "Unflagging Obligation": Federal Jurisdiction After Saudi Basic and Anna Nicole*, 42 TULSA L. REV. 553, 570 (2007) (describing the Court's jurisdictional holdings as increasingly formalist).

332. Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 344-45 (1999). There is also a rich literature on discussing formalism more generally. See, e.g., Larry Alexander, "With Me, It's All er Nuthin": *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530 (1999); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

333. Idleman, *supra* note 332, at 344.

334. *Id.* at 345.

focus,³³⁵ thus leading many to conclude that such rulings fail to create jurisdictional results that are cognizable *ex ante*.³³⁶

To see this divide at work, I again turn to protective jurisdiction. Here, the Court has consistently rejected the legitimacy of protective jurisdiction on the grounds that such an approach runs contrary to federalism norms and the structure of Article III.³³⁷ As such, the Court will not take federal question jurisdiction over cases with mandatory cross-references to state-law causes of action and rights.³³⁸ Assuming this position to be a sound one on the basis of avoiding the twin evils of undue dislodging of state law from the state courts and federal jurisdiction unmoored from Article III,³³⁹ the Court should avoid those jurisdictional rulings that foster the same functional ills.

On occasion, the Court does just that. For instance, the Court rejected *Shoshone*-style statutory federal question jurisdiction and offered dicta suggesting a rejection of Article III jurisdiction. Even though *Shoshone*-style cases are formally distinct from protective jurisdiction insofar as these cases couple a federal cause of action with a mandatory cross-reference to state-law rights, whereas protective jurisdiction mandatorily cross-references state-law causes of action as well,³⁴⁰ the Court's position makes sense on functionalist grounds, assuming protective jurisdiction is an illegitimate jurisdictional overreach. Recall that a cause of action is not, under contemporary doctrine, the same thing as a right.³⁴¹ A cause of action is merely a statement saying that if a person's right has been infringed, the person may seek redress.³⁴² A cause of action, then, does not speak to the substantive content of the right at issue; rather, it merely grants permission to sue to enforce rights created elsewhere.³⁴³ As such, all the supposed evils attaching to protective jurisdiction identified by Justice Frankfurter and others—federalism-based concerns regarding stripping

335. *Id.*

336. Contrary to the traditional view, there may be value in this uncertainty. *See* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1 (2011) (arguing that jurisdictional certainty is a goal that is both illusory and consistently overvalued normatively).

337. *See supra* Part III.A.1 (discussing protective jurisdiction).

338. *See supra* Part III.A.1.

339. *See supra* notes 98–99 and accompanying text (discussing these banes).

340. *See supra* Part III.A.2 (discussing *Shoshone*-style jurisdiction).

341. *See supra* Part II.A (distinguishing rights and causes of action).

342. *See, e.g.*, 40 U.S.C. § 3133(b)(1) (2006) (“Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished . . . and that has not been paid in full . . . may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due.”).

343. *See supra* Part II.A (distinguishing rights from causes of action).

state courts of interpretive power over state law,³⁴⁴ as well as structural concerns that protective jurisdiction renders Article III's limited delegation of jurisdiction to the federal courts meaningless³⁴⁵—apply with equal force to taking jurisdiction over federal causes of action coupled with mandatory cross-references to state-law rights. If Congress can vest federal question jurisdiction over mandatory cross-references to state-law rights by merely enacting a cause of action (i.e., language such as “persons not paid in full, contrary to the requirements of state contract law, may sue for damages”),³⁴⁶ then Congress could simply strip the state courts of jurisdiction to hear nearly any state-law claim and render Article III toothless at will. The functional distinction between the *Shoshone* line of cases and protective jurisdiction is nil.³⁴⁷

Professors Vázquez and Young have recently come to this same conclusion. Professor Vázquez argues that the distinction between protective jurisdiction (i.e., jurisdiction over mandatory cross-references to state-law causes of action and rights) and *Shoshone*-type cases (i.e., jurisdiction over federal causes of action coupled with mandatory cross-references to state-law rights) is merely formal.³⁴⁸ As one who is otherwise an advocate of protective jurisdiction, he celebrates this result insofar as

344. Providing an exhaustive list of the scholarship here is impractical. So I merely reference Justice Frankfurter's classic position and Professor Young's recent additions. *See, e.g.*, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 475 (1957) (Frankfurter, J., dissenting) (arguing that protective jurisdiction indulges in an extraconstitutional distrust of state courts); Young, *supra* note 67, at 1793–1802 (providing two federalism-based rationales weighing against protective jurisdiction).

345. *See, e.g.*, *Lincoln Mills*, 353 U.S. at 474 (Frankfurter, J., dissenting) (arguing that Article III restrictions should not be so easily dismissed); Seinfeld, *supra* note 67, at 1445 (noting that many, although not the author, critique protective jurisdiction because it renders Article III “toothless”).

346. For an example of Congress using such language, one may refer to the Miller Act. *See* 40 U.S.C. § 3133(b)(1); *see also* note 342.

347. *Cf. Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 594 n.22 (1949) (Jackson, J., plurality opinion) (“Moreover, the Tucker Act [like the FTCA referenced in the text of the opinion] simply opens those courts to plaintiffs already possessed of a cause of action. If that is sufficient to make the case one arising under the laws of the United States, the same is true of this suit and all others like it. No one urges that view of the present statute, nor could they.”); *id.* at 598 n.23 (arguing that federal permission to enforce a state-law right is insufficient to vest federal question jurisdiction). Justice Jackson, in footnote 25 and the accompanying paragraph in text, erroneously relies upon cases interpreting the federal question *statute*, not *Article III*, in opining that Article III federal question jurisdiction was lacking in *Tidewater*. Nevertheless, I rely upon his notion in footnote 24 that such a view of Article III federal question jurisdiction would allow Congress to vest federal question jurisdiction merely upon “open[ing] the courts,” *id.* at 594 n.22, i.e. passing a jurisdictional statute. That is to say, Justice Jackson equates this understanding of Article III federal question with protective jurisdiction. *See supra* Part III.A.1 (defining protective jurisdiction). Indeed, Professor Mishkin explicitly treats the *Tidewater* dissenters' view of Article III jurisdiction as a species of protective jurisdiction. *See supra* note 172.

348. Vázquez, *supra* note 20, at 1755 (arguing that despite the mere formal nature of the distinction, this “formal” change is enough to vest Article III jurisdiction).

Congress can reach the functional equivalent of protective jurisdiction without running into an Article III stumbling block and, therefore, advocates limiting the *Shoshone* line of cases strictly to their holdings as interpretations of § 1331.³⁴⁹ Professor Young also agrees that *Shoshone*-type cases are the functional equivalent to protective jurisdiction, but unlike Professor Vázquez, he finds this equivalence grounds for rejecting *Shoshone*-style jurisdiction on Article III grounds.³⁵⁰ This debate illustrates that, from a functionalist perspective, if one concludes with the Supreme Court that protective jurisdiction is beyond Article III's scope, then one should similarly conclude that *Shoshone*-style cases, with their attendant barrier to declaratory authority over the relevant substantive law, are as well.³⁵¹

Similarly, the Court has not let the formal aspects of enclave jurisdiction lead it to conflate that jurisdiction with protective jurisdiction. Indeed, these cases possess formal attributes much like protective jurisdiction (i.e., metadiscretionary cross-references to state-law causes of action and rights).³⁵² Moreover, the rationale often given for taking federal question jurisdiction over state-law claims in federal enclaves is that “[b]ecause Congress has exclusive legislative jurisdiction over federal enclaves—pieces of territory carved out of states for federal use and control—courts have reasoned that federal courts must also have subject matter jurisdiction over controversies that arise on such enclaves.”³⁵³ The resemblance of this argument to Professor Wechsler's the-greater-power-includes-the-lesser-power defense of protective jurisdiction is striking.³⁵⁴ Nevertheless, the functional pitfalls of protective jurisdiction are not an issue in enclave jurisdiction because in the latter cases, the state ceded authority over the land at issue prior to the federal courts taking jurisdiction.³⁵⁵ Thus, federal question jurisdiction in enclave jurisdiction

349. *Id.*

350. Young, *supra* note 67, at 1802–04.

351. See, e.g., James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CALIF. L. REV. 1423, 1469 (2007) (“The Court might resist an attempt by Congress to address a lack of substance for federal question purposes simply by declaring that federal law incorporates state rules for decision. Mere incorporation of state law has a bootstrapping quality that makes it an unattractive vehicle for the exercise of federal question jurisdiction.”); see also Goldberg-Ambrose, *supra* note 67, at 558 (“Incorporation alone should not suffice, however, to fit the claim within a conventional interpretation of the arising under clause of article III because incorporation of state law does not generate any new independent federal rights or obligations.”).

352. See *supra* Part III.C.1 (discussing enclave jurisdiction).

353. *Lawler v. Miratek Corp.*, No. EP-09-CV-252-KC, 2010 WL 743925, at *2 (W.D. Tex. Mar. 2, 2010).

354. Wechsler, *supra* note 67, at 224–25.

355. See *supra* note 254 (discussing types of cessations of land).

cases is not stripping state courts of their jurisdiction as is supposed with protective jurisdiction, because enclaves are uniquely subject to congressional control.³⁵⁶ Rather, in these cases, it is the federal government delegating legislative authority to the state over the enclave.³⁵⁷

But as often as not, the Court allows mere formal distinctions to vest federal question jurisdiction in the cross-referenced context. Such is the case when the federal common law metadiscretionarily cross-references state-law rights and the courts take federal question jurisdiction. The Court rightly (assuming protective jurisdiction beyond the pale) refuses federal question jurisdiction under *Shoshone* because the mere formal change of adding a federal cause of action to a mandatory cross-reference to state-law rights is functionally equivalent to protective jurisdiction. Yet the Court allows claims with nearly the same formal structure, coupled with the same functional ills, to arise as federal questions when the federal common law metadiscretionarily cross-references state-law rights. Both require the federal court to apply the law of the forum state unless overridden by an overwhelming federal interest.³⁵⁸ Moreover, both are subject to similar federalism³⁵⁹ and structural concerns.³⁶⁰ Thus, from a

356. See U.S. CONST. art. I, § 8, cl. 17 (Congress is vested with general legislative power over the national capital and other land ceded by the States to the national government); U.S. CONST. art. IV, § 3, cl. 2 (Congress is vested with general legislative power over territory owned by the national government).

357. See Joshua D. Samoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 249–50 (1997) (arguing that statutory cross-referencing to state law in the enclave context is best understood as congressional delegation of legislative authority).

358. Compare *supra* notes 48–51 and accompanying text (discussing that mandatory cross-references are subject to federal interest preemption), with *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (holding that forum state law applies in federal common law cases unless overridden by a strong showing of a unique federal interest).

359. Compare *supra* note 98 and accompanying text (noting federalism concerns in protective jurisdiction of stripping state courts of authority over state law), with *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (holding that because federal common law displaces state law, such issues properly are matters of congressional concern), and *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”), and Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 494–95 (2007) (“[C]onstitutional preemption is a component of almost all the federal common law decisions that displace state law with a judicially created alternative.”), and Tidmarsh & Murray, *supra* note 225, at 615 (“Federal common law displaces state law, and thus shifts the balance of power from state to federal government.”).

360. Compare *supra* note 99 and accompanying text (noting structural concerns in protective jurisdiction of overexpanding federal court jurisdiction), with Carlos Manuel Vázquez, *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 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

functionalist view, if protective *Shoshone*-style jurisdiction is beyond the boundaries of federal question jurisdiction, then federal common law that deploys a metadiscretionary cross-reference to state law should be as well.³⁶¹

In fact, the only distinction between protective and *Shoshone*-style jurisdiction and federal common law suits coupled with a metadiscretionary cross-reference to state law is the identity of the agent limiting the discretion to deviate from the law of the forum state—Congress in the former and the Court in the latter. The Court’s unwillingness to allow federal question jurisdiction to arise in cases where Congress mandates a cross-reference to state-law rights (i.e., protective jurisdiction cases, *Shoshone*-style cases, FTCA cases, and pre-1974 cases under the Miller Act), but its willingness to vest jurisdiction when the Court mandates the functionally equivalent result as a matter of federal common law, raise significant separation-of-powers concerns.³⁶²

The jurisdictional question forms the nub of this separation-of-powers difficulty. Absent some argument on the peripheries,³⁶³ jurists and scholars agree that the jurisdiction granted by Article III of the Constitution is not

bicameralism and presentment requirements are circumvented and no political actors can easily be held accountable for the displacement.” (footnotes omitted)).

361. See, e.g., John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 NW. U. L. REV. 1188, 1220 (1993) (“In short, the theory of protective jurisdiction is little more than federal common law in disguise.”); Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 381 (1988) (“Justice Frankfurter’s similar criticisms of both the federal common-law and protective jurisdiction theories indicates that it is not always easy to separate the two theories. Indeed, judicial reference to, or reliance on, nonfederal law in the creation of federal common-law causes of action differs little from the adoption of nonfederal causes of action under protective jurisdiction. Perhaps, then, the legitimacy of jurisdiction over federal common-law cases also supports judicial authority under the protective jurisdiction theory.” (footnotes omitted)). To be clear, I do not find this charge of formalism to carry the day in instances of federal common law in which the courts engage in discretionary cross-references to state law. See Young, *supra* note 50, at 1658 (arguing, based upon similar grounds, that federal common law should not lie when state law is cross-referenced in a metadiscretionary fashion). Nor do I find mandatory, or metadiscretionary, cross-references to state law inapt when jurisdiction does not rest on the existence of a federal question. See *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973) (“The federal jurisdictional grant over suits brought by the United States is not in itself a mandate for applying federal law in all circumstances. This principle follows from *Erie* itself, where, although the federal courts had jurisdiction over diversity cases, we held that the federal courts did not possess the power to develop a concomitant body of general federal law.”).

362. See Vázquez, *supra* note 20, at 1761 (“It would be odd to say that federal jurisdiction would exist when Congress delegates to the courts the power to preempt some state law, but not when Congress itself specifies the extent of preemption.”).

363. See Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 535 (2010) (arguing that *Boumediene v. Bush* represents the first case to hold Congress constitutionally bound to vest lower court jurisdiction).

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.³⁶⁴ Given that federal question jurisdiction “masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system,”³⁶⁵ it makes sense that Congress renders these jurisdictional decisions because it is the preeminent actor in resolving federalism questions³⁶⁶—at least in regard to

364. See, e.g., Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 2 (1990) (“[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.”); Idleman, *supra* note 332, at 241 (“For both constitutional and institutional reasons, the subject-matter jurisdiction of the federal courts is jealously guarded by its Article III keepers.”); *id.* at 250–51 (“[T]he jurisdiction of the lower federal courts does not flow directly from Article III; rather, the jurisdictional grants of Article III must be first affirmed by statute. . . . Congress—let alone the separation of powers—might be doubly offended by the unauthorized exercise of judicial power.” (footnotes omitted)); 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.”); see also MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 83 (2d ed., The Michie Company 1990) (1980) (stating that federal courts can hear cases only if the Constitution has authorized courts to hear such cases and Congress has vested that power in federal courts); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25 (1981) (“Courts and commentators agree that Congress’ discretion in granting jurisdiction to the lower federal courts implies that those courts take jurisdiction from Congress and not from article III.”). Congress retains broad control of the jurisdiction of the inferior federal courts, and it may grant a narrower scope of subject matter jurisdiction than is found in Article III. See, e.g., Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031 (1982) (espousing the traditional view that Congress is not required by Article III to vest full Constitutional subject matter jurisdiction in the inferior federal courts). *Contra* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 209 (1985) (arguing that Congress must vest some of the Article III heads of jurisdiction in the federal judiciary); see Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 134 (1981) (arguing that there are non-Article III limits to Congress’s discretion in vesting inferior federal courts with subject matter jurisdiction). Exercising this control over inferior courts, Congress withheld general federal question jurisdiction from them until 1875. See Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470 (1875); Randall, *supra* note 361, at 363, 365 n.76 (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).

365. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8 (1983); see also *Merrell Dow Pharms. 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.”).

366. 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, 543 (1954). See also Jesse H. Choper, *The Scope of National Powers Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557 (1977) (arguing that the national political system protects states’ interests in Congress and that the federal courts should focus on individual rights); Bradford R. Clark, *Separation of Powers as a Safeguard of*

the intersection of federalism and the control of the federal courts' jurisdiction.³⁶⁷ As a result, the Court consistently holds that Congress is the better institution to make these judgments than are the federal courts.³⁶⁸ This institutional advantage flows from the fact that the states are represented there, the actors involved are politically accountable,³⁶⁹ and the process for passing federal statutes offers several opportunities for the states to give input.³⁷⁰

Federal common law, generally speaking, raises concerns in this regard. When a federal court creates both a right and a cause of action as a matter of federal common law, the court is simultaneously creating § 1331 jurisdiction by crafting the very analytical components required to vest jurisdiction under the statute.³⁷¹ Moreover, federal common law rights

Federalism, 79 TEX. L. REV. 1321, 1324 (2001) (arguing that separation-of-powers doctrine protects states' interest in Congress by rendering the passage of federal legislation difficult); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (arguing that political parties adequately represent states' interests in Congress); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1476 (2007) ("[A]ssigning Congress primary control over interstate relations accords with precedent, federalism values, functional concerns, and history."); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2031 (2003) ("Congress can draw on its distinctive capacity democratically to elicit and articulate the nation's evolving constitutional aspirations when it enforces the Fourteenth Amendment. Because of the institutionally specific ways that Congress can negotiate conflict and build consensus, it can enact statutes that are comprehensive and redistributive, and so vindicate constitutional values in ways that courts cannot."). Of course, process federalism has its critics. See, e.g., Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1462 (2001) (arguing that process federalism does not adequately protect states' interests and thus the federal courts must play an active role in regard); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1815-44 (2005) (arguing that the federal courts have a primary role to play in questions of federalism doctrine).

367. See *Snyder v. Harris*, 394 U.S. 332, 341-42 (1969) (arguing that the Constitution places the power to "expand the jurisdiction of [the lower federal] courts . . . specifically . . . in the Congress, not in the courts"); Mishkin, *supra* note 19, 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."); 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." (footnote omitted)).

368. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (noting 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); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) (holding that "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts).

369. Vázquez, *supra* note 360, at 1273.

370. *Id.*

371. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972) (federal common law claim constitutes "a question arising under the 'laws' of the United States"); Tidmarsh & Murray, *supra* note

often³⁷² preempt state law in some fashion,³⁷³ contrary to the view that such decisions are better left to Congress.³⁷⁴ Given these impediments, even if one concludes as I do that federal common law is a necessary element of our constitutional scheme,³⁷⁵ it pushes the boundaries of credulity to maintain that the courts can exercise this common law power

225, 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 364 (discussing how Congress retains power to vest the lower federal courts with as much or as little of the federal jurisdiction that is granted by Article III).

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

373. *See, e.g.*, *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (holding that because federal common law displaces state law, such issues properly are matters of congressional concern); *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994) (rejecting federal common law rule for attorney malpractice, *inter alia*, as it would “divest[] States of authority over the entire law of imputation”); *see also* *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (“[A] few areas, involving ‘uniquely federal interests,’ are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called ‘federal common law.’” (citation omitted)); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (“This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs.”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (“We conclude that the scope of the act of state doctrine must be determined according to federal law.”); *Rosen, supra* note 359, at 494–95 (“[C]onstitutional 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 225, at 615 (“Federal common law displaces state law, and thus shifts the balance of power from state to federal government.”).

374. *See* *Redish, supra* note 238, at 766–67 (arguing that federal common law, as it is essentially a legislative function, violates separation-of-powers principles).

375. *See* *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 470 (1942) (Jackson, J., concurring) (“Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.”); *Monaghan, supra* note 238, 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.”); *see also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 21 (1985) (discussing how the Court will exercise legislative power at times due to our complex constitutional scheme). For a contrary view, *see* *Redish, supra* note 238, at 766–67 (arguing that federal common law, as it is essentially a legislative function, violates separation-of-powers principles).

functionally to mandate cross-references to state-law rights when that power is denied to Congress.³⁷⁶ If Congress cannot couple a federal cause of action to a mandatory cross-reference to state-law rights,³⁷⁷ then the Court should not be empowered to produce the functional equivalent on its own as a matter of federal common law causes of action coupled with metadiscretionary cross-references to state law.

V. CONCLUSION

In this Article, I contend that the federal courts take federal question jurisdiction over cross-referenced law only when the force of the cross-reference affords the federal court declaratory authority over the law in question. After testing this proposition from numerous angles, I contend that these somewhat esoteric cases provide the following valuable insights into the nature of federal question jurisdiction. First, the Court links declaratory power in federal question cases to notions of judicial independence. As a result, the notion that one of the core values of federal question jurisdiction is to serve as a mere fact finder requires retooling. Second, the courts' efforts to preserve declaratory power, unfortunately, often rely upon mere differences in form to vest federal question jurisdiction over matters that appear functionally equivalent to protective jurisdiction. The courts would be better served, and would avoid the significant separation-of-powers concern outlined previously, if they approached cross-referenced regimes functionally.

376. See Young, *supra* note 50, at 1664–67 (rejecting the notion that the Court may impose metadiscretionary cross-references to forum state law in favor of a view requiring federal common law to cross-reference state law only in a discretionary manner).

377. See *supra* Part III.A.2 (discussing the *Shoshone* line of cases).