Stalking the Yeti:
Protective Jurisdiction,
Foreign Affairs Removal,
and Complete Preemption

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Protective jurisdiction is the federal courts’ equivalent of the Yeti—many people claim to have seen it, but no one can prove it exists.¹

In 1953, an Assistant Professor at the University of Pennsylvania Law School named Paul Mishkin published his first article in the Columbia Law Review.² Although the article undertook a general exploration of “The Federal ‘Question’ in the District Courts,” its most interesting claims had to do with the notion of “protective jurisdiction,”³ which extends federal question jurisdiction to cases implicating federal powers or interests, even though the legal claims at issue rest on state law. Young Professor Mishkin did not invent this notion; the great Herbert Wechsler had alluded to it five years earlier.⁴ But Mishkin’s discussion was considerably more thorough and nuanced, and it soon drew four full pages of discussion in an opinion by Justice Felix Frankfurter, the patron saint of the then-emerging field of Federal Courts law.⁵ It is true that Frankfurter disagreed with Mishkin’s view, but who among us would not kill for that kind of attention?

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⁴ See id. at 184-96.


Half a century later, the existence and legitimacy of protective jurisdiction remains a live question. Each generation has had its jurisdictional statutes that arguably need a protective jurisdiction theory in order to pass muster under Article III. In the 1950’s, it was Section 301 of the Labor Management Relations Act (LMRA), which conferred jurisdiction over suits concerning breach of a collective bargaining agreement; in the 1980’s, it was the federal officer removal statute, which arguably allowed federal officers to remove state criminal prosecutions against them even in the absence of a federal law defense. The Supreme Court, however, has always managed to interpret these statutes in such a way as to avoid resolving the protective jurisdiction issue. Like the elusive Yeti, then, protective jurisdiction has loomed large in the collective consciousness—of federal courts scholars, at least—while avoiding capture and sustained study by the courts.6

This essay hopes to honor Professor Mishkin by exploring his theory and applying it to two contemporary controversies in federal courts law. Part I differentiates two traditional subspecies of protective jurisdiction and seeks to confirm whether either truly exists in various statutory habitats. Part II argues that if the Yeti does exist, then it poses a threat to federalism by easing the expansion of federal judicial power at the expense of the state courts and by undermining the state courts’ control over the content of state law. I also address my friend Carlos Vázquez’s effort, in his contribution to this Symposium, to save the beast by recharacterizing protective statutes as “adopting” state law into federal law.7 Finally, Part III argues that two contemporary jurisdictional doctrines—foreign affairs removal and complete preemption—are best thought of as instances of protective jurisdiction even though debates about them generally have not been conducted in those terms. This newly-evolved Yeti inhabits situations where Congress has enacted no special jurisdictional provision extending federal judicial competence to state law claims; instead, the courts themselves have implied such jurisdiction under the general federal question statute. While I respectfully disagree with Mishkin about the underlying theory of protective jurisdiction, I suspect that he would join me in condemning that theory’s extension in the absence of a specific jurisdictional statute.


I

THE NATURE OF THE BEAST

This part seeks to pin down what’s at stake in the debate over protective jurisdiction. I begin by distinguishing the two theories that might support (and define the limits of) such jurisdiction—one articulated by Herbert Wechsler, and the other by Paul Mishkin. I then identify some current statutory provisions that arguably implicate these theories, although I remain skeptical as to whether these provisions must be defended in protective terms.

A. Two Versions of Protective Jurisdiction

Article III and the general federal question statute, 28 U.S.C. § 1331, both confer jurisdiction over cases “arising under” federal law. Chief Justice Marshall’s opinion in Osborne v. Bank of the United States interpreted the constitutional language quite broadly to cover any case in which federal law supplies an ingredient of the case, whether or not that federal element was actually contested in the litigation. The same “arising under” language in § 1331, however, has been interpreted considerably more narrowly to confer jurisdiction only where the federal element arises on the face of the plaintiff’s well-pleaded complaint. This gap between the broad “arising under” concept in Article III and the narrower version in § 1331 exists, of course, as a matter of legislative policy, and Congress remains free to extend federal question jurisdiction into the gap by either amending or supplementing the general statute. The federal officer removal statute, for instance, abrogates the well-pleaded complaint rule and allows a federal officer prosecuted in state court to remove the case to a federal forum on the basis of a federal defense.

The theory of protective jurisdiction, by contrast, is employed to justify particular statutory grants of federal question jurisdiction that push beyond the bounds of Article III described in Osborne. Section 301 of the LMRA, for instance, provides for federal jurisdiction over disputes between labor unions and employers over the alleged breach of a collective bargaining agreement. Because the statute provides no federal substantive rules of contract law to govern such suits, it was plausible to read the statute as providing a federal forum only, leaving the cases to be governed

9. See id. at 823 (holding that when a federal question “forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause”). See also Mishkin, Federal Question, supra note 2, at 160-61 (discussing Osborne).
by state law on the merits. There would thus be no federal element to the case to warrant Article III jurisdiction under Osborn, leaving the statute in need of some other constitutional theory for support. Protective jurisdiction purports to fill this gap by arguing for constitutional “arising under” jurisdiction in cases that implicate federal powers and interests, even in the absence of a federal rule of decision.

The theory comes in at least two flavors. For Professor Wechsler, Article III’s “arising under” language “should extend . . . to all cases in which Congress has authority to make the rule to govern disposition of the controversy but is content instead to let the states provide the rule so long as jurisdiction to enforce it has been vested in a federal court.” The greater power to legislate substantively, in other words, includes the lesser power to provide a federal forum while leaving state law to govern the dispute on the merits. This view ties the power to confer jurisdiction to Congress’s general Article I powers, rather than limiting it to creating the jurisdiction recognized by Article III. As Wechsler put it, “[a] grant of jurisdiction is . . . one mode by which Congress may assert its regulatory powers.”

Professor Mishkin’s seminal article criticized Wechsler’s approach as bootstrapping. “Cases that are comprehended within a solitary jurisdictional statute in a field otherwise virgin to federal legislation,” he said, “could hardly ‘arise under’ any national law other than the jurisdictional statute itself.” Mishkin thus rejected the notion that Article I might augment Congress’s authority to enact jurisdictional statutes; instead, “only Article III . . . could be looked to as a constitutional basis for jurisdictional grants.” Protective jurisdiction is thus permissible only “where there is an articulated and active federal policy regulating a field”; a case in that field then arises under the federal program, even if the particular claim at issue is “substantively governed by state law.” Like the provision of a federal forum for ordinary cases involving federal rules of decision, the point of this jurisdictional extension is “the protection of the congressional legislative program in the area.”

13. This is how Justice Frankfurter read the statute in the Lincoln Mills case. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 461 (1957) (Frankfurter, J., dissenting) (describing § 301 as “plainly procedural”). The majority disagreed, however. See infra note 23 and accompanying text.
14. As Justice Frankfurter put it, § 301 raised “the serious constitutional question . . . 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.” Id. at 469-70.
15. Wechsler, supra note 4, at 224.
16. Id. at 225.
17. Mishkin, Federal Question, supra note 2, at 190.
18. Id.
19. Id. at 192.
20. Id. at 195.
source of the law applicable to a particular case," after all, "an uninformed or hostile attitude on the part of the [state] tribunal deciding cases in such an area might well constitute a significant stumbling block in the way of effectuating federal policy."21

One may compare these two positions by reference to the grant of jurisdiction over collective bargaining disputes under the LMRA. For Professor Wechsler, that grant would be constitutional even if it existed in splendid isolation: It would be enough that labor disputes fall within the scope of the federal Commerce Power, so that Congress could have legislated a set of substantive federal rules of decision to govern those disputes. For Professor Mishkin, on the other hand, the grant would be sustainable only in light of Congress's extensive substantive regulatory program in the area of labor law. Even if that program did not include substantive federal rules of decision to govern a particular collective bargaining dispute, the point of protective jurisdiction over those disputes would be to ensure that they were not decided in such a way as to interfere with the articulated federal policies in the area.22

B. Yeti Sightings: Some Protective Jurisdictional Statutes

I have thus far used § 301 of the Labor Management Relations Act as an illustrative example, since it was that statute that occasioned the most extensive discussion of protective jurisdiction in both the academic literature and the Supreme Court. A majority of the Court in Lincoln Mills, however, construed § 301 as conferring authority on the federal courts to create federal common law rules governing the enforceability of collective bargaining agreements.23 This enabled the majority to avoid any reliance on protective jurisdiction; once the courts are empowered to fashion federal rules of decision to govern the merits of LMRA disputes, the cases "arise under" those rules rather than state law, and the protective jurisdiction issue evaporates.24 It is worth asking, then, whether any contemporary statutes raise the protective jurisdiction question. The answer should help clarify the stakes in any current debates about the validity of the theory.

Unfortunately, there is no tidy answer to the question. As I demonstrate in this Section, the Yeti has been sighted but has so far eluded

21. Id.
22. See id. at 196. Ray Forrester developed a similar version of protective jurisdiction in a 1948 article concerning the LMRA. See Ray Forrester, The Jurisdiction of Federal Courts in Labor Disputes, 13 LAW & CONTEMP. PROBS. 114, 120 (1948) ("[W]here Congress has set up a broad legislative program and policy ... it may be argued that Congress is acting within the constitutional intent ... in granting jurisdiction to the federal courts over all litigation connected with and forming part of such a program.").
23. 353 U.S. at 456-57.
24. See Goldberg-Ambrose, supra note 6, at 547 ("[W]e must distinguish those cases that are encompassed by conventional readings of the arising under clause of article III from those that are not. Only in the latter need some concept of protective jurisdiction be invoked at all.").
capture. A number of statutes could be interpreted to raise issues of protective jurisdiction, but alternate explanations are available to avoid reliance on the controversial theory. Courts have almost always taken these “outs.” In *Mesa v. California*, for example, the Supreme Court construed the federal officer removal statute, 28 U.S.C. § 1442, to permit removal of a state court prosecution of a federal officer only where the officer asserts a federal defense. The Government had argued for a right to removal in *all* cases based on a protective theory, but the Court declined to consider the “grave constitutional problems” that would then arise. Lower courts have tended to read *Mesa* as a strong directive to avoid relying on protective jurisdiction if at all possible.

The extent to which protective jurisdiction actually occurs in current law is important in two respects. The first derives from the significance of the statutes themselves. Protective rationales have been asserted not only for jurisdictional oddities like the Diplomatic Relations Act or the Alien Tort Statute, but also for portions of major regulatory schemes like the Bankruptcy and Clean Air Acts. Arguments about protective jurisdiction may determine not only the validity but also the scope, as in *Mesa*, of these statutes. The second point is more fundamental. If protective jurisdiction is a tool of frequent and longstanding application, then that congressional practice would be relevant—if not necessarily dispositive—to construing what Article III permits. If, on the other hand, there are not any—or hardly any—statutes that must be understood to rely on a protective theory, then it will be easier to dismiss the Yeti—both descriptively and normatively—as a constitutional myth.

The first four examples of protective jurisdiction statutes—the Bankruptcy, Clean Air, and Air Transportation Safety Acts, as well as a provision of the LMRA not involved in *Lincoln Mills*—involve areas in which Congress has created a federal regulatory regime. While federal law may not provide the rule of decision for every claim in the field, state law claims are brought in the shadow of an extensive federal legislative policy. These statutes thus fall under Professor Mishkin’s narrower view of

26. *Id.* at 139.
27. *See*, e.g., *A.I. Trade Fin., Inc. v. Petra Int’l Banking Corp.*, 62 F.3d 1454, 1461 (D.C. Cir. 1995) (citing *Mesa* as “reject[ing] the notion of a ‘protective jurisdiction’ that goes beyond the reach of any substantive federal law”).
protective jurisdiction. The remaining two examples—the Diplomatic Relations Act and the Alien Tort Statute—take the form of freestanding jurisdictional grants. They must rely, accordingly, on Professor Wechsler’s broader theory that Congress may confer federal question jurisdiction over any case in which it would possess enumerated power to legislate substantively. None of these statutes, however, lacks for alternative grounds for federal jurisdiction that may obviate recourse to a protective theory.

1. The Bankruptcy Code

The Bankruptcy Code provides for “original but not exclusive jurisdiction of all civil proceedings arising under, or arising in or related to cases under [the Code].” For present purposes, the cases encompassed by this jurisdictional grant may be divided into three categories. First, federal bankruptcy courts may exercise jurisdiction over “core” bankruptcy claims—that is, claims governed by the substantive provisions of the Act. Second, federal courts have jurisdiction over all suits to which the bankrupt estate is a party, whether as a defendant (against claims by creditors) or a plaintiff (seeking to recover money on behalf of the estate). Finally, the Code’s provision for federal jurisdiction over claims “related to” the bankruptcy may include state law claims between third parties.

30. 28 U.S.C. § 1334(b). The statute also provides for “original and exclusive jurisdiction of all cases under” the Code. Id. at § 1334(a). This confusing juxtaposition of exclusive jurisdiction over bankruptcy “cases” and concurrent jurisdiction, with the state courts, of “civil proceedings” means that the federal court have “exclusive and nondelegable control over the administration of [a bankruptcy estate],” Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 483 (1940), but that particular litigated controversies pertaining to the estate—i.e., “civil proceedings”—may be heard in the state courts. Brubaker, supra note 28, at 839-40. See also 1 COLLIER ON BANKRUPTCY ¶¶ 3.01[3]–[4] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006) (discussing federal court jurisdiction over Title 11 proceedings).

31. According to Professor Brubaker, “[t]his arising under bankruptcy jurisdiction was designed to replicate general federal question jurisdiction where the source of federal law under which a claim is made is the federal Bankruptcy Code.” Brubaker, supra note 28, at 801. He gives the example of a trustee’s effort “to recover a preferential transfer pursuant to the cause of action created by section 547 of the Bankruptcy Code.” Id.

32. In contrast to the “arising under” bankruptcy jurisdiction, see supra note 31, Professor Brubaker describes this “arising in” jurisdiction “as a grant of general federal bankruptcy jurisdiction over all claims by and against the bankruptcy estate.” Brubaker, supra note 28, at 853. These will frequently be state law claims, as when the bankruptcy trustee seeks to recover an ordinary debt owed to the estate.

33. See, e.g., Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (observing that “the ‘related to’ language of [28 U.S.C. § 1334(b)] must be read to give [federal courts] jurisdiction over more than simply proceedings involving the property of the debtor or the estate”); 1 COLLIER ON BANKRUPTCY P3.01[1][c][iv], p. 3-28 (15th ed. 1994) (stating that “related to” claims encompass both causes of action owned by the debtor that become property of the estate and disputes between third parties that have an effect on the estate). Celotex, for example, involved an effort by one of the debtor’s creditors to execute against a surety on a bond posted by the debtor.
“Core” claims obviously raise federal questions under the Bankruptcy Act; they will typically fit squarely under the “Holmes rule” that “[a] suit arises under the law that creates the cause of action.” State law claims by and against the bankruptcy estate pose a somewhat more difficult question. Bankruptcy scholars appear to agree that, where a federal trustee is appointed to represent the bankruptcy estate, state law claims involving the trustee contain a necessary federal element, much as the Bank of the United States’ federal statutory capacity to sue and be sued was sufficient to support federal jurisdiction in Osborn. An important class of cases under Chapter 11 of the Bankruptcy Code, however, allows the “debtor in possession” — i.e., the original bankrupt corporation — to administer the estate without appointment of a trustee. Some scholars argue that the real

34. See Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916). American Well Works was construing the statutory reach of § 1331, but its conclusion applies a fortiori to Article III itself. Justice Holmes believed that a federal right of action is a necessary condition for arising under jurisdiction, but the Court held (over his objection) that a federal element in a state cause of action will sometimes support federal question jurisdiction. See Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 199-202 (1921); see also Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg., 545 U.S. 308 (2005) (reaffirming Smith). It seems clear, however, that a federal cause of action is a sufficient basis for “arising under” jurisdiction. See Richard H. Fallon, Jr., Daniel J. Meltzer, & David L. Shapiro, Hart and Wechsler’s The Federal Courts and the Federal System 864 (5th ed. 2003) [hereinafter Hart & Wechsler]; but see Mary P. Twitchell, Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts, 54 Geo. Wash. L. Rev. 812, 819 n.36 (1986) (relying on Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900), to establish that “the crucial factor for arising-under jurisdiction is the substantive law that applies to plaintiff’s claim, not the law that provides the remedy”).

35. See 11 U.S.C. § 323(b) (providing that the bankruptcy trustee “has capacity to sue and be sued”); Brubaker, supra note 28, at 815 (describing a “scholarly consensus” that “when a bankruptcy trustee sues on a debtor’s state-law cause of action in federal court, because the bankruptcy trustee is a federal official . . . the trustee’s right to bring the action is an original federal ingredient”); Thomas Galligan, Article III and the “Related To” Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction, 11 U. Puget Sound L. Rev. 1, 33-34 (1987) (“[F]ederal law is an original ingredient in any suit brought by a trustee in bankruptcy.”).

36. See Osborn, 22 U.S. (9 Wheat.) at 823–25 (holding that the capacity of the Bank of the United States to sue and be sued was a necessary federal element of any suit involving the Bank, so that the statute providing for federal jurisdiction over such suits fell within the scope of Article III). Professor Mishkin likewise agreed that in suits by the bankruptcy trustee, “the original ingredient of national law may be found in the assignment to the plaintiff-trustee, by operation of federal law, of the claim on which he is suing.” Mishkin, Federal Question, supra note 2, at 194-95. He considered these suits instances of protective jurisdiction nonetheless, because he thought Congress’s purpose in providing for federal jurisdiction over them was protection of the overall program of bankruptcy regulation, not guarding against state court bias against the trustee itself. See id. at 195. I suspect, however, that one could make a similar legislative motive claim about any number of statutes using a relatively minor federal element as a hook to provide a federal forum. These sorts of motive inquiries tend to be highly indeterminate—a particularly serious problem when they are injected into jurisdictional inquiries that courts seek to resolve expeditiously at the outset of litigation. Moreover, I argue in Part II that even a fairly formal requirement that Congress include some substantive element when it extends federal question jurisdiction may act as a practical constraint on the scope of such jurisdiction. See infra notes 105-113 and accompanying text. If correct, that argument provides some support for a more formal approach to jurisdictional hooks than Professor Mishkin’s view would appear to contemplate.
party in interest in Chapter 11 cases remains the bankruptcy estate—a creature of federal law—and that claims by and against the estate fit under Osborn's theory regardless of the presence or absence of a trustee. Other scholars reject this notion as a sham, arguing that federal law does not meaningfully constitute a new entity in the sense that Osborn requires.\footnote{See, e.g., Galligan, supra note 35, at 35 ("If all Congress has to do is to create a federal jurisdiction, then whenever it wanted a federal court to hear a case Congress could so legislate by engaging in semantics."); 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, 1230 n.158 (1993) ("[A] case involving a debtor in possession cannot be readily fit into the 'federal party' theory").}

This debate about the nature of the bankruptcy estate as a federal entity, independent of any trustee, is not something that a generalist scholar of federal jurisdiction can resolve with complete confidence. But federal law regulating the reorganization of the bankrupt estate is sufficiently pervasive that, even in debtor-in-possession cases, claims involving the estate fit plausibly within the class of federal entity claims recognized by Osborn as arising under federal law.\footnote{Professor Brubaker points out that [F]ederal law, inter alia, (1) enjoins enforcement of claimants' prebankruptcy rights, channeling them into the bankruptcy forum for resolution and eventual treatment under a reorganization plan; (2) closely regulates all aspects of the ongoing financing and operation of the business; (3) introduces an interim regime of internal governance and fiduciary obligation, including a distinct body of law regarding control of 'derivative' litigation; and (4) arms the estate with an arsenal of unique federal causes of action in the form of the so-called avoiding powers—all under the watchful supervision of official constituent committees, the Justice Department, and a federal bankruptcy court. Brubaker, supra note 28, at 827-28 (footnotes and statutory citations omitted). He thus concludes that "[a] reorganization estate, . . . even with a debtor-in-possession at the helm, truly exists as a unique federal entity and not a mere jurisdiction-conferring sham." Id. at 829.}

Jurisdiction over claims "related to" the bankruptcy poses a more difficult question, as those claims may involve neither a federal entity nor any claim for which federal law provides the rule of decision. Some commentators have invoked a protective theory as the justification for this sort of jurisdiction. Thomas Galligan, for example, has argued that the "related to" jurisdiction is "a constitutional effort to protect the federal interest in efficient bankruptcy administration [by providing a federal forum], and at the same time preserve the states' interests in interpreting, applying, and developing state law."\footnote{Galligan, supra note 35, at 5.} Others, however, have described the "related to" provision as a form of supplemental jurisdiction.\footnote{See Brubaker, supra note 28, at 806.}
the breaking point.41 This plausible concern seems substantially mitigated, however, if one views the operative jurisdictional unit in bankruptcy as a particular "proceeding"—for example, a suit on a cause of action belonging to the debtor—then defines "related to" disputes as those claims that would meet the ordinary supplemental jurisdiction standards for relation to that proceeding.42 This approach might require some revision of current judicial constructions of the "related to" jurisdiction—43—an issue that takes us outside the scope of this article. The important point for present purposes is simply that interpretations of the "related to" jurisdiction are available that fit comfortably within traditional concepts of supplemental jurisdiction. If that is true, then it seems hard to justify resort to more constitutionally problematic theories of protective jurisdiction.

2. The Labor Management Relations Act, Revisited

By holding that § 301 of the LMRA authorized courts to fashion federal common law rules of decision, the Lincoln Mills case obviated the issue of protective jurisdiction in the most visible class of LMRA cases: suits between employers and labor unions to enforce a collective bargaining agreement.44 Other sorts of LMRA suits exist, however, and they are instructive in separating out precisely which sorts of cases require a protective rationale. United Association of Journeymen v. Local 334,45 for example, concerned litigation between an international labor union and one of its locals under § 301, which provides for jurisdiction over suits for "violation of contracts . . . between . . . labor organizations" as well as between unions and employers.46 After holding that the instant case fell within that provision, Justice Brennan's majority opinion had this to say about the applicable law:

We need not decide today what substantive law is to be applied in §301(a) cases involving union constitutions. It is enough to observe that the substantive law to apply "is federal law, which the courts must fashion from the policy of our national labor laws." . . . Whether the source of that federal law will be state law . . . or other principles can be left to another case.47

41. See Galligan, supra note 35, at 36-41; Goldberg-Ambrose, supra note 6, at 552.
42. See Brubaker, supra note 28, at 831-43.
43. See id. at 869-70.
44. See supra notes 23-24 and accompanying text.
46. 29 U.S.C. § 185(a).
47. 452 U.S. at 627 (citing Lincoln Mills, 353 U.S. at 456, and Automobile Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05 (1966)). Hoosier Cardinal dealt with the applicable limitations period for a § 301 suit. The Court held that "since no federal provision governs . . . the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." 383 U.S. at 704-05.
Like other areas in which courts have the power to fashion federal common law, then, the LMRA case law contemplates that courts will sometimes derive federal principles from analogous rules of state law.

The question is whether a protective theory is necessary to justify federal jurisdiction over a case in which the court adopts state law to govern a dispute under § 301. Carole Goldberg-Ambrose has argued that such a theory is necessary; "[i]ncorporation alone," she contends, "should not suffice . . . 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." Evaluating Professor Goldberg's argument is difficult due to persistent confusion in the cases over exactly what happens when a court applies a state substantive rule to a dispute over which it possesses federal common lawmaking authority. The early cases say that the court "adopts" or "incorporates" state law into federal law, while more recent decisions have preferred the simpler view that state law applies of its own force. One could happily while away an entire article on this distinction, but I think Goldberg's claim cannot be sustained under either of the relevant choices.

Take the "adoption" or "incorporation" theory first. When a court "adopts" a state rule of decision as part of federal law, the resulting rule is federal in character. Professor Goldberg suggests that this designation is purely formal in character, since federal law adds no substance to the state

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48. See, e.g., United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-28 (1979) ("Controversies directly affecting the operations of federal programs, although governed by federal law, do not invariably require resort to uniform federal rules . . . . Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law") (internal citations and quotation marks omitted); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) ("In our choice of the applicable federal rule we have occasionally selected state law."); Hart & Wechsler, supra note 34, at 701 (observing that "the Court's current approach to federal common lawmaking" demonstrates "a preference for incorporation of state law absented a demonstrated need for a federal rule of decision").

49. Goldberg-Ambrose, supra note 6, at 558.

50. Compare, e.g., Kimbell Foods, 440 U.S. at 740 (deciding "to adopt the readymade body of state law as the federal rule of decision"), with O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994) ("[K]nowing whether 'federal law governs' in the Kimbell Foods sense—a sense which includes federal adoption of state-law rules . . . .—does not much advance the ball. 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."), and Boyle v. United Technologies 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 designating to 'borro[w],' . . . or 'incorporate[e]' 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.") (citations omitted).
rule. But if we take the adoption and incorporation language seriously, several functional consequences follow. A subsequent change in the state law, for example, would not necessarily be reflected in the federal law principle; if the federal court felt that the altered version of the state rule conflicted with federal policy, it would be free to adhere to the old rule. Moreover, the application of the adopted state law principle would arguably be reviewable by the U.S. Supreme Court; likewise, it is not clear that the federal courts would be bound by state court interpretations of the adopted state rule under the *Erie* doctrine. If statutes like § 301 federalize the state law principles they incorporate, then that decision has sufficiently meaningful consequences that the resulting rule of decision should be treated as federal for purposes of Article III.

The case for protective jurisdiction is stronger, by contrast, if we deem state law to apply "of its own force" in a case like *Journeyman*. In that scenario, the state rule is not federalized, and none of the consequences just described would follow. Nonetheless, I submit that the issue whether to apply a federal common law rule or a state rule of decision is itself a federal question sufficient to satisfy *Osborn*'s theory of "arising under" jurisdiction. The Court has made clear that, even when it determines to apply state law in an area subject to federal common lawmaking authority, that determination will not extend to "specific aberrant or hostile state rules"; application of state law "would be acceptable only 'so long as it is plain . . . that the state rules do not effect a discrimination against the [federal] Government, or patently run counter to the terms of the [relevant federal statute]." In other words, *every time* a court deciding a case within the scope of federal common lawmaking authority elects to apply state law, it must decide whether the particular state rule in question creates a conflict with federal policy. That determination will require an interpretation of the underlying federal regulatory scheme; in *Journeyman*, for example, it would require interpreting the purposes of the LMRA. This federal element is at least as substantial as that presented by the federal status of the Bank in *Osborn*.

Any number of federal regulatory schemes either incorporate state law rules of decision by reference or allow those rules of decision to apply of

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52. Federal common law binds both federal and state courts, and indeed some § 301 actions are brought initially in state court. See, e.g., Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962). Generally speaking, the Supreme Court cannot review issues of state law on appeal from the state courts. See *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875). But the application of a state law rule *incorporated* into federal law would presumably present a reviewable federal question.
53. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that federal courts must follow the interpretation of state law articulated by the state’s highest court).
their own force so long as they meet certain federal requirements.\textsuperscript{55} My argument here suggests that recourse to protective theories of jurisdiction is unnecessary in either of these two contexts. In the first, the incorporated state rule of decision is itself meaningfully federal. In the second, the compliance of state law with federal standards is the only federal question necessary to support "arising under" jurisdiction.

3. The Clean Air Act

Under the federal Clean Air regime, the Environmental Protection Agency sets standards for permissible levels of pollutants; the states, however, are charged with formulating policies (within federal guidelines) to meet those standards.\textsuperscript{56} The EPA might require, for example, that the ambient level of ozone be reduced to $X$ parts per million; state environmental agencies would then formulate state implementation plans (SIPs) that would determine whether that goal would be reached by inspecting cars' emission control equipment, building mass transit, etc. These SIPs are themselves a matter of state law. The citizen suit provision of the Clean Air Act provides for federal district court jurisdiction over private suits charging violation of any "emission standard or limitation" under the Act, and these standards include the provisions of state SIPs.\textsuperscript{57} Private citizens may sue, for example, to enforce the provisions of an emissions permit issued to polluters by state agencies pursuant to a state SIP.\textsuperscript{58} To the extent that these suits allege violations only of the state-law portion of the clean air regime, the Act's provision for federal jurisdiction without regard to citizenship of the parties would arguably need to rely on a protective jurisdiction theory.\textsuperscript{59}

\textsuperscript{55} Section 302 of the LMRA takes this form: It generally prohibits payments by employers to employee representatives, but exempts trust funds that meet certain federal requirements. It then permits federal courts to hear claims that the state-law fiduciary obligations arising from such trusts have been violated. See 29 U.S.C. § 186(c)(5), (e); Goldberg-Ambrose, supra note 6, at 563-64 (describing the operation of this provision and characterizing it as an instance of protective jurisdiction). My analysis in the text suggests that, since the enforceability of these state-law obligations depends in federal court depends on the trust's compliance with federal requirements, that federal question of compliance is sufficient to support arising under jurisdiction without recourse to any protective theory.


\textsuperscript{57} See 42 U.S.C. § 7604(a) (providing that "[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order [issued by the Administrator or a State with respect to such a standard or limitation]").

\textsuperscript{58} See, e.g., Georgia Power, 443 F.3d at 1347.

\textsuperscript{59} See Goldberg-Ambrose, supra note 6, at 564; HART & WECHSLER, supra note 34, at 854 (citing the Clean Air Act as a possible example of a protective jurisdiction statute).
It is not obvious, however, that a suit to enforce a SIP’s provisions would lack any federal element. Most important, the same statutory provision that confers jurisdiction on the federal courts also appears to create a private right of action to sue for violations of both federal and state standards.\textsuperscript{60} Like "core" bankruptcy claims, then, private suits to enforce a SIP come into federal court under the Holmes rule that a case arises under the law that creates the cause of action.\textsuperscript{61} Moreover, SIP provisions must meet various federal criteria in order to be valid; hence, as Carol Goldberg-Ambrose has noted, “every time a standard is enforced under the Clean Air Act in federal court, a potential question will be whether the standard is in fact part of such [a federally-approved] Plan.”\textsuperscript{62} As with \textit{Journeyman} claims under the LMRA, then, state law’s conformity to federal standards is itself a federal question that may be sufficient to support jurisdiction under Article III.\textsuperscript{63} Accepting either of these theories would put Clean Air Act claims within the realm of \textit{Osborn} and obviate any recourse to protective theories.

4. The Air Transportation Safety and System Stabilization Act

Shortly after the September 11, 2001 terrorist attacks, Congress sought to regulate claims for damages arising out of those attacks.\textsuperscript{64} The Air Transportation Safety and System Stabilization Act (ATSSSA) creates a federal cause of action for damages as an exclusive remedy, but provides that the substantive rule of decision “shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by federal law.”\textsuperscript{65} The Act further confers exclusive jurisdiction over such claims on the United States District Court for the Southern District of New York. Because jurisdiction is without regard to citizenship, and the rules of decision prescribed by the Act derive from state law, this statute has been cited as a possible instance of protective jurisdiction.\textsuperscript{66}

\begin{footnotes}
\item[60] See 42 U.S.C. § 7604(a) (providing that “any person may commence a civil action on his own behalf—(1) against any person . . . who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation”).
\item[61] See supra note 34 and accompanying text.
\item[62] Goldberg-Ambrose, supra note 6, at 614 n. 370. See, e.g., Sierra Club v. Tenn. Valley Auth., 430 F. 3d 1337, 1349 (11th Cir. 2005) (holding that an Alabama modification to its SIP failed to meet the requirements of the federal Act).
\item[63] See supra notes 54-55 and accompanying text.
\item[65] ATSSSA, § 408(b)(1), (2).
\item[66] See Holt, supra note 64, at 544-45; Hart & Wechsler, supra note 34, at 854-55.
\end{footnotes}
Once again, however, some skepticism is warranted. Although the law to be applied is state law, the Act itself creates a federal cause of action. That in itself is probably sufficient to support constitutional “arising under” jurisdiction under the Holmes rule. One of the few commentators on this provision has objected to characterizing the ATSSSA cause of action as “federal,” on the ground that the Act “simply fails to create any substantive federal law or remedy beyond the federal jurisdictional grant.” But the decision to permit or deny plaintiffs a right to recover is a significant legislative act; that is why the creation of implied rights of action by courts is so controversial. Congress’s decision to create such a right, for example, would presumably preempt any state decision to categorically bar tort recovery in cases arising out of a terrorist attack. One should hesitate, then, to abrogate the Holmes principle that a federal cause of action is sufficient for “arising under” jurisdiction simply because the ATSSSA cause of action incorporates substantive state rules of decision. Moreover, by limiting an air carrier’s total liability to the limits of the carrier’s insurance coverage, the Act restricts the operation of state law in an important class of cases. That restriction in itself may constitute a federal “element” sufficient to support Article III jurisdiction under Osborn, at least for claims against air carriers.

5. The Diplomatic Relations Act of 1978

Unlike the statutes discussed thus far, which confer federal jurisdiction in order to protect “an articulated and active federal policy,”

67. See ATSSSA, § 408(b)(1) (“There shall exist a Federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001.”).

68. See supra note 34 and accompanying text.

69. Holt, supra note 64, at 544; see also Goldberg-Ambrose, supra note 6, at 550 (“Claims in which the only federal law is an incorporation of existing state law [should be] treated the same as claims based on state law alone because the incorporation, by definition, would not alter any elements of the claim.”).

70. See, e.g., Cannon v. Univ. of Chi., 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting): As the Legislative Branch, Congress . . . should determine when private parties are to be given causes of action under legislation it adopts. As countless statutes demonstrate, . . . Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction.

71. The ATSSSA’s language, moreover, suggests that it adopts state tort rules rather than allows them to apply of their own force. That implies that, while the underlying principles would be drawn from state law, their application in ATSSSA cases would represent a federal question for a variety of purposes, such as whether federal courts would be bound by state court decisions or whether federal court rulings would be reviewable by the U.S. Supreme Court. Cf. Goldberg-Ambrose, supra note 6, at 550 n.46 (acknowledging that “a ‘true’ federal question will exist” where Congress adopts state law without committing the federal courts to follow subsequent interpretations or changes to that law).

72. See ATSSSA § 408(a).

73. Mishkin, Federal Question, supra note 2, at 192.
the Diplomatic Relations Act stands largely apart from any such federal regulatory program. The Act arises from the unfortunate intersection of diplomatic immunity and bad driving. Federal law recognizes the diplomatic immunity of foreign diplomats from tort liability, but it requires that foreign missions carry liability insurance and permits persons injured by diplomats to bring a direct action for damages against the foreign mission’s liability carrier. Congress has conferred exclusive jurisdiction over such suits on the federal district courts, even though the legislative history makes clear that state law provides the rule of decision in such cases. Unlike the previous examples, it would be hard to argue that Congress has a broad, articulated policy governing the liability of foreign diplomats; nonetheless, it seems clear that Congress would have power to legislate such a scheme if it so wished. The Diplomatic Relations Act thus arguably illustrates Professor Wechsler’s “greater power includes the lesser” version of protective jurisdiction.

I am unaware of any decisions considering constitutional challenges to jurisdiction in Diplomatic Relations Act cases. Nonetheless, I suspect that a court hearing such a challenge would be able to uphold the statute without relying on a protective jurisdiction theory. In addition to providing for jurisdiction, the statute also provides that:

Any direct action brought against an insurer under subsection (a) shall be tried without a jury, but shall not be subject to the defense that the insured is immune from suit, that the insured is an indispensable party, or in the absence of fraud or collusion, that the insured has violated a term of the contract, unless the contract was cancelled before the claim arose.

By prescribing certain procedures and preempting certain defenses that might otherwise be available under state law, the Act likely provides a sufficient federal element to pass muster under Osborn’s broad view of “arising under” jurisdiction.

6. The Alien Tort Statute

Since 1789, the federal courts have enjoyed jurisdiction in a “civil action by an alien for a tort only, committed in violation of the law of nations.” The origins and purpose of this provision are notoriously murky; Judge Friendly, for example, called it “a kind of legal Lohengrin;

74. See generally Pub. L. No. 95-393.
76. 28 U.S.C. § 1364(b).
77. This argument would be harder to make for 28 U.S.C. § 1351, which provides exclusive federal jurisdiction for all civil actions against members of diplomatic missions or their families. Any such suit involving a U.S. plaintiff, of course, would fall under the citizen-alien diversity provision of Article III.
78. 28 U.S.C. § 1350.
although it has been with us since the First Judiciary Act, no one seems to know whence it came.”79 Interest in the Alien Tort Statute (ATS) has blossomed in recent years, as a result of its invocation to support human rights litigation in federal courts and of more theoretical controversy over the status of international law within the domestic legal system.80 Some scholars have maintained (rightly, in my view) that norms of customary international law—international law derived from the practice of nations rather than from formal agreements—should not be treated as federal law in American courts unless those norms are explicitly adopted and incorporated by federal legislation.81 This position on the status of customary international law calls the constitutionality of the ATS into question, as it seems to provide federal jurisdiction over non-diversity suits by aliens against other aliens where the rule of decision is provided by international rather than federal law.82 One prominent school of thought would “save” the ATS in such circumstances by deeming it an exercise of protective jurisdiction over an important class of controversies implicating federal interests in the conduct of foreign affairs.83

As with suits under the Diplomatic Relations Act, protective jurisdiction over ATS suits would rest on broad federal interests in foreign affairs and the undisputed power that Congress enjoys to federalize norms of international law,84 rather than on an actual federal regulatory regime embodied in positive law.85 It is unclear, however, that a protective theory

79. JIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).
80. See, e.g., Fialartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (upholding jurisdiction under the ATS over a suit by Paraguayan citizens against a former Paraguayan official for acts of torture committed in Paraguay); Ernest A. Young, Sorting Out the Debate Over Customary International Law, 42 VA. J. INT’L L. 365 (2002) (surveying the theoretical and doctrinal debate).
82. The problem would not arise for ATS suits in which an alien sued a U.S. citizen, or in which the rule of decision was provided by a federal treaty. But alien vs. alien suits under customary norms appear to have been an important category of claim in the founding period and remain an important category today. For a modern example of an alien vs. alien suit, see Kadid v. Karadzic, 70 F.3d 232, 246 (2d. Cir 1995) (retaining jurisdiction, under Alien Tort Statute, of suit by Bosnians against Bosnian-Serb leader for the commission of atrocities). For an important alien versus alien incident in the preconstitutional period, see Respública v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784).
84. See U.S. CONST. art. I, § 8 (conferring legislative power “To define and punish... Offenses against the Law of Nations”).
85. Some of the most important torts covered by customary international law have, in fact, been federalized by statute. See, e.g., Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350); 18 U.S.C. § 1651 (criminalizing, under federal law, “the crime of piracy as defined by the law of nations”). In these instances, however, federal law adopts the
is necessary to support jurisdiction even over the classic ATS suit, involving a suit by an alien against another alien for a tort that violates customary international law. In Sosa v. Alvarez-Machain, the Supreme Court held that while the ATS does not itself create private rights of action, the statute nonetheless presupposes the existence of a federal right of action to vindicate at least some rights under customary international law. This recognition of a federal common law right of action is sufficient for federal question jurisdiction, because as I have already noted, it is well-settled that a case "arises under" federal law where federal law creates the plaintiff's right of action. The ATS claims recognized in Sosa thus need not rely on any protective theory in order to fall within Article III.

Justice Souter's majority opinion in Sosa described the federal right of action under the ATS in exceptionally narrow terms, suggesting that "any claim based on the present-day law of nations [must] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." It may be that the ATS's relatively capacious jurisdictional language could cover claims falling outside this narrow federal common law right of action—for example, if international law itself, or perhaps even state law, can be construed as creating a cause of action. In such a case, where there is no federal right of action, some sort of protective theory may be required to bring the ATS within the scope of Article III. Even here, however, there may be alternative constitutional grounds for jurisdiction: some such cases will involve ambassadors or public ministers, for example, many others will feature parties of diverse citizenship, and still others may arise on navigable waters so as to fall

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86. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (upholding federal jurisdiction over a suit by an alien against another alien for a tort in violation of customary international law).
88. See Ernest A. Young, Sosa and the Retail Incorporation of International Law, 120 Harv. L. Rev. F. 28 (2007); supra note 34 and accompanying text (discussing the Holmes rule).
89. For further discussion of the nature of the federal question in Sosa, see William A. Fletcher, International Human Rights in American Courts, 93 Va. L. Rev. In Brief 1, 7–8 (2007), http://www.virginialawreview.org/inbrief/2007/03/22/fletcher.pdf. Anthony J. Bellia, Jr., Sosa, Federal Question Jurisdiction, and Historical Fidelity, 93 Va. L. Rev. In Brief 15, 17 (2007), http://www.virginialawreview.org/inbrief/2007/03/22/bellia.pdf. Judge Fletcher argues that Sosa went so far as to federalize the customary international law rules of decision that fall within the narrow set of approved claims, see Fletcher, supra, at 12. My own view is that Sosa is best read more narrowly as recognizing a federal right of action to enforce customary international law rules of decision, without taking the additional step of federalizing those rules of decision. See Young, Retail Incorporation, supra note 88, at 31–33. The important point for present purposes, however, is that in neither event would we have to rely on a protective theory to support the ATS.
90. 542 U.S. at 725.
within the admiralty jurisdiction.\textsuperscript{91} In any event, I am aware of no such non-federal rights of action to enforce international law.\textsuperscript{92} And given \textit{Sosa}’s narrow reading of the ATS’s purposes,\textsuperscript{93} one may fairly doubt whether the Supreme Court would seek to extend its jurisdictional provision to cover such a case.

The ATS presents any number of fascinating questions, but it is important to keep one’s eye on the ball. The central question for present purposes is whether the U.S. Code contains jurisdictional statutes that (1) are of such importance and long standing as to shape our understandings of Article III itself, and (2) have central applications that can only be explained on a theory of protective jurisdiction. The ATS probably fails the first criterion, because “it was an insignificant source of federal court jurisdiction during most of its history,” prior to the Second Circuit’s \textit{Filartiga} decision in 1980.\textsuperscript{94} More importantly, \textit{Sosa} demonstrates that important applications of the ATS do not require any protective justification, whether or not we can come up with other, more marginal applications that might. Neither the ATS, nor any other of the jurisdictional statutes surveyed in this Section, affords a compelling reason to step beyond traditional understandings of Article III “arising under” jurisdiction.

\section{Protective Jurisdiction as a Threat to Federalism}

I want to develop two general sets of criticisms of protective jurisdiction, both of which sound in federalism. The first focuses on the expansion of federal court jurisdiction at the expense of state courts; the second emphasizes federal court interference with state courts’ control over their own law. Each set of arguments applies to both the Wechsler and Mishkin versions of protective jurisdiction, although in each case there are some differences in degree. Neither set of criticisms is original with me,

\textsuperscript{91} See, e.g., Curtis A. Bradley, \textit{The Alien Tort Statute and Article III}, 42 Va. J. Int’l L. 587, 591 (2002) (arguing that the First Congress intended the ATS to “authorize[] federal court jurisdiction over certain sensitive disputes between aliens and U.S. citizens, without regard to the $500 amount in controversy limitation generally imposed by the First Congress on alienage jurisdiction.”).

\textsuperscript{92} See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d. 774, 817 (D.C. Cir. 1984) (Bork, J., concurring) (“International law typically does not authorize individuals to vindicate rights by bringing actions in either international or municipal tribunals.”); Anne-Marie Burley, \textit{The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor}, 83 Am. J. Int’l L. 461 (1989) (describing as “vexed” the question whether international law itself creates a cause of action to enforce international rights). On the possibility that state law might choose to provide rights of action to enforce international norms, see Fletcher, supra note 89, at 8-10. I am unaware, however, that any state has so far chosen to create such a right.

\textsuperscript{93} See \textit{Tel-Oren}, 726 F.2d at 724 (“we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conduct, infringement of the rights of ambassadors, and piracy”).

\textsuperscript{94} Bradley, \textit{supra} note 91, at 588.
although I hope to flesh each out in such a way as to move the analytic ball forward a bit. I then consider how these criticisms bear on Professor Vázquez’s proposal to think of protective statutes as “adopting” state rules of decision into federal law.

A. The Political and Procedural Safeguards of Federalism

Justice Frankfurter noted in Lincoln Mills that “under the theory of ‘protective jurisdiction,’ the ‘arising under’ jurisdiction of the federal courts would be vastly extended,” and that this would disrupt “the compromise of federal and state interests leading to distribution of jealously guarded judicial power in a federal system.”95 Unlike the state courts, after all, the federal courts purport to be courts of limited jurisdiction in two distinct and crucial senses: Their jurisdiction must be conferred by statute,96 and the outer limits of the jurisdiction that can be conferred by statute are set in Article III.97 The question raised by protective jurisdiction is whether the “arising under” language in Article III can really only be satisfied by a conjunction of two federal enactments: a statute conferring jurisdiction on the federal courts, and a federal statute (or treaty or constitutional provision) providing a federal rule of decision governing the case in question on the merits.

It is not obvious that even people concerned about maintaining a balance of power between the federal and state judicial systems should insist on this second federal enactment as a prerequisite to federal jurisdiction. Alexander Bickel and Harry Wellington argued that “providing a forum for the enforcement of state law in a field which Congress could occupy is . . . a way of seeking a degree of uniformity while leaving the maximum room for the exercise of initiative by the states.”98 They went on to suggest that “[i]t would be most regrettable if a

95. 353 U.S. at 474 (Frankfurter, J., dissenting).
96. This is true of the lower federal courts because of the “Madisonian Compromise” at the Constitutional Convention, which punted to Congress the decisions whether to create lower federal courts at all and, if it did choose to create them, what jurisdiction to confer upon them. See generally HART & WECHSLER, supra note 34, at 330-61. It is also effectively true of the Supreme Court’s appellate jurisdiction, because the Court has chosen to read statutes conferring some degree of appellate jurisdiction upon it as implicit exercises of Congress’s power to make “exceptions” to the Court’s jurisdiction, see U.S. CONST. art. III, § 2; all jurisdiction not explicitly conferred, in other words, is deemed “excepted.” See Ex parte McCordle, 74 U.S. (7 Wall.) 506, 513 (1869) (acknowledging “the principle that the affirmation of appellate jurisdiction [in statute] implies the negation of all such jurisdiction not affirmed”).
97. Although the Supreme Court has never struck down a statutory grant of jurisdiction on the ground that it exceeded the scope of the “arising under” clause in Article III, it has struck down such statutes for seeking to extend the Supreme Court’s original jurisdiction beyond constitutional bounds, see Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and for attempting to confer jurisdiction over suits falling outside Article III’s “case or controversy” requirement, see Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
federal constitution forbade the general government to exercise its regulatory powers in this forbearing, sanguine, and initially perhaps experimental manner . . . . It would be regrettable for Congress to be forced instead to exert its authority to the full in order to employ it at all.99 I have argued elsewhere that the principal threat to state autonomy in the current legal environment stems from the preemption of state law by federal statutes.100 If that is true, then perhaps we should celebrate a “species of regulation”101 that leaves state substantive law intact.

This argument derives much of its force from an assumption that we should be more worried about expanding the substantive reach of federal legislation than about merely expanding federal jurisdiction to adjudicate. That may, as a relative matter, be so. But I want to suggest that there is also something normatively attractive about state court adjudication. This is not the place to explore that issue in depth, but I can at least identify one rarely noted reason to care about state court jurisdiction, which is that state courts diversify political control over the judiciary.102 They are constituted through different forms of judicial selection (e.g., elections, different appointment regimes), and the traditional levers of ex post political control (e.g., jurisdiction stripping, budgetary control) may operate differently at state level. More importantly, the state courts are selected and sometimes curbed by communities in which the correlation of political forces may be quite different from that at the national level. This diversification is significant because no one is certain that the way federal judges are appointed, confirmed, and checked is optimal. But the crucial point is that having the law applied by different courts subject to different lines of accountability contributes to an overall regime of checks and balances. If this is right, then a regime of protective jurisdiction that leaves state substantive law intact but shifts authority to adjudicate to the federal courts fails to capture an important aspect of federalism.

In any event, Justice Frankfurter was skeptical of Professors Bickel and Wellington’s argument, commenting in *Lincoln Mills* that “[s]urely the truly technical restrictions of Article III are not met or respected by a beguiling phrase that the greater power here must necessarily include the lesser.”103 Such arguments often fail on the ground that the lesser power is

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99. *Id.* at 20-21. *Accord Vázquez*, supra note 7, at 34 (“Conferring federal jurisdiction by displacing state law is more intrusive from a federalism perspective than conferring federal jurisdiction without displacing state law”).


102. There are also, of course, the more traditional arguments about superior state court expertise on state law questions and limitations on federal judicial resources.

103. 353 U.S. at 474 (Frankfurter, J., dissenting). “Greater/lesser power” arguments have been rejected in any number of areas. *See*, e.g., *Republican Party v. White*, 536 U.S. 765, 788 (2002) (“The greater power to dispense with [judicial] elections altogether does not include the lesser power to
not really "lesser,"\textsuperscript{104} and I submit that this may well be true in the case of protective jurisdiction. In a world with hardly any substantive constraints on the reach of Congress's powers,\textsuperscript{105} the critical restraints on national legislative action are political and procedural: Statutory proposals must navigate a complicated legislative procedure with multiple veto-gates, and they must secure the acquiescence of a majority of legislators who may not only be cognizant of state governmental interests but also (or alternatively) hostile to the particular proposal on the merits.\textsuperscript{106} The maintenance of these political and procedural constraints on national action is the central concern of "process federalism" approaches, which accordingly de-emphasize substantive constraints like the enumerated powers doctrine. From a process perspective, the "lesser" power to create federal jurisdiction over a given situation may be easier for Congress to use than the "greater" power to legislate substantially.\textsuperscript{107}

\textsuperscript{104} See, e.g., Richard A. Epstein, \textit{Unconstitutional Conditions, State Power, and the Limits of Consent}, 102 Harv. L. Rev. 4, 30-31 (1988) (demonstrating, by way of the economic effects on two businesses seeking corporate charters, that the "lesser power" of selectively granting charters has greater effects than the "greater power" of denying all charters); Seth F. Kreimer, \textit{Allocational Sanctions: The Problem of Negative Rights in a Positive State}, 132 U. Pa. L. Rev. 1293, 1313-14 (1984) (noting that because the government's "greater power" to absolutely deny a benefit may be practically unusable, it does not follow that the government has the "lesser power" of selective denial).

\textsuperscript{105} Compare, e.g., United States v. Lopez, 514 U.S. 549 (1995) (holding that the federal Gun Free School Zones Act fell outside the reach of Congress's commerce powers), with Gonzales v. Raich, 545 U.S. 1 (2005) (reading Lopez narrowly in upholding Congress's authority to regulate the possession of home-grown marijuana). See generally Bickel & Wellington, \textit{supra} note 98, at 21 (acknowledging that protective jurisdiction could potentially encompass "a considerable slice of state law" because of "the general expansion of the area of federal interest and competence").

\textsuperscript{106} See generally Herbert L. Wechsler, \textit{The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government}, 54 Colum. L. Rev. 543 (1954) (stressing the political representation of the states in Congress); Bradford R. Clark, \textit{Separation of Powers as a Safeguard of Federalism}, 79 Tex. L. Rev. 1321 (2001) (stressing the procedural difficulties of the legislative process as a check on federal legislative action). Professor Vázquez argues that "the reason that a statute substantively displacing state law would be more difficult to get enacted is precisely because it is more intrusive of state interests," and suggests that "the comparative ease of enacting such a law" is hardly a reason to prefer the more intrusive option. Vázquez, \textit{supra} note 7, at 1767. This would be correct if intrusion on state interest were the only reason making substantive federal legislation more difficult to enact. As I discuss in the text, however, the primary hurdle to such legislation is likely not federal solicitude for state interests, but rather the difficulty of reaching agreement among federal politicians concerning the substantive policy to be enacted. Vázquez's argument becomes even less compelling if the enactment of "bare" jurisdictional statutes actually leads to the creation of preemptive federal common law. See \textit{infra} notes 114-115 and accompanying text.

\textsuperscript{107} See Goldberg-Ambrose, \textit{supra} note 6, at 578 ("To avoid having to articulate a policy that may offend some segment of the public, Congress may prefer to rely on state law, using federal jurisdiction as a covert means of achieving its ends.").
Consider, for example, the provision for a federal forum to settle disputes about liability for injuries arising out of the September 11, 2001 attacks. Compensation of the victims of those attacks has been highly contentious along a number of different dimensions. If Congress had had to agree on substantive rules of liability, the political and procedural obstacles to legislating would have gone up substantially; indeed, it is hardly inconceivable that the parties would have been left to litigate under state rules of decision in state court. I do not mean to venture an opinion as to whether that would have been a good thing; my point is simply that the ability to bracket the substantive issues and simply provide a federal forum may often lower the political and procedural hurdles that federal legislation must otherwise overcome. If that is right, then Professors Bickel and Wellington may have been wrong to suggest that providing a federal forum is always a “lesser” threat to state interests then substantive federal legislation. The option of providing for protective jurisdiction may, in fact, threaten state courts by making extensions of federal jurisdiction easier than they would be if they were required to be accompanied by extensions of federal substantive law.

Professor Mishkin’s more circumscribed approach to protective jurisdiction is less vulnerable to these sorts of process federalism arguments. That is because his theory requires, as a predicate to the exercise of protective jurisdiction, that Congress have already enacted a substantive federal legislative program in the relevant field. Even


109. This is no doubt why, in administering the federally-created fund for compensating victims who opt to forego litigation, Congress largely delegated responsibility for determining entitlements to compensation to a “special master” appointed by the Attorney General. See ATSSSA §§ 404(a)(2) (delegating authority to the Attorney General to “promulgate all procedural and substantive rules for the administration of this title”), 405(b)(1)(B)(ii) (delegating to the Special Master authority to determine “the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant”).

110. My argument here is similar to a standard critique of broad delegations of legislative authority to administrative agencies. That critique holds that the ability to delegate difficult policy choices to agencies makes it easier for Congress to legislate without being held politically accountable for potentially unpopular aspects of the resulting legislative program. See, e.g., DAVID Schoenbrod, Power Without Responsibility 99–105 (1993).

111. See, e.g., Goldberg-Ambrose, supra note 6, at 582 (“[T]he situation may often be such that Congress would not act at all if its only option were to create federal substantive standards.”). It is odd to object, as Professor Vázquez does, that this is “more a political than a legal argument.” Vázquez, supra note 7, at 1766 (quoting Michael Herz, Justice Byron White and the Argument that the Greater Includes the Lesser, 1994 BYU L. Rev. 227, 241–42 (1994)). After all, our legal structures of federalism and separation of powers are designed primarily to calibrate political checks on power.

112. Justice Frankfurter scoffed at this distinction, observing that Professor Mishkin’s theory “has the dubious advantage of limiting incursions on state judicial power to situations in which the State’s feelings may have been tempered by early substantive federal invasions.” 353 U.S. at 476 (Frankfurter, J., dissenting).
Mishkin’s theory posits, of course, that the federal regime will take no substantive position on many of the issues giving rise to litigation; otherwise, there would be no need to extend a protective umbrella over cases for which state law provides the rule of decision. This necessarily implicates the process federalism argument already developed, because every issue that federal legislation can bracket may well reduce the political and procedural obstacles to enactment;\footnote{113} indeed, the issues most likely to raise such obstacles are precisely those that Congress is most likely to bracket.

Moreover, the narrower form of protective jurisdiction raises a distinct problem of its own. Where Congress has already articulated an extensive policy in the relevant regulatory field—the prerequisite for Professor Mishkin’s version of protective jurisdiction—federal courts are likely to take that policy as an invitation to formulate federal common law rules of decision to govern the cases falling within their jurisdiction. This, after all, is precisely what happened in Lincoln Mills, where the majority avoided recourse to protective jurisdiction altogether by finding a delegation of federal common lawmaking authority implicit in the jurisdictional statute.\footnote{114} Congress may be able to avoid this problem of substantive law “creep” by making clear its intention that cases falling within the jurisdictional statute be governed by state law. Even where Congress seeks to disavow substantive preemption, however, the courts may well find that particular state rules of decision conflict with federal policy in the area,\footnote{115} creating a regulatory vacuum to be filled with federal common law.

\textit{B. State Courts’ Control of State Law}

A second set of arguments against protective jurisdiction focuses on its tendency to divest the state courts of their authority over state law. As the Supreme Court acknowledged in Murdock v. Memphis, “[t]he State courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise.”\footnote{116} For this reason, Justice Frankfurter argued, “[a]ny advantage of giving jurisdiction to the

\begin{footnotesize}
\footnote{113}{See Martha Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 883, 938 (1986) ("It is also probably true that more federal law will result if Congress can delegate to the judiciary than if it could not; it is easier for Congress to enact a law federalizing an area and telling the courts to devise the law than it is for Congress to create the law itself."). See also James J. Brudney, Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response? 93 Mich. L. Rev. 1, 29-32 (1994) (describing how requiring Congress to legislate in detail can increase burdens of legislative inertia).}
\footnote{114}{See Lincoln Mills, 353 U.S. at 456.}
\footnote{115}{See, e.g., Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (finding conflict preemption notwithstanding the presence of an explicit savings clause protecting state law).}
\footnote{116}{87 U.S. (20 Wall.) 590, 626 (1875). See generally Barry Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1237-38 (collecting authorities in support of this principle).}
\end{footnotesize}
federal courts must be balanced against the disadvantages of taking away from the State courts causes of action rooted in State law.\footnote{117}

One version of this argument focuses on the dignitary affront to the state judiciary. As Justice Frankfurter noted, "[t]he theory [of protective jurisdiction] must have as its sole justification a belief in the inadequacy of state tribunals in determining state law."\footnote{118} These sorts of dignitary concerns were central to the Rehnquist Court’s revival of federalism-based constraints on Congress’s legislative powers; the Court has written, for example, that "[t]he preeminent purpose of state sovereign immunity is to accord states the dignity that is consistent with their status as sovereign entities."\footnote{119} Many commentators have criticized this emphasis on dignity,\footnote{120} and I do not mean to press the purely dignitary criticism too far. Nonetheless, as Judith Resnik and Julie Chi-Hye Suk have demonstrated, the dignity of public institutions is important to their ability to govern.\footnote{121} Moreover, dignity may be especially important to state courts, which like all courts in our system depend on their perceived legitimacy to give authority to their rulings.\footnote{122}

\begin{footnotes}

\footnotetext{117.} Williams v. Austrian, 331 U.S. 642, 680 (1947) (Frankfurter, J., dissenting).

\footnotetext{118.} Lincoln Mills, 353 U.S. 475 (Frankfurter, J., dissenting); see also Note, Over-Protective Jurisdiction?: A State Sovereignty Theory of Federal Questions, 102 Harv. L. Rev. 1948, 1961 (1989) (arguing that protective jurisdiction "discredits state courts").

\footnotetext{119.} Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002); see also Robert F. Nagel, Judicial Power and the Restoration of Federalism, 574 Annals Am. Acad. Pol. & Soc. Sci. 52, 58 (2001) (arguing that the Court’s federalism rulings "insist that states retain a certain degree of dignity and status, and this is an important precondition to the sort of competition between levels of government that the Framers envisioned").

\footnotetext{120.} See, e.g., Ann Althouse, On Dignity and Deference: The Supreme Court’s New Federalism, 68 U. Cinn. L. Rev. 245 (2000) (criticizing the Court’s invocations of state dignity as an unhelpful abstraction); Peter J. Smith, States as Nations: Dignity in Cross-Doctrinal Perspective, 89 Va. L. Rev. 1 (2003) (acknowledging the importance of sovereign dignity in foreign relations law, but arguing that the concept has no application when Congress seeks to subject states to suit under federal law). The dignitary argument advanced here is arguably consistent with Professor Smith’s criticism of the Court’s state sovereign immunity cases, which involve the states’ responsibilities under supreme federal law. With respect to the state law claims at issue in protective jurisdiction situations, the states are the relevant sovereign. See, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 150-57 (1996) (Souter, J., dissenting) (arguing that the States are sovereign as against state claims, but not federal ones).

\footnotetext{121.} Judith Resnik & Julie Chi-Hye Suk, Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty, 55 Stan. L. Rev. 1921, 1943-46 (2003); see also Young, Two Federalisms, supra note 100, at 157-58 (discussing the importance of dignity for states).

\footnotetext{122.} Cf. Note, Over-Protective Jurisdiction, supra note 118, at 1961-62 (worrying that federal laws divesting the state courts of jurisdiction over their own law “forecloses a view of state courts as the impartial articulators of the political community’s shared ideals, reducing them to mere administrative bodies serving at the pleasure of Congress”). Professor Vázquez’s invocation of Justice Story’s opinion in Martin v. Hunter’s Lessee in response to this dignitary concern, see Vázquez, supra note 7, at 1770 (quoting Martin v. Hunter’s Lessee, 14 U.S. 304, 346-47), is odd, as Story was talking about affronts to state court dignity, such as the diversity jurisdiction, that were built into the constitutional text. Protective jurisdiction has no such textual warrant, of course. The empirical assumptions about the quality of justice in state courts that may have informed textual provisions like the Diversity Clause do not bind us today, and Justice Story’s views on the question are nearly 200
The more fundamental problem, however, arises out of protective jurisdiction's threat to the state courts' supremacy as expositors of state law.\textsuperscript{123} In Murdock, the Supreme Court interpreted the federal statute conferring jurisdiction over appeals from the state courts of last resort to permit review of federal questions only; on any state law issues that might be present in the same case, the state courts hold the final say.\textsuperscript{124} That, after all, is why we call them the state supreme courts. Although Murdock was decided on statutory grounds, Justice Miller's majority opinion noted that it was avoiding the constitutional issue that would have been raised had Congress sought to set the Supreme Court above the courts of the States on questions of state law.\textsuperscript{125}

Whether its rule is statutory or constitutional, Martha Field has rightly called Murdock part of the "well-established foundation of the system on which many of our suppositions concerning federalism have been built."\textsuperscript{126} She explains that "Murdock and Erie give states control over their own law":

Without Murdock, the content of 'state law' would vary according to whether it was reviewed by the Supreme Court. If the Supreme Court followed its own view of the best rule on review, instead of following the pronouncements of the highest state court concerning state law, it would not be possible to identify any body of law as 'state law.' It is thus because of Murdock that the whole concept of state law as distinct from federal law is a meaningful one.\textsuperscript{127}

Grants of protective federal jurisdiction over state law claims, however, threaten this crucial relationship between state law and state courts. Even if Murdock had gone the other way, cases like it would have at least started in state courts, so that those courts would have had the first crack at the resolution of state law claims. The interference posed by Supreme Court review would have been mitigated by its infrequency. Protective jurisdiction, however, moves whole categories of state law claims to be tried in the federal courts in the first instance. While the federal courts would no doubt be technically "bound" by state court interpretations, there would be no opportunity for any state court review.

\textsuperscript{123} See generally Goldberg-Ambrose, supra note 6, at 604-08.
\textsuperscript{124} See 87 U.S. (20 Wall.) at 636.
\textsuperscript{125} See id. at 633. See also Field, supra note 113, at 920 ("Murdock is like Erie in that it is unclear whether its . . . rule is properly seen as one of constitutional dimension."). The fundamental role played by the Murdock rule illustrates the vital constitutive role played by jurisdictional statutes in constructing the architecture of the dual judicial system. See generally Ernest A. Young, The Constitution Outside the Constitution, 117 YALE L. J. (forthcoming Fall 2007) (arguing that the vast majority of constitutive work in our legal system is done by extracopyright rules).
\textsuperscript{126} Field, supra note 113, at 922.
\textsuperscript{127} Id. at 921.
Moreover, due to the rule under *Erie* that federal courts are only bound by the rulings of the states’ highest courts, federal judges would be free to disagree with or simply disregard the jurisprudence of state trial and intermediate appellate courts.\textsuperscript{128}

Professor Vázquez notes that the Constitution does not give “the state courts exclusive power to interpret and apply state law.”\textsuperscript{129} He points out that diversity jurisdiction also takes state claims out of the state courts, and that state control over state law is also threatened by outright substantive preemption.\textsuperscript{130} As I discuss further below, however, diversity jurisdiction does not remove entire categories of state claims from state court cognizance, and *Erie* acknowledged the interpretive primacy of state supreme courts by binding federal courts to follow state interpretations of state law. And while I would not deny the threat that substantive preemption poses to state law, such law ceases to be a “state” product if state courts do not control its interpretation.\textsuperscript{131} It is only the state courts, moreover, that are politically responsible to the state electorate, through election in some states and, in others, through all the mechanisms of appointment and budgetary or jurisdictional control available to the political branches.\textsuperscript{132}

The extent to which protective jurisdiction threatens state court control of state law depends on at least three variables: the overall volume of state law claims swept into federal court by a protective statute; the concentration of those claims in particular areas of state law; and the extent to which federal protective jurisdiction is exclusive of the state courts.\textsuperscript{133} Article III’s provision for diversity jurisdiction—a form of protective jurisdiction recognized by the Constitution itself—sweeps a large number of state law claims into federal court. Federal jurisdiction is not exclusive, however, and the claims are not concentrated in any particular area of state law; federal adjudication in the area of torts or contracts, for example, is largely sporadic and based on a variable—the citizenship of the parties—that has little relation to the arguments on the merits.

\textsuperscript{128} See Goldberg-Ambrose, supra note 6, at 575 (suggesting that Congress may create protective jurisdiction because it hopes that federal courts will interpret state law in a way that reflects federal policy preferences).

\textsuperscript{129} Vázquez, supra note 7, at 1768.

\textsuperscript{130} Id. at 1767-68.

\textsuperscript{131} See supra note 127 and accompanying text.

\textsuperscript{132} Professor Vázquez misconstrues the political accountability argument for state court control over state law as one about the “blurring” of political responsibility. See Vázquez, supra note 7, at 1756. My argument is more fundamental, however. It is predicated on the need for state law to be interpreted by judicial institutions that are constituted, staffed, and controlled through the state’s own political processes.

\textsuperscript{133} See Goldberg-Ambrose, supra note 6 at 609-11 (suggesting that protective jurisdiction is most subversive of state courts’ control over state law when it “dominates the litigation in a well-defined area of state law”).
The Clean Air Act’s provision for federal jurisdiction over disputes under state implementation plans, by contrast, may be more troubling on this score. Although the volume of cases is considerably less than in diversity, the Act creates an area of state law—the interpretation of state standards and other pollution control requirements—that can always be litigated in federal court, with no possibility of state supreme court review. If the situation were reversed—that is, if Congress created a significant class of federal law questions that could be litigated in state court and cut off any possibility of review by the U.S. Supreme Court—such a scheme would raise a serious threat to the “essential function” of the Supreme Court in maintaining the uniformity and supremacy of federal law. As Murdock strongly suggests, state courts have a similar role in maintaining the coherence of state law within its own sphere. Systematically diverting particular classes of state questions to the federal courts may threaten that role.

C. Federal “Adoption” of State Law

Professor Vázquez’s contribution to this Symposium offers a creative reconceptualization of protective jurisdiction that seeks to render it more consistent with traditional conceptions of “arising under” jurisdiction. Endorsing Judge Wyzanski’s pre-Lincoln Mills interpretation of the LMRA, Vázquez urges that federal jurisdictional statutes unaccompanied by legislative rules of decision should be construed as adopting the otherwise-applicable state law as federal law. In this scenario, “[j]urisdiction exists over all such claims even if the substantive federal law governing such claims is identical to the laws of some states on the subject.” Not surprisingly, my own view is that this reconceptualization does little to address the underlying problems raised by protective jurisdiction.

Although he acknowledges that “[t]he difference between the adoption theory and Professor Wechsler’s protective jurisdiction theory is no doubt a formal one,” Professor Vázquez sees the objections to

134. See supra notes 56-62 and accompanying text.
135. See, e.g., Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362 (1953) (insisting that Congress’s power to make “exceptions” to the Supreme Court’s appellate jurisdiction does not empower Congress to “destroy the essential role of the Supreme Court in the constitutional plan”); Leonard G. Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. PA. L. REV. 157, 201-02 (1960) (arguing that Congress may not use the Exceptions Clause to negate the Court’s “essential constitutional functions of maintaining the uniformity and supremacy of federal law”); but see Herbert L. Wechsler, The Courts and the Constitution, 65 COLUM. L. REV. 1001, 1005-06 (1965) (suggesting that the power of judicial review springs from jurisdiction to hear a case, not the other way round).
137. Vázquez, supra note 7, at 1754.
protective jurisdiction as essentially formal as well. I hope to have demonstrated, however, that the "formal" requirement that a case "arise under" a substantive federal rule of decision serves meaningful functional purposes. "Adopting" state law without regard to its content would absolve Congress of any need to agree upon and articulate federal policy; hence, the adoption approach would greatly ease the expansion of federal jurisdiction. Indeed, Vázquez would go further than Professor Mishkin by resting protective jurisdiction even on purely procedural interests—\textsuperscript{138} at which point it would be hard to imagine any limit at all on federal question jurisdiction. And by adopting state law as federal, Vázquez’s approach would sever the link between state law and state courts even more dramatically than traditional protective proposals.

I am also unwilling to concede Professor Vázquez’s premise, which is that Congress could confer a blanket authorization to the federal courts to make federal common law in a given substantive area.\textsuperscript{139} To the extent that such an authorization did not provide an "intelligible principle" to guide federal common lawmaking, it would raise significant nondelegation concerns.\textsuperscript{140} The nondelegation doctrine, to be sure, poses little current impediment to broad delegations of lawmaking authority to federal administrative agencies.\textsuperscript{141} But administrative lawmaking is subject to extensive procedural regulation, as well as substantive judicial review, under the Administrative Procedure Act; likewise, administrative agencies are subject to legislative oversight and political control through the elected Executive.\textsuperscript{142} Checks on delegations to courts, by contrast, are considerably fewer and further between. Moreover, the fact that courts have found the nondelegation doctrine too difficult to enforce in a principled way hardly means that nondelegation concerns are irrelevant in assessing the merits of a doctrinal proposal like Vázquez’s.\textsuperscript{143}

Federal common lawmaking provides an uncomfortable analogy to protective jurisdiction in a second sense. The most legitimate forms of such lawmaking occur when Congress explicitly authorizes federal common law, when the otherwise applicable state law rules would conflict with

\textsuperscript{138} See id. at 1762.

\textsuperscript{139} Id. at 1767-68.

\textsuperscript{140} See, e.g., J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (requiring Congress to articulate an "intelligible principle" to guide the exercise of executive discretion).


\textsuperscript{142} See, e.g., CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEPTUALIZING THE REGULATORY STATE 143 (1990) ("Broad delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.")

federal policy, or when the federal court is filling in the interstices of federal enactments.\textsuperscript{144} Professor Vázquez's notion of "adoption" fits none of these categories. He does not claim that any current jurisdictional statute was actually intended to adopt state law; rather, he would have federal courts—in their discretion—reinterpret certain jurisdictional statutes as accomplishing this end.\textsuperscript{145} By suggesting that federal law adopt state law irrespective of the latter's content, Vázquez jettisons any notion of conflict between federal policy and particular state rules.\textsuperscript{146} And because the adoption proposal is not limited to areas of extensive federal regulation, judicial federalization would be primary rather than interstitial. The proposal thus bears virtually no resemblance to legitimate federal common lawmaking under current law.

The most fundamental problems with Professor Vázquez's proposal, however, stem from the ambiguity of his concept of "adopting" state law. Ordinarily, when federal law "adopts" a principle or concept from state law, it selects the best or most widely-subscribed version of that concept from among the various state permutations on offer.\textsuperscript{147} And if state law is truly "adopted" into federal law, then it becomes federal law for all further purposes: Federal courts should not be bound to follow state court interpretations of that law, for example, and disagreements about its content would be appealable to the U.S. Supreme Court. It is not at all clear that the state law "adopted" under Professor Vázquez's proposal would have these qualities, and that in turn suggests that the adoption is simply a device designed to support federal question jurisdiction. Moreover, it is not clear whether Vázquez would read the jurisdictional statute itself in such cases to authorize the plaintiff's right of action, or whether instead the cause of action would likewise be "adopted" from state into federal law. If the former, then the proposal is unnecessary; the federal statute's creation of the cause of action will suffice to support "arising under" jurisdiction. If the latter, however, the proposal flies in the face of the Court's recent case law disfavoring implication of federal private rights of action.\textsuperscript{148}


\textsuperscript{146} Compare Atherton v. FDIC, 519 U.S. 213, 218 (1997) (noting that "a significant conflict between some federal policy or interest and the use of state law . . . is normally a precondition" for fashioning a rule of federal common law).

\textsuperscript{147} See, e.g., Field v. Mans, 516 U.S. 59 (1995) (defining the meaning of a creditor's reliance under the Bankruptcy Code by selecting a definition of "reliance" from state law, based on a survey of all the different interpretations of such reliance in the different state jurisdictions).

\textsuperscript{148} See, e.g., Alexander v. Sandov, 532 U.S. 275 (2001); HART & WECHSLER, supra note 34, at 781 (observing that since 1979, "the Court . . . has generally rejected claims of implied federal remedies").
To be sure, there are situations in which federal law does adopt state law, and in many of these situations I would agree that cases implicating the adopted state norms arise under federal law. Professor Vázquez argues that once one accepts such adoption at all, the line between adoptions that arise under federal law and those that do not becomes impossible to draw. The question, however, is whether Congress has made a judgment that the particular norms adopted should become federal law. That sort of judgment is recognizably distinct from a judgment that state law, whatever it happens to be, should provide the rule of decision. Whether we call it “adoption” or “protective jurisdiction,” the latter judgment does not create a federal question under Article III.

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Much of the literature on protective jurisdiction, both critical and approving, comes from an era in which discussion of federalism was dominated by open-ended arguments about state sovereignty and the political safeguards of federalism. Carole Goldberg-Ambrose, for example, argued that protective jurisdiction should be limited by means of “a tenth amendment test that weighs competing federal and state interests.” Similarly, Thomas Galligan argued that we may discount federalism-based concerns about protective jurisdiction in bankruptcy because federalism is protected primarily through the political process, and the structure of the jurisdictional statute demonstrated congressional solicitude for state interests. Both these general approaches have come in for considerable criticism in the more recent literature. In addition to problems associated with generalized invocations of sovereignty or political safeguards, each prescription would invite federal courts to exercise a remarkable degree of discretion, either to undertake an indeterminate balancing of likely incommensurable interests, or to judge whether the action of the federal political branches is sufficiently solicitous of state interests. Professor Vázquez would likewise magnify federal judicial discretion, both by expanding the constitutional power of federal courts to decide cases and by encouraging judges to impute to Congress an intent to adopt state law as

149. Vázquez, supra note 7, at 1757-1760.
150. Goldberg-Ambrose, supra note 6, at 609.
151. See Galligan, supra note 32, at 58-71.
152. See, e.g., Saikrishna B. Prakash & John C. Yoo, The Puzzling Persistence of Process-Based Federalism Theories, 79 TEX. L. REV. 1459 (2001) (criticizing process federalism approaches); Timothy Zick, Are the States Sovereign? 83 WASH. U. L. Q. 225 (2005) (criticizing generalized invocations of sovereignty in debates about federalism). By criticizing generalized invocations of these concepts, I do not mean to suggest that they are irrelevant to judicial federalism; after all, I have invoked both process federalism and sovereign dignity in criticizing protective jurisdiction. The point is that previous invocations of these concepts in debates about protective jurisdiction have tended to be far too blunt to respect the relevant interests, and too open-ended to constrain judicial discretion.
federal whenever, by the judges' own lights, expanding jurisdiction would further some federal interest.

My own preference would be to stick with traditional interpretations of the text of Article III. Cases arise under federal "law," not federal interests; hence, as Osborn held long ago, federal law must supply some legal element for a case to fall within Article III. It is no doubt true that, like most formal requirements, this rule will prove both over- and under-inclusive with respect to the federal interests at stake in litigation. That, however, is simply the price we pay for limits on federal power that are sufficiently determinate to be enforced in a principled, law-like way. And in any event, the actual incidence of statutes that must rely on protective theories suggests that adhering to Osborn would do little practical damage to federal concerns. If the Yeti is ever found, it should be shot.

III

IMPLIED PREEMPTION OF STATE COURT JURISDICTION

I have already suggested that it is hard to find any statutes that can be defended solely on a protective theory of "arising under" jurisdiction. In this last Part, however, I want to discuss two additional jurisdictional phenomena that share important characteristics with protective jurisdiction. The first, the doctrine of foreign affairs removal, allows removal to federal court of state law claims that implicate important foreign policy interests of the United States. The second, the doctrine of complete preemption, requires certain state law claims that implicate areas of pervasive federal regulation to be construed as federal claims, with the result that the case may be removed to federal court. Each of these removal doctrines permits federal courts to exercise jurisdiction over cases in which state law provides the rule of decision, for the purpose of protecting strong federal interests. Unlike the forms of protective jurisdiction already discussed, these cases for various reasons generally fall within Article III's grant of subject matter jurisdiction. Nonetheless, federal courts have employed protective theories to extend federal question jurisdiction over the claims in question when otherwise they would run afloat of the well-pleaded complaint rule or be forced to rely on diversity of citizenship.

The most salient difference between these removal doctrines and the ordinary argument for protective jurisdiction is that both foreign affairs removal and complete preemption are wholly products of the judicial imagination. As Judge Tjoflat has noted, "[t]he theory of protective jurisdiction applies only within the context of a special jurisdiction statute; no one has ever argued that § 1331 itself amounts to a grant of jurisdiction to entertain state law claims on particular matters of federal concern."153

153. BellSouth Telecomm. v. MCIphone Access Transmission Servs., 317 F.3d 1270, 1290 (11th Cir. 2003) (Tjoflat, J., dissenting); see also Goldberg-Ambrose, supra note 6, at 566 ("Protective
But what Judge Tjoflat thought impossible is exactly what these removal doctrines assert—that the presence of a sufficiently strong federal interest can cause a state law claim to arise under § 1331 itself. Unsurprisingly, I conclude that these judge-made forms of protective jurisdiction are even more troubling than the versions already canvassed.

A. Foreign Affairs Removal

Foreign affairs removal occurs when a federal court asserts jurisdiction over a suit involving only state law claims, on the ground that those claims implicate important federal interests in the conduct of foreign policy. *Torres v. Southern Peru Copper* 154 is typical. In that case, approximately 700 Peruvian citizens sued a copper mining company, alleging that they had been harmed by sulfur dioxide emissions from the company’s smelting and refining operations in Peru. The plaintiffs filed their case in Texas state court, relying on state law theories of negligence, intentional tort, and nuisance. 155 The defendants removed the case to federal court, and both the district court and the Fifth Circuit found that federal question jurisdiction existed notwithstanding the state-law nature of the claims. Noting that copper mining is critical to the economy of Peru and that the Government of Peru had vigorously protested the lawsuit, the Fifth Circuit concluded that “plaintiffs’ complaint raises substantial questions of federal common law by implicating important foreign policy concerns.” 156

In support of its holding, the *Torres* court noted that “[t]he Supreme Court has authorized the creation of federal common law in the area of foreign relations.” 157 The leading case is *Banco Nacional de Cuba v. Sabbatino*, 158 which fashioned a federal common law rule, the Act of State doctrine, which forbids courts to inquire into the validity of an act of a sovereign government taken within its own territory. The critical point about *Sabbatino* for present purposes, of course, is that it fashioned a federal rule of decision; *Torres*, by contrast, provided a federal forum without articulating any federal rule of decision to govern the case. It is therefore completely unclear, in cases like *Torres*, what federal law the case “arises under” for purposes of § 1331. Presumably, the contention is much like Professor Wechsler’s “greater/lesser power” argument.

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154. 113 F.3d 540 (5th Cir. 1997).
155. See id. at 541-42.
156. Id. at 543.
157. Id. at 542 n.7 (citing Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)).
foreign policy interests would support the fashioning of federal common law rules of decision, as in Sabbatino,\textsuperscript{159} then a fortiori they must support the mere provision of a federal forum.

As I have already suggested, the problem with exercising protective jurisdiction over cases like Torres is not of constitutional dimensions in the same sense addressed by Professors Wechsler and Mishkin. In Torres itself, the parties were of diverse citizenship.\textsuperscript{160} A significant proportion of foreign affairs removal cases likewise involve diverse parties: Foreign nationals sue a U.S. corporation in a state court, plead state law claims, and seek to avoid removal to a federal forum by suing the defendant in its home state.\textsuperscript{161} The rule that defendants may not remove based on diversity if sued in their home state is a statutory rule, however, not a constitutional one. Another leading foreign affairs removal case, Republic of the Philippines v. Marcos,\textsuperscript{162} lacked diversity but postulated, as an alternative ground, that the claim raised as a "necessary element" an issue governed by an actual federal common law rule of decision,\textsuperscript{163} thereby satisfying Osborn's test for constitutional "arising under" jurisdiction.

\textsuperscript{159} I have argued elsewhere that Sabbatino does not, in fact, support any broad mandate to formulate federal common law rules of decision in any case implicating foreign affairs. See Young, Customary International Law, supra note 80, at 443-44.

\textsuperscript{160} See 113 F.3d at 543-44. Jurisdiction in Torres could have been sustained on grounds of diversity alone; the district court had relied on foreign affairs removal only because it determined that Southern Peru Copper was a citizen of both Delaware (its state of incorporation) and Peru (its principal place of business). The court of appeals reversed on this point, rejecting the argument that "a corporation incorporated in the United States with its principal place of business located abroad" should be treated as a foreign citizen, thereby destroying diversity. The court concluded that the state of incorporation controlled. See id.

\textsuperscript{161} See 28 U.S.C. § 1441(b) (permitting removal on diversity grounds "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought"); Paciello de Perez v. AT&T Co., 139 F.3d 1368, 1371 (11th Cir. 1998) (noting that, "because the individual defendants in this case are Georgia citizens, removal would not ordinarily be permitted on diversity grounds").

\textsuperscript{162} 806 F.2d 344 (2d Cir. 1986).

\textsuperscript{163} The question was "whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States subject to future process in the foreign state." Id. at 354. That question, the court of appeals concluded, "it itself a federal question to be decided with uniformity as a matter of federal law." Id. This question seems sufficiently close to the concerns of the federal act of state doctrine recognized in Sabbatino to fit within even a narrow reading of the federal common lawmaking authority recognized in that case. It is not necessarily the case, however, that such a federal element would support statutory "arising under" jurisdiction under § 1331.

The plaintiffs' cause of action in Marcos was, as the court acknowledged, predicated on "a theory . . . akin to a state cause of action for conversion"; the federal common law question concerning the force of the foreign government's directive appeared as an "element" in that cause of action. Id. at 354. The Supreme Court seemed to hold in Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 817 (1986), that a federal element in a state law cause of action would "arise under" federal law for purposes of § 1331 only if a federal private right of action were available to enforce the federal element in question. The federal common law element in Marcos seems unlikely to fit that description. More recently, the Court retreated from Merrell Dow in Grable & Sons Metal Prods., Inc. v. Darwe Engineering & Mfg., 545 U.S. 308 (2005), suggesting that federal elements without a federal private
All these cases, moreover, at least potentially implicate the dormant preemption doctrine recognized by the Supreme Court in Zschernig v. Miller.\textsuperscript{164} Zschernig invalidated an Oregon probate rule restricting the right of foreign heirs to recover proceeds of Oregon estates if their home government was likely to “confiscate” those proceeds. Because the rule invited state judges to comment on the economic system prevalent in other countries—in other words, to bash Communist regimes from the bench—it unconstitutionally interfered with the national government’s exclusive control over foreign relations.\textsuperscript{165} Cases where a foreign government has protested a lawsuit in state court raise similar concerns, so that Zschernig is at least potentially available as a federal defense to the imposition of liability under state law. The presence of that potential federal element may be sufficient to satisfy Article III under a broad reading of Osborn.\textsuperscript{166}

right to enforcement may support jurisdiction under § 1331 if there are strong interests in providing a federal forum and the federal element in question implicates a class of cases that is small enough not to alter the balance between state and federal courts. Cases like Marcos may or may not fit this new standard.

\textsuperscript{164} 389 U.S. 429 (1968).

\textsuperscript{165} See id. at 440-41.

\textsuperscript{166} Resting federal question jurisdiction on a potential Zschernig argument is subject to two powerful criticisms. The first would attack the broad reading of Osborn as recognizing “arising under” jurisdiction whenever the suit includes a potential federal element. Although there is language in Chief Justice Marshall’s opinion to support this reading, it would remove virtually all limits to Article III. Any case, for instance, encompasses the possibility that a party might raise a federal Due Process challenge to the court’s procedures. While I think this is a powerful criticism in general, in the context of foreign affairs removal it would function largely as a rule of pleading. Although the cases thus far have not generally invoked Zschernig explicitly, it would be easy to do so: Any defendant who can plausibly raise the foreign affairs removal doctrine will be able to make an argument for dormant preemption under Zschernig. Once that is done, the case will fit squarely under a more limited reading of Osborn.

A second criticism stems from the dubious validity of the Zschernig doctrine itself. Many scholars have recognized that, in a globalizing world, an incredibly wide range of state actions—from regulating pollution within state borders to executing state citizens for murder—may complicate the nation’s foreign relations. See, e.g., Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 85 Va. L. Rev. 1617 (1997); Young, Customary International Law, supra note 80, at 415-23. The majority opinion in Zschernig offered no principled basis for distinguishing among these various forms of potential “interference.” The doctrine is, in other words, so broad as to be unusable in practice. Hence, as Carlos Vázquez has noted, “Zschernig has so far been the only case in which the U.S. Supreme Court has struck down a state law on dormant foreign affairs power grounds.” Carlos Manuel Vázquez, Whither Zschernig? 46 Vill. L. Rev. 1259, 1262 (2001). Professor Vázquez rightly notes that Zschernig’s general concern about state interference with foreign relations influences a variety of other doctrines governing the interaction of state and federal law in foreign affairs cases, including statutory preemption of state actions bearing on foreign relations. See id. at 1266; see also American Ins. Assn. v. Garamendi, 539 U.S. 396, 419-20 (2003) (invoking Zschernig to inform a decision concerning the preemptive effect of a federal executive order). But these narrower doctrines are not nearly so universally available in foreign affairs removal situations.

As long as Zschernig remains good law, however, an argument predicated upon it can at least plausibly be advanced in a wide variety of cases implicating foreign relations. This poses a procedural conundrum: Because of the cautious way that courts have generally applied Zschernig in practice, courts seem likely to reject on the merits a claim that state tort liability is preempted in a case like Torres, for example. Arguments grounded in federal law generally need not be meritorious, however, in
The fact that Congress could probably enact a statute establishing protective jurisdiction over cases like Torres, at least for cases involving diverse parties or where a federal common law rule of decision plausibly provides an element of or defense to the plaintiff's claim, does not mean that foreign affairs removal is constitutionally sound. A serious separation of powers objection remains, stemming from the judge-made nature of the doctrine. The Supreme Court has repeatedly said that "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree."\textsuperscript{167} This is especially true of the lower courts, where the limitation stems from the fact that Article III confers the power to establish lower federal courts on Congress, not on the courts themselves:

Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. . . . [T]his reflects the constitutional source of federal judicial power: Apart from this Court, that power only exists "in such inferior Courts as the Congress may from time to time ordain and establish."\textsuperscript{168}

Even if we were to accept that federal courts ought to exercise jurisdiction over state law claims on the basis of federal interests not reflected in positive law, and even if we were convinced that such jurisdiction would fit within Article III, it would still remain Congress's prerogative to provide for such jurisdiction.

Strict enforcement of this principle in the context of foreign affairs removal would serve two important sets of constitutional interests. The first consists of the federalism interests discussed in Part II—that is, minimizing the intrusion on state court jurisdiction and maintaining the state courts' control over the interpretation and application of state law. Although foreign affairs removal has thus far been applied relatively narrowly to cases in which foreign governments have filed protests concerning a particular lawsuit, its articulated rationale extends to all cases

\textsuperscript{167} Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); see also Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties.").

that have the potential to affect the foreign policy interests of the United States. In a world where international concerns about trade and human rights pervasively bear on much of what our states do, the class of cases in which a foreign affairs argument could be made is quite broad.\textsuperscript{169} We would ordinarily expect these sorts of concerns to be balanced against the values of state autonomy by the federal political branches, and particularly by Congress, in which the states are at least represented. But where the federal courts take it upon themselves to extend their jurisdiction at the expense of state courts, even these tenuous "political safeguards" fall by the wayside.

Where the courts weigh the federal foreign policy interests to be protected by an extension of federal question jurisdiction, concerns also arise about their competence to do such balancing. A protective jurisdictional \textit{statute} represents a judgment by the national political branches that the advantages of providing a federal forum outweigh any corresponding disadvantages, but no such political-branch judgment has been made under the doctrine of foreign affairs removal. As one scholar has noted, "[j]udges typically lack the diplomatic experience and expertise necessary to make these determinations. Institutionally, courts are poorly situated to gather the necessary information and intelligence or to consult with the relevant government stakeholders . . . ."\textsuperscript{170} Indeed, the practice of allowing removal to turn on direct protests by foreign governments filed with the court calls upon federal judges to play the role of diplomats themselves, undermining the traditional imperative that the nation speak with "one voice" in foreign affairs.\textsuperscript{171}

It may well be that certain classes of state law claims pose a particular risk of upsetting U.S. foreign policy. At a minimum, Congress should have to identify those classes of cases for itself and enact a jurisdictional statute to cover them. Such a statute would be constitutional at least in those cases involving diverse parties or where a claim or defense incorporates elements of national foreign affairs law. Better yet, Congress could identify the substantive federal interests most likely to be threatened and fashion a


\textsuperscript{170} Baak, supra note 1, at 1511; see generally Goldsmith, supra note 166, at 1623 (questioning the competence of judges to evaluate foreign affairs interests without guidance from the political branches).

\textsuperscript{171} In practice, of course, the nation inevitably speaks in many voices on many issues. See generally Sarah H. Cleveland, \textit{Crosby and the 'One-Voice' Myth in U.S. Foreign Relations}, 46 VILL. L. REV. 975 (2001). But adding a direct voice for federal judges to the cacophony hardly seems like a positive step. See Baak, supra note 1, at 1509-10 (suggesting that "[i]nviting foreign governments to play a role in a federal court's determination of jurisdiction actually increases the possibility that a foreign government will be offended").
preemptive federal rule of decision to protect them, thus avoiding any question of protective jurisdiction. Any such rule seems likely to be less intrusive on the states than the open-ended, judge-made doctrine of foreign affairs removal.

B. Complete Preemption

The doctrine of "complete preemption" holds that "if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law."172 Like foreign affairs removal, complete preemption is a theory for removing complaints pleaded entirely under state law to federal court under § 1331, notwithstanding the lack of any relevant federal jurisdictional statute abrogating the well-pledged complaint rule.173 Like protective jurisdiction, complete preemption ultimately rests on the notion that "arising under" federal law should be interpreted expansively to cover not only cases in which federal law provides the rule of decision but also cases in which a federal forum for state claims is deemed necessary to protect federal interests stemming from a federal regulatory scheme. Although it may seem that we are now far afield from the core issues of protective jurisdiction, I hope to show that complete preemption rests upon many of the same assumptions—and raises many of the same problems.

Complete preemption and protective jurisdiction share a common ancestry: They both arise out of controversies surrounding the Labor Management Relations Act and the *Lincoln Mills* case. As I have already discussed, Professor Mishkin and others interpreted § 301 of the LMRA as providing a federal forum for disputes about the interpretation and enforcement of collective bargaining agreements, even though those disputes would be decided under state law on the merits. The *Lincoln Mills* majority, however, held that § 301 implicitly delegated to the federal courts the authority to fashion federal common law rules of decision to govern such disputes. Somehow, subsequent courts magnified this wholly implicit grant of lawmaking authority into a federal substantive regime of "unusually powerful preemptive force."174 In *Avco Corp. v. Aero Lodge No. 735*,175 the Court interpreted § 301 not only as providing a federal

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175. 390 U.S. 557 (1968).
forum for LMRA disputes and delegating federal common lawmakers authority to govern such disputes, but as preempting state law so thoroughly “as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization.” As a result, “[a]ny such suit is purely a creation of federal law,” even if the plaintiff seeks to plead its case under state rules of decision. Avco thus allowed the defendant to remove such a case to federal court under the general removal and “arising under” statutes.

The most recent specimen of complete preemption is the Supreme Court’s decision in Beneficial National Bank v. Anderson, which described the doctrine in expansive terms. The plaintiffs in Beneficial sued a federally-chartered bank under state law, alleging that the bank’s interest rates were usurious. The bank removed the case to federal court on the ground that the National Bank Act not only exclusively governs usury claims against national banks on the merits, but also that the remedies provisions in the Act are exclusive of state law. The Supreme Court upheld the district court’s exercise of jurisdiction:

Because [provisions of the National Bank Act] provide the exclusive cause of action for [usury] claims, there is, in short, no such thing as a state-law claim of usury against a national bank. Even though the complaint makes no mention of federal law, it unquestionably and unambiguously claims that petitioners violated usury laws. This cause of action against national banks only arises under federal law and could, therefore, be removed under § 1441.

After Beneficial, removal on a complete preemption theory seems to be available whenever a federal statute “provide[s] the exclusive cause of action” for a particular class of claims.

The rationale for complete preemption, on the surface, is that state law claims in an area that Congress has regulated with unusual preemptive force really just are federal claims. For this reason, complete preemption

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176. Franchise Tax Bd., 463 U.S. at 23. I quote Justice Brennan’s explication of Avco in Franchise Tax Board by necessity, because Avco itself said very little about why it permitted removal. See Beneficial Nat’l Bank, 539 U.S. at 14 (Scalia, J., dissenting) (observing that “the opinion in Avco failed to clarify the analytic basis for its unprecedented act of judicial alchemy”).


178. See 390 U.S. at 360.


181. 539 U.S. at 11.

182. The majority framed “the dispositive question in this case” as follows: “Does the National Bank Act provide the exclusive cause of action for usury claims against national banks? If so, then the cause of action necessarily arises under federal law and the case is removable.” Id. at 9.

183. See id. at 8 (“When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.”); Seinfeld, supra note 172, at 567-68; Mary P. Twitchell, Characterizing
is sometimes labeled the "artful pleading" doctrine—it purports to unmask federal claims masquerading as state ones.\footnote{184} The Supreme Court has long maintained, however, that "[t]he [well-pleaded complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law."\footnote{185} If a federal cause of action is exclusive of state claims—that is, if federal law preempts state causes of action—then the state claim pleaded by the plaintiff is simply invalid.\footnote{186} As Justice Scalia's dissent in Beneficial pointed out, "[t]he proper response to the presentation of a nonexistent claim to a state court is dismissal, not the 'federalize-and-remove' dance authorized by today's opinion."\footnote{187} The meaning of a "well-pleaded" complaint is that plaintiffs may not avoid federal jurisdiction by omitting a federal element that is necessary to the state law theory they have chosen to plead,\footnote{188} or create federal jurisdiction by including a federal element that is superfluous to the plaintiff's chosen theory. The rule does not enjoin courts to identify the Platonic essence of the plaintiff's claim and determine whether that essential claim relies upon a different source of law than what the plaintiff has identified.\footnote{189} Thus, the Court's suggestion that state law claims subject to complete preemption are really federal ones is "an entirely conclusory rationale"—a "sheer fiction."\footnote{190}

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\footnote{184}{See, e.g., Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 310 n.5 (3d Cir. 1994). See generally Tristin K. Green, Comment, Complete Preemption—Removing the Mystery from Removal, 86 Calif. L. Rev. 363, 371-79 (1998). Ms. Green traces the term "artful pleading" back to Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981), which stated that "courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . and occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." Id. at 397 n.2 (quoting 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722 at 564-66 (1976)). Moitie was a case about res judicata; it held that a plaintiff should not be allowed to avoid the preclusive effect of a prior adverse judgment on a federal claim by repleading what was functionally the same claim under state law. See id. at 397 n.2, 402. That tells us little about the distinct issue of complete preemption.

\footnote{185}{Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); see also The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("Of course the party who brings a suit is master to decide what law he will rely upon."); Twitchell, supra note 183, at 821-22 (collecting cases). Professor Twitchell rightly notes that there are exceptions to this rule. See id. at 822-25. The trick, of course, is not to construe these exceptions so broadly as to swallow the general rule of plaintiff choice.

\footnote{186}{See Friedman, supra note 116, at 1273 (commenting that the complete preemption situation "essentially is no different than when a defendant argues that a state statutory cause of action is unconstitutional").

\footnote{187}{539 U.S. at 18 (Scalia, J., dissenting); see also Seinfeld, supra note 172, at 553-54 n.59.

\footnote{188}{This would be the case if, for example, if a state-law suit against a foreign sovereign omitted to acknowledge that the defendant was, in fact, a foreign sovereign or to plead one of the requisite federal-law predicates to liability under the Foreign Sovereign Immunities Act.

\footnote{189}{See, e.g., Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced.").

\footnote{189}{Morrison, supra note 173, at 187, 188.
There is, of course, a federal-law defense in all complete preemption cases—that the plaintiff’s state-law claims are preempted by the exclusive federal cause of action. For that reason, a special removal statute allowing federal-defense removal in preemption cases would surely be constitutional under Osborne. Congress might also federalize the relevant class of affirmative claims and provide explicitly for their removal to federal court, as it did in the Price-Anderson Act for tort actions arising out of nuclear accidents. But there was no such statute in Beneficial—or in Avco, or in any of the Court’s other complete preemption cases. In the absence of such legislation, a preemption defense should be treated like any other defense. As Justice Scalia explained, “pre-emption requires a state court to dismiss a particular claim that is filed under state law, but it does not, as a general matter, provide grounds for removal.”

If we cannot say that the plaintiff’s claim is “really” a federal one, and we cannot support removal on the basis of a federal preemption defense, then what is the basis for federal subject matter jurisdiction in cases like Avco and Beneficial? I submit that complete preemption is best understood as a form of protective jurisdiction. Just as Professor Mishkin argued that courts should interpret the “arising under” language of Article III to cover state-law claims implicating federal interests in the integrity of a federal regulatory program, complete preemption theories seek to interpret § 1331’s parallel language to provide a federal forum for state-law claims

191. See Mesa v. California, 489 U.S. 121, 136-37 (1989) (reading the federal officer removal statute to require the assertion of a federal defense, for the reason that so construed, the statute would avoid any constitutional difficulty under Osborne’s interpretation of Article III).

192. See 42 U.S.C. §§ 2014(hh) (“A public liability action shall be deemed to be an action arising under section 170, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.”), 2210(n)(2) (“With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court . . . shall be removed . . . to the United States district court having venue under this subsection.”). The Supreme Court described the significance of these provisions as follows:

By its unusual preemption provision, see 42 U.S.C. § 2014(hh), the Price-Anderson Act transforms into a federal action, “any public liability action arising out of or resulting from a nuclear accident,” § 2210(n)(2). The Act not only gives a district court original jurisdiction over such a claim, see ibid., but provides for removal to a federal court as of right if a putative Price-Anderson action is brought in a state court, see ibid. Congress thus expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested.

193. Beneficial National Bank, 539 U.S. at 13 (Scalia, J., dissenting); see also Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987) (stating that “a case may not be removed to federal court on the basis of . . . the defense of pre-emption”); Gully v. First Nat’l Bank, 299 U.S. 109, 116 (1936) (“By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.”).
that overlap with important areas of federal regulation. Although the arguments against protective jurisdiction in the § 1331 context are not of constitutional stature, they implicate structural concerns similar to those that I have already discussed under Article III.

Like protective jurisdiction, complete preemption reflects a profound distrust of state courts’ willingness to adjudicate state-law claims in a way that respects federal policy. In fact, it seems fair to say that Professor Mishkin’s version of protective jurisdiction is inherently based on notions of preemption. Consider, for example, state-law claims for breach of a fiduciary duty brought by employees against the administrator of an employee benefit plan. The federal ERISA statute, which governs such plans, represents a complex balance of different federal regulatory policies. Mishkin’s theory of protective jurisdiction would permit Congress to bring state-law claims bearing upon such plans into federal court, based on the fear that the state courts might decide such claims in a way that would undermine the effectiveness of the overlapping federal regulatory regime. Any such resolution of the state claims, however, would be preempted under ordinary principles of preemption doctrine as an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”194 The only reason to take the additional step of bringing the state claims into federal court, then, is if one does not trust the state courts to reach this conclusion on their own.195

Complete preemption would achieve precisely the same result, for precisely the same reason, by recharacterizing the state-law claims as “essentially federal.”196 As Gil Seinfeld has explained, “[t]he most significant functional effect of applying the complete preemption rule in any given case is that a federal court (rather than a state court) gets to decide whether state law is, in fact, preempted.”197 The only difference between my hypothetical protective statute and a case like Metropolitan Life Insurance Co. v. Taylor,198 which held certain claims completely preempted under ERISA, is that complete preemption occurs of the judges’ own volition, without the nicety of a jurisdictional statute. Both doctrines permit a form of federal defense removal based on the fear that state courts will either incompetently or unfaithfully decide questions concerning the preemptive effect of the federal regulatory regime on the state-law claims.

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195. If I am right about the relationship between preemption and Professor Mishkin’s version of protective jurisdiction, then Mishkin’s view could be implemented, without stretching current Article III doctrine, by a statute permitting removal on the basis of a federal preemption defense.
196. Federated Dept. Stores v. Moitie, 452 U.S. 394, 397 n.2 (1981). In Moitie, the Court acknowledged that removal of “essentially federal” claims may sometimes be appropriate, without exploring the scope or limits of that principle.
197. Seinfeld, supra note 172, at 568.
before them. Hence, in *Beneficial*, the United States argued for removal based on the fear that “the state court would err and allow the claim to proceed under state law notwithstanding Congress’s decision to make the federal cause of action exclusive.”

As Justice Scalia has pointed out, complete preemption is an odd way to protect federal law from the state courts’ supposedly unsympathetic disposition toward preemption arguments: Complete preemption (thus far) only occurs where there is an affirmative federal cause of action supplanting state claims, and “there is no more reason to fear state-court error” in that sort of situation than with respect to federal preemption arguments generally. Indeed, Professor Seinfeld’s recent defense of complete preemption seems to reject this exclusive cause of action test in favor of an analysis grounded in the federal interest in the uniform interpretation of federal law. This rehabilitative effort, however, has problems of its own. Professor Seinfeld suggests that complete preemption should be limited to circumstances in which there is a particularly strong federal interest in “regulatory uniformity,” and that the presence of *field* preemption is a good proxy for this interest. It is hardly obvious, however, that Congress may not have an overriding interest in the uniform application of a single rule in an otherwise unpreempted field. Moreover, as Justice Stone observed over a half-century ago,

Little aid can be derived from the vague and illusory but often repeated formula that Congress “by occupying the field” has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power served to it by the Constitution.

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199. Brief for the United States as *Amicus Curiae* in No. 02-306, *Beneficial National Bank v. Anderson*, at 18 (quoted in *Beneficial National Bank*, 539 U.S. at 20 (Scalia, J., dissenting); see also Twitchell, *supra* note 183, at 819 (defending complete preemption based on fear that state courts will “err on the side of state law and find preemption less frequently than Congress intended”).

200. 539 U.S. at 20-21; see also id. at 21 (“The rational response to the United States’ concern is to eliminate the well-pledited complaint rule entirely.”).

201. *See* Seinfeld, *supra* note 172, at 566 (observing that the existence of an exclusive federal cause of action “is both an unsure indicator that fundamental jurisdictional policies are implicated . . . and significantly underinclusive as a means of singling out those preemptive federal statutes” that establish an “unusually potent” interest in uniformity). Professor Seinfeld speculates that the Court has emphasized the exclusive federal cause of action variable largely as a way of disguising the reality that complete preemption represents an exception to the well-pledited complaint rule. *See* id. at 566-67.

202. Professor Seinfeld purports to distinguish this “regulatory uniformity” interest, which “varies from statute to statute,” from an always-present interest in “equal-application uniformity.” *See* id. at 573. Both interests arise from the unfairness of subjecting the subjects of regulation to divergent rules, however, so that it is hard to see what the distinction is.

203. *See* id. at 573-75.

The contortions of the Court’s recent ERISA cases, for example, demonstrate just how difficult it is to determine the boundaries of a preempted field and whether a particular state law claim falls within it. Moreover, cases of clear field preemption would seem to be the ones in which state courts are least likely to err if left to adjudicate a federal preemption defense to a state law claim.

More fundamentally, one might challenge the premise that federal courts are better suited to determine the preemptive reach of federal law. Indeed, one might just as easily suggest that preemption arguments should be resolved in state fora because the federal judiciary is insufficiently sympathetic to state law. The fact that federal law is supreme over state law in the event of an actual conflict between them tells us nothing about which side courts should err upon in determining whether such a conflict exists. If anything, current doctrine—often honored in the breach—dismails reading federal law to preempt state law. And the Court’s general failure to police the boundaries of Congress’s enumerated powers suggests that judge-made doctrinal adjustments should push toward preserving state autonomy rather than maximizing the preemptive reach of federal mandates.

Assertions that the state courts are unsympathetic to federal preemption defenses, or that the federal courts are too sympathetic, each


206. See Morrison, supra note 173, at 192.

207. Cf. Twitchell, supra note 183, at 862 (“By placing [preemption] questions in the hands of the states at the outset, we may balance the power of the central government with a countervailing state-oriented weight.”).

208. Cf. Geier v. Am. Honda Motor Co., 529 U.S. 861, 894 (2000) (Stevens, J., dissenting) (“When a state statute, administrative rule, or common-law cause of action conflicts with a federal statute, it is axiomatic that the state law is without effect. U.S. Const. art. VI, cl. 2 . . . . On the other hand, it is equally clear that the Supremacy Clause does not give unelected federal judges carte blanche to use federal law as a means of imposing their own ideas of tort reform on the States.”).

209. See, e.g., Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (“[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

raise empirical questions with no easy answers. In order to measure the frequency and direction of error, one would first have to define the “correct” resolution of the preemption issue in each case in the sample. We are unlikely to have sufficient consensus on this prior question to be able to conduct adequate empirical research on the question of federal or state court sympathy or competence. Even if we could answer these questions, moreover, it seems unlikely that the answers would be the same for all federal regulatory schemes at all points in time. To the extent that judgments about the relative competence and receptivity of the state and federal courts with respect to preemption defenses are both contingent and complex, those judgments seem most appropriately left to Congress. In this vein, it is worth noting that the groups protected in the Court’s complete preemption cases—national banks, insurance companies operating employee benefit plans, labor unions and employers—are hardly the sorts of powerless minorities that the federal courts usually step in to protect due to defects in the political process. Indeed, they are hardly the sorts of interests that would seem to lack effective recourse in state legislatures if they are being systematically disadvantaged in the state courts. It is hard to see the need for a judge-made extension of arising-under jurisdiction, rather than an appeal to Congress to extend removal rights if state courts are, in fact, systematically disregarding federal preemption defenses.

Justice Scalia was right to suggest that complete preemption “represents a sharp break from our long tradition of respect for the autonomy and authority of state courts.” Like foreign affairs removal, moreover, complete preemption executes that sharp break without action by Congress, which we ordinary look to as the first-line guardian of state interests. Whether or not federal question jurisdiction should be extended, as Professor Mishkin suggested, to cases in which we fear state-court adjudication may interfere with the operation of a federal regulatory scheme, that extension should come through legislative action rather than judicial fiat.

211. Similar problems have always plagued the more general debate about “parity”—that is, whether the state and federal courts are equally competent and sympathetic with regard to federal claims. See Hart & Wechsler, supra note 34, at 324-25 (identifying difficulties inherent in empirical measures of parity); Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. REV. 233, 273 (1988) (concluding that “[a]lthough parity is an empirical question, no empirical answer seems possible”).

212. See, e.g., Seinfeld, supra note 172, at 572 (observing that “concerns relating to state court bias are historically contingent”); Morrison, supra note 173, at 192 (observing that “the federal courts’ superior capacity to produce federal uniformity” is also contingent).

213. See Morrison, supra note 173, at 194.


CONCLUSION

The Yeti lives, but it has changed its colors. Congress rarely provides for federal jurisdiction without also providing some degree of substantive regulation, and in the rare instances where it has done so, the courts have sometimes provided federal rules of decision of their own. It is accordingly hard to find statutes that raise the pure constitutional question addressed by Professors Wechsler and Mishkin in their seminal works on protective jurisdiction. I have suggested that each of the statutes commonly invoked as instances of protective jurisdiction include some federal-law element sufficient to support constitutional “arising under” jurisdiction under *Osborne*. Protective jurisdiction survives, however, as an interpretation of the parallel language in the federal question statute, 28 U.S.C. § 1331. The doctrines of foreign affairs removal and complete preemption are each best understood as instances of the protective idea that “arising under” jurisdiction should exist not only to interpret federal rules of decision but also to protect federal interests that may be threatened by state-court adjudications of state-law claims.

I have also suggested that, like other dangerous beasts, the Yeti should be eliminated—or at least kept carefully confined to a narrow habitat. Protective jurisdiction facilitates the erosion of state court jurisdiction by not requiring Congress to agree on a substantive federal rule of decision before transferring cases from state to federal court. And it threatens the state courts’ control over state law by creating classes of state-law claims that may never be reviewed in the state courts. These problems are compounded by more recent instances of protective jurisdiction—foreign affairs removal and complete preemption—that take the form of judge-made doctrines rather than jurisdictional statutes. While much of this essay has sought to pay Professor Mishkin the compliment of respectful disagreement, I would hope that he—as one of our most eloquent advocates of federal judicial restraint—could join in urging that any extension of federal jurisdiction occur at the behest of the states’ representatives in Congress rather than by the dictate of the federal courts themselves.