COMMENTS

The Illegitimacy of Protective Jurisdiction over Foreign Affairs

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> Any advantage of giving jurisdiction to the federal courts must be balanced against the disadvantages of taking away from the State courts causes of action rooted in state law.[1]
>
> —Justice Felix Frankfurter

Lawsuits filed in U.S. courts frequently antagonize foreign nations. For example, a sizeable mass tort suit filed against a corporation that is vital to a foreign state's economy is likely to capture the government's attention; in some instances, the lawsuit might compel the foreign government to raise the issue directly with the United States through diplomatic channels. As a result, the suit has potential ramifications for the United States' relations with that nation. Some courts have held that these speculative U.S. foreign relations interests are sufficient to support federal question jurisdiction over cases that are otherwise based on state law.[2] In this Comment, I explore whether jurisdiction in such cases can be squared with the statutory and constitutional limits of federal question jurisdiction.

The courts that have allowed federal question jurisdiction based on a case's possible impact on U.S. foreign affairs have rested their holdings on the federal common law of foreign relations. In *Banco Nacional de Cuba v Sabbatino*,[3] the Supreme Court recognized that some aspects of the United States' foreign affairs are governed exclusively by federal law.[4] While *Sabbatino* left many unanswered ques-

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1 *Williams v Austrian*, 331 US 642, 680 (1947) (Frankfurter dissenting).

2 See, for example, *Republic of Philippines v Marcos*, 806 F3d 344, 353 (2d Cir 1986) (finding jurisdiction under § 1331 over a suit where the cause of action was a state law claim of conversion).

3 376 US 398 (1964).

4 Id at 425 ("[A]n issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.").

tions about the scope and import of the newly discovered common law, the Court has never held (nor implied) that every case that involves U.S. foreign relations is governed by federal law.

This Comment argues that allowing federal jurisdiction over state causes of action that merely implicate U.S. foreign affairs is inconsistent with both the statutory and constitutional requirements for federal question jurisdiction. A close examination of the cases confronting this issue reveals that federal law is not actually governing any aspect of the disputes. Rather, the federal common law is invoked only as some vague background principle; with little analysis, the courts simply assume that all things "foreign" are necessarily "federal." Cases finding jurisdiction based on the federal common law of foreign relations are properly understood as examples of protective jurisdiction—a theory that has never been accepted by the Supreme Court and that would render the limitations of Article III superfluous. Protective jurisdiction is the federal courts' equivalent of the Yeti—many people claim to have seen it, but no one can prove it exists. Originally developed in a pair of seminal law review articles by Professors Herbert Wechsler and Paul Mishkin, this theory is an attempt to justify federal jurisdiction in cases where the issue of federal law is, at best, remote.

My argument is structured as follows. In Part I, I introduce the federal common law of foreign relations and examine the current scope of federal question jurisdiction.[5] In Part II, I critique the handful of cases considering jurisdiction based on the federal common law of foreign relations and conclude that the cases allowing jurisdiction cannot be explained as applications of existing federal question jurisprudence. Part III considers an alternative explanation for the exercise of jurisdiction in these cases—protective jurisdiction. After describing this doctrine, I explain why jurisdiction based on the federal common law of foreign relations is properly understood as an example of protective jurisdiction. I further argue that the problems with protective jurisdiction underscore the weak theoretical and practical foundations of jurisdiction based on the federal common law of foreign relations.

I. FEDERAL QUESTION JURISDICTION AND THE FEDERAL COMMON LAW OF FOREIGN RELATIONS

Before considering when, if ever, federal question jurisdiction can arise under the federal common law of foreign relations, a bit of background is necessary. In this Part, I discuss the scope of federal question jurisdiction under both Article III and 28 USC § 1331. In addition, I

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5 While the validity of the federal common law of foreign relations is not the focus of this Comment, Part I briefly considers the weak foundations of this doctrine.

briefly introduce the theory of protective jurisdiction.[6] Finally, I consider the origins and scope of the federal common law of foreign relations.

A. The Scope of Constitutional and Statutory Federal Question Jurisdiction

Under Article III, federal courts may assert jurisdiction (with congressional authorization) over cases involving a federal question. A case involving a federal question is any case "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[7] In addition, 28 USC § 1331 similarly authorizes district courts to exercise jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[8]

Although Article III and § 1331 use similar language, it is well established that the constitutional scope of federal question jurisdiction is broader than the statutory grant.[9] In *Osborn v Bank of the United States*,[10] the Court confronted the scope of Article III's "arising under" clause.[11] Chief Justice Marshall's opinion for the Court endorsed an expansive reading of the proper scope of Article III, holding that constitutional federal question jurisdiction extends to any case in which federal law "forms an ingredient of the original cause."[12] In contrast,

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6 The theory of protective jurisdiction is discussed in detail in Part III.A.

7 US Const Art III, § 2.

8 28 USC § 1331 (2000).

9 See *Verlinden B.V. v Central Bank of Nigeria*, 461 US 480, 494–95 (1983). While this interpretation is well settled today, its historical pedigree is uncertain. Section 1331 was part of the Judiciary Act of 1875 that was enacted at the end of a session with little debate. See Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 65–69 (Macmillan 1928). There is little legislative history, but the record does contain the following comment from the bill's sponsor, Senator Carpenter:

> The act of 1789 did not confer the whole power which the Constitution conferred; it did not do what the Supreme Court has said Congress ought to do; it did not perform what the Supreme Court has declared to be the duty of Congress. This bill does. . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less.

Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 909 (Foundation 4th ed 1996). However, it is worth noting that Carpenter was discussing the bill as a whole, and not just the federal question section. Id. While some commentators have argued that this demonstrates that the Supreme Court has erred in its reading of § 1331, see James H. Chadbourn and A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U Pa L Rev 639, 645–74 (1942), the interpretation has been consistently reaffirmed by the Court. See, for example, *Franchise Tax Board v Construction Laborers Vacation Trust*, 463 US 1, 8 n 8 (1983).

10 22 US (9 Wheat) 738 (1824).

11 US Const Art III, § 2.

12 22 US (9 Wheat) at 823.

> A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that

the Court has interpreted the statutory grant of federal question jurisdiction in § 1331 more narrowly. Under the well-pleaded complaint rule, jurisdiction is authorized by statute only when it is clear from the face of the plaintiff's complaint that the case presents a question of federal law.[13] One consequence of this rule, however, is that many claims involving a federal question will be barred from federal court.[14]

In an effort to justify an expansion of the federal courts' power beyond the limits established in *Osborn*, several scholars have advanced a theory known as "protective jurisdiction." Although protective jurisdiction is explored more fully in Part III, it bears mentioning at this point. The theory of protective jurisdiction attempts to justify the extension of federal jurisdiction over cases governed by state law where important federal interests are at stake. One version of this theory would allow jurisdiction in any case in which Congress could have enacted substantive federal law governing the dispute pursuant to Article I.[15] Another formulation would allow jurisdiction over any area of law where an "articulated and active federal policy" is present.[16] The key element in both versions of protective jurisdiction is that federal courts are empowered to hear cases based on state law between nondiverse parties. The Supreme Court has never endorsed the theory of protective jurisdiction.[17] At a minimum, protective jurisdiction would represent a departure from the well-pleaded complaint rule. At worst, protective jurisdiction lacks any ingredient of federal law and thus represents an extension of judicial power beyond the bounds of Article III.

B. The Federal Common Law of Foreign Relations

Nearly forty years ago, the Supreme Court held for the first time that the Constitution implicitly requires that certain aspects of U.S.

> law. . . . [It is] a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction.

Id at 821–22. The Supreme Court reaffirmed this interpretation in *Verlinden*, 461 US at 492–93.

13 See *Louisville & Nashville Railroad v Mottley*, 211 US 149, 152 (1908) ("It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States.").

14 See David P. Currie, *Federal Jurisdiction in a Nutshell* 67 (West 4th ed 1999) (noting that the *Mottley* rule prevents removal from state courts when a defense based on federal law is raised).

15 See Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 L & Contemp Probs 216, 225 (1948).

16 Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 Colum L Rev 157, 192 (1953).

17 See *Mesa v California*, 489 US 121, 137 (1989) (declining the government's invitation to decide the case on the basis of protective jurisdiction and noting that the Court has never embraced this theory).

foreign affairs be governed exclusively by federal law. In this Part, I explore the foundations of this newly discovered federal common law of foreign relations.

1. Post-*Erie* federal common law.

Although the Supreme Court famously stated in *Erie v Tompkins*[18] that "there is no federal general common law,"[19] *Erie* changed, but did not eliminate, federal common law. *Erie* simply prevents federal courts from developing general common law without authorization from Congress or the Constitution.[20] Federal courts continue to develop and apply federal common law in areas where such authorization is present.[21] One important feature of post-*Erie* common law is that, unlike its predecessor, it is part of the "Laws of the United States" under the Supremacy Clause.[22] Thus, federal common law is binding upon the states and may even preempt conflicting state law.

The Supreme Court has provided little guidance on how courts should determine whether they are authorized to create federal common law. In most cases, courts rely on an implicit authorization from Congress to fill gaps in a statutory scheme.[23] The Supreme Court has also found authorization to create common law based on the Constitution's text. For example, Article III's grant of judicial power over "all Cases of admiralty and maritime jurisdiction"[24] provides the basis for the federal common law governing admiralty.[25] Finally, and perhaps

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18 304 US 64 (1938).

19 Id at 78.

20 This type of general common law is usually associated with *Swift v Tyson*, 41 US (16 Pet) 1 (1842).

21 See, for example, *Clearfield Trust Co v United States*, 318 US 363, 366–67 (1943) ("We agree with the Circuit Court of Appeals that the rule of [*Erie*] does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."). See also Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 NYU L Rev 383, 405–07 (1964).

22 See US Const Art VI, cl 2.

23 See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv L Rev 883, 890–94 (1986) (defining federal common law as "any rule of federal law created by a court (usually but not invariably a federal court) *when the substance of that rule is not clearly suggested by federal enactments*—constitutional or congressional" and stating that "federal common law includes much we think of as interpretation; it leaves no clear-cut line between federal common law and federal interpretational law").

24 US Const Art III, § 2, cl 1.

25 This view originated in Justice Story's opinion in *DeLovio v Boit*, 7 F Cases 418 (CC D Mass 1815) (examining the origins and development of admiralty jurisdiction). But see Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va L Rev 1617, 1627–28 n 33 (1997) (noting that the federal common law of admiralty is probably closer to a structural authorization).

Another example of federal common law that might be based on the constitutional text is the law governing disputes between states. The textual support for this common law also comes from Art III, § 2, cl 1, which authorizes jurisdiction over interstate disputes. See Field, 99 Harv L

most controversially, the Court has recognized federal common law authorized implicitly by the structure of the Constitution.[26] Such a structural inference requires the implication of "uniquely federal interests."[27] These federal interests are thought to justify the creation of federal common law because of the need for uniformity in a given area. The federal common law of foreign relations is one example of judge-made law authorized by the Constitution's structure.

2. *Sabbatino* and the origins of the federal common law of foreign relations.

The federal common law of foreign relations was first recognized by the Supreme Court in *Banco Nacional de Cuba v Sabbatino*.[28] In *Sabbatino*, a Cuban bank sought to recover the proceeds from the sale of a sugar shipment that the Cuban government had expropriated from a company owned by United States residents. The defendant argued that the bank was not entitled to the sale proceeds because the expropriation violated customary international law.[29] In response, the bank invoked the act of state doctrine, an international law doctrine that provides that "the courts of one country will not sit in judgment of the acts of the government of another done within its own territory."[30] The Court concluded that the act of state doctrine applied to the Cuban government's actions and accordingly the expropriation was not subject to legal challenge in U.S. courts.[31]

Justice Harlan's majority opinion explored the legal basis for the act of state doctrine. Harlan concluded that the doctrine was not required by the Constitution, by any federal statute,[32] nor by international law.[33] Nevertheless, the Court determined that the act of state doctrine was a matter of federal, not state law. Harlan stated that "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."[34]

Rev at 891 (cited in note 23). See also *Illinois v Milwaukee*, 406 US 91, 100 (1972) (holding that § 1331 federal jurisdiction exists over cases involving interstate waters and pollution, because such cases arise under federal common law).

26 For a discussion of federal common law based on such structural inferences, see Thomas W. Merrill, *The Federal Common Law Powers of the Federal Courts*, 52 U Chi L Rev 1 (1985).

27 *Boyle v United Technologies Corp*, 487 US 500, 504 (1988).

28 376 US 398 (1964).

29 Id at 401–08.

30 Id at 416, quoting *Underhill v Hernandez*, 168 US 250, 252 (1897).

31 See *Sabbatino*, 376 US at 439.

32 Id at 421–27.

33 Id at 421–23.

34 Id at 425 ("It seems fair to assume that the Court did not have rules like the act of state

While not explicitly using the term "common law," the Supreme Court had recognized a new area of federal judge-made law with "constitutional underpinnings."[35] In doing so, Harlan emphasized the uniquely federal interests implicated by the act of state doctrine. The Court supported its decision with previous instances where the creation of federal common law was found warranted by the strength of the federal interests at stake.[36] Because of the interest in uniformity in the United States' dealings with foreign countries, the Court concluded that the act of state doctrine was a creature of federal law.[37] *Sabbatino* left the precise scope of the federal common law of foreign relations uncertain.[38] However, the Court made clear that the application and development of the act of state doctrine was based upon the Court's own analysis of the foreign relations issues at stake.[39] According to Professor Henkin, *Sabbatino* established

> an independent power for the federal courts to make [foreign relations] law on their own authority. It was the federal judiciary that decided that the foreign relations of the United States required the act of state doctrine; and it was the judiciary that was deciding, in *Sabbatino*, that the foreign relations of the United

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doctrine in mind when it decided *Erie Railroad v. Tompkins*.").

35 Id at 423 (internal quotation marks omitted). While these "underpinnings" did not mandate the act of state doctrine, the Court found that federalism and separation of powers concerns were sufficient to warrant federalizing the doctrine. "[The act of state doctrine] arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." Id.

36 Id at 426, citing *D'Oench, Duhme & Co v Federal Deposit Insurance Corp*, 315 US 447 (1942) and *Clearfield Trust Co v United States*, 318 US 363 (1943). The Court acknowledged that these cases were different because each relied on a congressional enactment as the basis for federal common law and suggested that federalizing this area of foreign relations was more analogous to the law governing coastal waters. See *Sabbatino*, 376 US at 426. However, as Professor Redish has pointed out, this comparison is strained because federal law makes more sense in the interstate waters context where it is unclear which state law should apply. See Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 95 (Michie 2d ed 1990).

37 See *Sabbatino*, 376 US at 427.

38 Lower courts and commentators have embraced the development of federal common law in a number of areas: private international law, including forum non conveniens, choice of law, forum selection clauses, and the enforcement of foreign judgments; substantive areas of state law, such as torts and contracts; dormant foreign commerce clause; state foreign affairs actions; and perhaps customary international law. See Goldsmith, 83 Va L Rev at 1632–41 (cited in note 25).

39 See *Sabbatino*, 376 US at 423 (noting that while the Constitution does not require the act of state doctrine, it "does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state"). See also Goldsmith, 83 Va L Rev at 1628 (cited in note 25) ("[T]he Court based both the need for, and the content of, the doctrine on its own independent analysis of the foreign relations interests of the United States.").

> States did not require (or permit) an exception for acts of state that violate international law.[40]

Several years after *Sabbatino*, the Court further expanded the federal courts' powers over foreign affairs in *Zschernig v Miller*.[41] *Zschernig* involved an Oregon statute that denied inheritance rights to East German heirs.[42] The Court invalidated the statute even though it was not in conflict with any federal statute or treaty.[43] The Court concluded that the statute was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[44] Taken together, *Sabbatino* and *Zschernig* suggest a broad federalization of foreign affairs issues. In practice, however, the scope of these decisions remains uncertain.[45] Since *Zschernig*, the Supreme Court has not invalidated any state statute based on the dormant foreign affairs power;[46] the Court has also provided little guidance on the common law ushered in by *Sabbatino*.

While a full critique of the federal common law of foreign relations is beyond the scope of this Comment, it is worth emphasizing several problems with this doctrine. First, *Sabbatino*'s reliance on the Constitution's structure as a basis for authorization is troubling. Absent any textual support for creating federal common law, how does the Court determine when the Constitution's structure provides such authorization? As Professor Henkin notes, this raises the possibility

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40 Louis Henkin, *Foreign Affairs and the United States Constitution* 139 (Clarendon 2d ed 1996).

41 389 US 429 (1968).

42 Id at 430.

43 Id at 441.

44 Id at 432.

45 While the federal common law of foreign relations has been widely accepted by commentators, see Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U Pa L Rev 1245, 1292 (1996), it has recently come under attack. For a general discussion, see Goldsmith, 83 Va L Rev 1617 (cited in note 25) (arguing that the federal common law of foreign relations lacks justification from either a historical or functional perspective); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 Yale J Intl L 1 (1995) (advocating a more limited approach to federalizing foreign affairs issues).

46 Consider *Crosby v National Foreign Trade Council*, 530 US 363 (2000) (holding that a Massachusetts law barring state entities from buying goods from persons or companies doing business with Burma was invalid under the Supremacy Clause on the grounds that it improperly interfered with the objectives of a federal statute targeting Burma).

The Supreme Court recently relied on *Zschernig* in *American Insurance Association v Garamendi*, 123 S Ct 2374 (2003). *Garamendi* struck down a California statute that required insurers doing business in the state to disclose certain information on Holocaust-era policies issued in Europe. While Justice Souter invoked *Zschernig* to support his analysis, see id at 2388–90, his holding does not appear to rest on dormant foreign affairs preemption (the opinion is not a model of clarity). Rather, the Court found that the California scheme conflicted with a series of executive agreements signed by President Clinton settling Holocaust-related claims. Id at 2390–92. See also id at 2399–400 (Ginsburg dissenting) (criticizing the majority's reliance on *Zschernig*).

that the Court can simply declare other areas "intrinsically federal" and preempt state law.[47] Second, it took the Court 150 years to discover that the Constitution empowers federal courts to override state law in areas that are somehow classified as "foreign affairs." Indeed, twenty years before *Zschernig*, the Court rejected the argument that the Constitution contained a dormant foreign affairs power; Justice Douglas dismissed the argument as "farfetched."[48] Despite these concerns, the federal common law of foreign relations seems here to stay.[49] However, the Supreme Court has yet to address this doctrine's implications for federal question jurisdiction.

II. WHEN DOES JURISDICTION ARISE UNDER THE FEDERAL COMMON LAW OF FOREIGN RELATIONS?

Even if one accepts the federal common law of foreign relations—despite its shaky theoretical foundations—the jurisdictional implications of *Sabbatino* are uncertain. Several courts have addressed the question of when, if ever, the federal common law of foreign relations can provide the basis for federal question jurisdiction.[50] In this Part, I analyze these cases and conclude that several courts have erred in allowing jurisdiction; a speculative impact on U.S. foreign affairs does not provide the element of federal law necessary to satisfy the requirements of § 1331.

A. Cases Considering Jurisdiction under the Federal Common Law of Foreign Relations

The handful of cases considering the relationship between the federal common law of foreign relations and federal question jurisdiction are characterized by their cursory treatment of the issues. Typically, one party argues that the federal common law of foreign relations is somehow implicated because of the case's potential impact on U.S. foreign affairs. Despite this vague invocation of the federal common law, neither the parties nor the courts have shown much interest in identifying exactly what substantive issue is governed by federal law. On this basis alone, however, several courts have found federal question jurisdiction appropriate.

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47 See Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 Colum L Rev 805, 815–17 (1964).

48 *Clark v Allen*, 331 US 503, 517 (1947) ("What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line.").

49 See generally Clark, 144 U Pa L Rev 1245 (cited in note 45).

50 *Sabbatino* did not address this issue because there was diversity jurisdiction. See 376 US at 421 n 20 (declining to consider whether federal question jurisdiction was present).

Republic of Philippines v Marcos[51] was the first case in which a court found federal question jurisdiction based on the federal common law of foreign relations. In *Marcos*, the Republic of the Philippines sued its former dictator to enjoin him from disposing of several New York properties that he allegedly purchased with misappropriated government funds.[52] The new Filipino government had issued an executive order freezing the Marcoses' assets and appealing to foreign governments to freeze assets in their countries as well.[53] Although the cause of action was a state law claim for conversion,[54] the Second Circuit found jurisdiction under § 1331. In his opinion for the court, Judge Oakes stated that "the plaintiff's claims necessarily require determinations that will directly and significantly affect American foreign relations."[55] Because of this impact on U.S. foreign relations, the court held that the case was governed at least in part by federal law.[56]

In applying the well-pleaded complaint rule, Judge Oakes first considered whether state law had been completely preempted by the federal common law of foreign relations. The court concluded that the state cause of action was "probably" displaced by federal law: "an action brought by a foreign government against its former head of state arises under federal common law because of the necessary implications of such an action for United States foreign relations."[57] The court provided little justification for extending a doctrine that the Supreme Court has found applicable on only two occasions.[58] Indeed, the court failed to address how federal common law could trigger a doctrine that has congressional intent as its touchstone.[59]

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51 806 F2d 344 (2d Cir 1986).

52 Id at 347.

53 Id at 353.

54 Id at 354.

55 Id at 352, citing *Sabbatino*, 376 US 398.

56 See *Marcos*, 806 F2d at 351–53. Interestingly, the *Marcos* court supported its position by quoting *Sabbatino* as stating that "our relationships with other members of the international community must be treated exclusively as an aspect of federal law." Id at 352. This reliance on *Sabbatino* is somewhat misleading; the full quotation is as follows: "[h]owever, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Sabbatino*, 376 US at 425.

57 *Marcos*, 806 F2d at 354. In determining whether state law was preempted, the court relied on the Supreme Court's discussion of *Avco Corp v Aero Lodge No 735*, 390 US 557 (1968), in *Franchise Tax Board v Construction Laborers Vacation Trust*, 463 US 1, 23–24 (1983).

58 See *Avco*, 390 US at 560–62; *Metropolitan Life Insurance v Taylor*, 481 US 58, 64–67 (1987). See also *Republic of Venezuela v Philip Morris*, 287 F3d 192, 199 (DC Cir 2002) (Williams concurring) (rejecting a similar argument because the defendants had not offered "an analytical basis for extending the complete preemption doctrine beyond the two statutes that the Supreme Court has held effectuated such a preemption").

59 See *Taylor*, 481 US at 66. For a thoughtful analysis of the relationship between complete preemption and the well-pleaded complaint rule, see *Anderson v H&R Block, Inc*, 287 F3d 1038,

The Second Circuit did not rest its holding on the complete preemption basis alone. The court also determined that there was a federal issue presented by the plaintiff's state law cause of action.[60] The federal issue was whether to honor the request of the foreign government to freeze assets that may have been misappropriated by a former head of state.[61] Without identifying how federal *law* rather than State Department policy governed this question, Judge Oakes concluded that this question must be governed by federal common law because of the need for uniformity.[62] Thus, the Republic of the Philippines's state law cause of action presented a federal issue sufficient to provide a basis for jurisdiction under § 1331.

The Fifth Circuit reached a similar conclusion in *Torres v Southern Peru Copper Corp.*[63] The plaintiffs were seven hundred Peruvians allegedly harmed by emissions from smelting and refining operations in Peru. They filed suit in Texas alleging state claims of negligence, intentional tort, and nuisance.[64] Peru protested the lawsuit by filing a letter with the State Department and submitting an amicus brief.[65] The Fifth Circuit said the case struck "not only at vital economic interests but also at Peru's sovereign interests" because of the importance of the mining industry to the Peruvian economy.[66] The court concluded that "[o]n the record before [it], . . . plaintiffs' complaint raise[d] substantial questions of federal common law by implicating important foreign policy concerns."[67] Without further analysis, the court held that federal question jurisdiction was present.[68]

1040–44 (11th Cir 2002).

60 See *Marcos*, 806 F2d at 354, citing *Merrell Dow Pharmaceuticals, Inc v Thompson*, 478 US 804, 810 (1986).

61 See *Marcos*, 806 F2d at 354.

62 See id.

63 113 F3d 540 (5th Cir 1997).

64 See id at 541.

65 See id at 542 ("Peru maintains that the litigation implicates some of its most vital interests and, hence, will affect its relations with the United States.").

66 Id at 543. The court emphasized the high degree of government involvement in the mining industry in Peru, including the fact that the government owned the land on which the mining company operated and owned the minerals being extracted.

67 Id.

68 See id. In *Pacheco de Perez v AT&T Co*, 139 F3d 1368 (11th Cir 1998), the Eleventh Circuit adopted the reasoning of *Torres* and *Marcos* but declined to exercise jurisdiction after determining that the foreign policy issues presented were speculative. See id at 1377–78. The court also relied heavily on the fact that the foreign government involved (Venezuela) had not protested the suit. See id at 1378 ("[The court] think[s] it significant, for purposes of this case, that the Venezuelan government has taken no position on whether this lawsuit proceeds in the United States or in Venezuela.").

As discussed in Part III, this holding illustrates several problems with the *Marcos/Torres* approach. First, it creates uncertainty in federal question jurisdiction. In every case, the parties will not know whether federal jurisdiction is present until a court of appeals has had an opportunity to determine whether the suit is somehow important enough to trigger federal interests. Second,

Judge Kozinski of the Ninth Circuit took a different approach to this issue in *Patrickson v Dole Food Co*,[69] which involved a class action suit brought by banana workers in Costa Rica, Ecuador, Guatemala, and Panama for exposure to toxic pesticides.[70] The workers brought suit against Dole in a Hawaii state court, and Dole removed to federal court.[71] On removal, the federal district court found federal question jurisdiction and dismissed the case for forum non conveniens.[72] On appeal, the Ninth Circuit held there was no federal question jurisdiction.[73] Judge Kozinski noted that the court was not required "to evaluate any act of state or apply any principle of international law."[74] He characterized Dole's argument based on the federal common law of foreign relations as an "exception" to the well-pleaded complaint rule. The court found such an exception unwarranted, however, because sufficient uniformity on issues of federal law was assured by the Supreme Court having the final say on any interpretation of federal common law.[75] In addition, Judge Kozinski noted that Congress could have granted jurisdiction over this class of cases, but chose not to.[76] He also emphasized that the interests of the various foreign governments would still be implicated if the case were litigated in federal rather than state court.[77] Finally, he reasoned that the court was not competent to evaluate the diplomatic interests of the United States, and that courts should avoid this type of arm-chair foreign policy analysis.[78]

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federal judges are simply not competent to make these foreign policy judgments. There is no obvious reason to conclude that a suit hostile to the Peruvian mining industry (*Torres*) is more important to U.S. interests than a suit against AT&T involving a gas pipeline explosion in Venezuela (*Pacheco de Perez*).

69 251 F3d 795 (9th Cir 2001), affd in part, cert dismissed in part, 123 S Ct 1655 (2003) (dismissing writ of certiorari in No 01-593 on the grounds that the Dole petitioners did not seek review of the portion of the Ninth Circuit's ruling which held that Dole could not base removal on the federal common law of foreign relations).

70 251 F3d at 798.

71 See id.

72 See id.

73 Id at 804–05.

74 Id at 800.

75 See id at 802 ("Ultimately, the Supreme Court has the final say on any question of federal law, whether it arises in federal or state court, and this is thought sufficient to ensure nationwide uniformity in areas as diverse as criminal procedure, patent law and labor law.").

76 See id at 803 (noting that Congress had provided jurisdiction in a number of other types of cases that implicate foreign relations).

77 See id ("That the case is litigated in federal court, rather than in state court, will not reduce the impact of the case on the foreign government.").

78 See id at 804, citing Goldsmith, 83 Va L Rev at 1667 (cited in note 25). See also *In re Tobacco/Governmental Health Care Costs Litigation*, 100 F Supp 2d 31, 38 (D DC 2000) (finding no jurisdiction in tobacco litigation involving several foreign governments). The D.C. Circuit has recently reviewed this case on mandamus and held that it was not clear error for the district court to refuse jurisdiction. See *Republic of Venezuela*, 287 F3d at 199. In his concurring opinion, Judge Stephen F. Williams argued that the issues were "a good deal subtler than the majority opinion lets on." Id at 200. However, Williams concluded that even if the case presented issues governed

B. Why Jurisdiction under the Federal Common Law of Foreign Relations Is Inconsistent with Existing Federal Question Jurisprudence

None of the courts addressing federal jurisdiction under the federal common law of foreign relations has provided a satisfactory analysis. The cases finding jurisdiction—*Torres* and *Marcos*—are, at the very least, inconsistent with the well-pleaded complaint rule. In each of these cases the plaintiffs' suits were based on state law. Federal question jurisdiction is appropriate in such circumstances only when the plaintiff's right to relief depends on the resolution of a substantial question of federal law or when a federal cause of action completely preempts a state cause of action.[79] State tort suits that have speculative implications for U.S. foreign policy meet neither of these criteria. The courts finding jurisdiction based on the federal common law of foreign relations have erred, in part, by simply assuming that all things involving foreign relations are necessarily federal.

The *Marcos* and *Torres* courts seem to ignore that the Supreme Court has never suggested that every case implicating foreign relations must be governed by federal law. Indeed, the Court has allowed states to regulate activity affecting U.S. foreign relations even when the regulation has clearly antagonized foreign governments.[80] It is insufficient for courts to simply point to a suit's potential impact on U.S. foreign relations and conclude that federal common law is triggered. Moreover, even if the federal common law is somehow relevant, neither the courts nor the parties articulated what *legal* issues must be governed by federal law.[81] Vague references to U.S. foreign policy were the only federal ingredient offered.

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by federal common law, these issues arose only as a defense and thus could not satisfy the well-pleaded complaint rule. See id.

[79] See *Construction Laborers Vacation Trust*, 463 US at 23–24, citing *Avco*, 390 US 557.

[80] For example, in *Barclays Bank PLC v Franchise Tax Board of California*, 512 US 298 (1994), the Court declined to preempt a state tax scheme under the dormant foreign commerce clause despite repeated complaints from foreign governments. See id at 324 n 22 ("The governments of many of our trading partners have expressed their strong disapproval of California's method of taxation.").

The case of Angel Francisco Breard provides another telling example of the relevance of states' interests to foreign affairs. Breard was a Paraguayan citizen who was convicted of murder in Virginia. Breard appealed, claiming that his rights under the Vienna Convention (which guarantees certain procedural protections to expatriates) were violated. The federal government requested that the governor of Virginia stay the execution, but conceded that it was powerless to interfere in the state proceedings. See *Breard v Greene*, 523 US 371 (1998); Curtis A. Bradley and Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 Am J Intl L 675, 676 (1998) ("[T]he Department of State . . . acknowledged Virginia's right to go forward with Breard's execution, and with great reluctance *requested* that it not do so.") (internal quotation marks omitted).

[81] Only *Marcos* identified the purported federal legal issue, but as mentioned above it is unclear how deference to the Philippine government is a question of common law, rather than

This is not to say that federal question jurisdiction could never arise under the federal common law of foreign relations.[82] Depending upon the scope of the federal common law of foreign relations, it is possible to conceive of a tort claim based on federal common law. However, this remote possibility is no reason to depart from the baseline for statutory federal question jurisdiction: the plaintiff's complaint should determine whether the cause of action is state or federal. As the plaintiffs in both *Marcos* and *Torres* chose a state law cause of action, federal question jurisdiction was inappropriate; no issue of federal law—including the federal common law of foreign relations—was presented by either plaintiff's complaint.

Another problem that characterizes *Marcos*, and in particular *Torres*, is that these courts misconceived the Supreme Court's federal question jurisprudence. These opinions simply assert that foreign relations is an area of important federal concern (with little explanation) and rely solely on this assertion to conclude that there must be federal question jurisdiction. *Marcos* represents a plausible attempt to work within the doctrinal framework of the well-pleaded complaint rule. However, it still failed to decide conclusively whether the plaintiff's cause of action was completely preempted by federal law; the court noted that the action was "probably" preempted, but provided no analysis.[83] In addition, the court based jurisdiction on finding a substantial question of federal law, but declined to identify the federal law at issue.[84] *Torres* is an even more egregious application of the well-pleaded complaint rule. There, the court rested its decision on a substantial question of federal law, but provided no explanation of what the federal question might be.[85]

While Judge Kozinski's analysis in *Patrickson* is closer to the mark, it also has several flaws. Although Kozinski was correct that *Sabbatino* says nothing about jurisdiction, he was wrong to suggest that it has no implications for jurisdiction. Issues of federal common law, if properly presented by the plaintiff's complaint, are a valid basis for jurisdiction; the recognition of a new area of common law neces-

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executive branch policy.

[82] The Supreme Court has held that a case that arises under federal common law is sufficient to create federal question jurisdiction under § 1331. See *Illinois v City of Milwaukee*, 406 US 91, 100 (1972) ("We see no reason not to give 'laws' its natural meaning, and therefore conclude § 1331 jurisdiction will support claims founded upon federal common law as well as those of statutory origin.") (citations omitted).

[83] *Marcos*, 806 F2d at 354.

[84] See id (stating that the decision whether to recognize the foreign government's request is governed by federal law). However, the court later said that the Philippine government did not allege that its executive order had any legal force. See id at 360 ("[A]n examination of Executive Orders Nos. 1 and 2 shows that they do not purport to seize the United States properties of the Marcoses, nor does the Republic seek to enforce these orders as the basis for a recovery.").

[85] *Torres*, 113 F3d at 543.

sarily has jurisdictional implications. In addition, Kozinski mischaracterized the argument in favor of federal question jurisdiction as an "exception" to the well-pleaded complaint rule. The defendants sought to remove the case by arguing that the plaintiffs' complaint on its face raised issues of federal law. While I believe Kozinski was correct to reject this argument, state suits that actually present questions of federal law, common law or otherwise, are not exceptions to, but applications of, the well-pleaded complaint rule.

In sum, the cases finding jurisdiction based on foreign relations common law cannot be squared with the well-pleaded complaint rule. Whether these cases can be squared with the broader constitutional limits of Article III is a more difficult question to which I now turn.

III. THE PROBLEMS WITH PROTECTIVE JURISDICTION UNDER THE FEDERAL COMMON LAW OF FOREIGN RELATIONS

Standard federal question analysis does not adequately justify jurisdiction based on the federal common law of foreign relations. In light of this problem, it is possible that an alternative theory of jurisdiction is at work. In this Part, I argue that jurisdiction based on the federal common law is actually a type of protective jurisdiction. When properly understood as protective jurisdiction, the illegitimacy of federal question jurisdiction based on a suit's speculative impact on U.S. foreign relations becomes more evident.

A. What Is Protective Jurisdiction?

There is no universally accepted definition of protective jurisdiction. It is usually understood as congressionally authorized federal court jurisdiction over cases that do not directly present questions of substantive federal law.[86] Jurisdiction in these cases is based on the need to "protect" or promote federal interests by granting a federal forum for cases that otherwise would not meet the requirements of Article III. This theory is most closely associated with Professors Herbert Wechsler and Paul Mishkin, two scholars that articulated different formulations of protective jurisdiction over fifty years ago.[87] De-

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[86] For another formulation, see Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L Rev 542, 546–47 (1983) ("The concept of protective jurisdiction tends to arise in situations in which Congress has authorized a federal forum, the accepted minimum requirements for a case to arise under federal law are not met, and no other basis for federal jurisdiction can be found under Article III of the Constitution.").

[87] See Mishkin, 53 Colum L Rev at 192 (cited in note 16); Wechsler, 13 L & Contemp Probs at 225 (cited in note 15). There is a wealth of recent scholarship on the theory of protective jurisdiction. See, for example, Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L Rev 731; John Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 Nw U L

spite their differences, both versions of protective jurisdiction are in tension with the scope of judicial power established by Article III.

Wechsler's theory of protective jurisdiction asserts that if Congress has the power to regulate a particular matter, it could take the lesser step of providing federal court jurisdiction.[88] That is, if Congress has power under the Commerce Clause to regulate medical malpractice in general, it should also have the power to provide a federal forum for malpractice cases without establishing substantive law in this area. Wechsler tried to bootstrap this theory to Article III by arguing that the jurisdictional statute provides the "federal law" under which the case arises.[89]

Mishkin, who was critical of Wechsler's formulation, argued that protective jurisdiction was appropriate where Congress has an "articulated and active federal policy regulating a field."[90] For example, the Supreme Court held that Congress lacked the Article I power to enact the Gun-Free School Zones Act in *United States v Lopez*.[91] Accepting this ruling, Mishkin would still allow for federal jurisdiction over a similar state statute because Congress has an active policy in favor of both ensuring safe schools and limiting gun violence. Despite the differences between the two scholars, at the core of their theories is the notion that claims governed by state substantive law can be heard in federal courts without a clear Article III basis.

Accepting either theory of protective jurisdiction would render the limitations of Article III essentially meaningless. The Supreme Court has never accepted protective jurisdiction and indeed has declined to do so despite government urging.[92] The most famous critique

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Rev 1188 (1993); Goldberg-Ambrose, 30 UCLA L Rev 542 (cited in note 86); Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 NYU L Rev 933 (1982).

88 See Wechsler, 13 L & Contemp Probs at 224–25 (cited in note 15):

> Where, for example, Congress by the commerce power can declare as federal law that contracts of a given kind are valid and enforceable, it must be free to take the lesser step of drawing suits upon such contracts to the district courts without displacement of the states as sources of the operative, substantive law.

See also Alexander M. Bickel and Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv L Rev 1 (1957) ("The point is simply that providing a forum for the enforcement of state law in a field in which Congress could occupy is itself a species of regulation, a way of seeking a degree of uniformity while leaving the maximum room for the exercise of initiative by the states.").

89 See Wechsler, 13 L & Contemp Probs at 225 (cited in note 15) ("A case is one 'arising under' federal law within the sense of Article III whenever it is comprehended in a valid grant of jurisdiction as well as when its disposition must be governed by the national law.").

90 Mishkin, 53 Colum L Rev at 192 (cited in note 16).

91 514 US 549 (1995). While the statute at issue in *Lopez* was criminal, assume for the sake of this hypothetical that both the federal statute and its state counterparts provided civil remedies against parties who brought guns within a school zone.

92 See *Mesa v California*, 489 US 121, 137 (1989):

> At oral argument the Government urged upon us a theory of 'protective jurisdiction' to

of protective jurisdiction was provided by Justice Frankfurter's dissent in *Textile Workers Union of America v Lincoln Mills of Alabama*,[93] which considered the theories advanced by both Wechsler and Mishkin. In rejecting protective jurisdiction, Justice Frankfurter stated that "[t]he theory must have as its sole justification a belief in the inadequacy of state tribunals in determining state law."[94] He also rejected Wechsler's theory that Congress could provide protective jurisdiction as long as it had the power to enact substantive law under Article I: "[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."[95]

Professor David Currie has expanded on this last point by noting that if there is no federal law to interpret, the reasons for federal question jurisdiction—uniformity of interpretation and the vindication of federal rights—are not an issue.[96] Currie has also noted that if jurisdiction can arise under the jurisdictional statute itself, then there is essentially no limit to the federal judicial power based on Article III. Under this view, the substantive law governing a case would become irrelevant. Assuming Congress passed a jurisdictional statute, federal question jurisdiction would automatically be constitutional; in short, the jurisdictional inquiry would be tautological. Moreover, Article III contemplates situations in which state courts are not to be trusted in applying state law. In such cases, the Constitution provides subject matter jurisdiction in federal court based on the diversity of the parties even if the issues are solely of state law. One could plausibly argue (while recognizing the weakness of expressio unius arguments) that by negative implication the Constitution does not allow suits based on state law to be brought in federal court if they do not meet Article III requirements.

> avoid these Art. III difficulties. . . . We have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction, and we do not see any need for doing so here.

(internal citations omitted).

93 353 US 448 (1957).

94 Id at 475.

95 Id at 474. As Professor David Currie notes, the doctrine of unconstitutional conditions is one example in constitutional law where the greater power does not necessarily include the lesser. See Currie, *Federal Jurisdiction in a Nutshell* at 63 (cited in note 14). On the doctrine of unconstitutional conditions, see generally Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv L Rev 4, 6–7 (1988) ("In its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights.").

96 See Currie, *Federal Jurisdiction in a Nutshell* at 63 (cited in note 14) ("Absent federal law there is no need for uniformity and no federal right to vindicate.").

B. Jurisdiction Based on the Federal Common Law of Foreign Relations Is an Example of Protective Jurisdiction

A form of both Mishkin's and Wechsler's theories of protective jurisdiction is at work in the cases resting jurisdiction on the federal common law of foreign relations. At a minimum, none of these cases can be explained as an application of § 1331—each cause of action is based entirely on state law. More importantly, these cases have no readily identifiable ingredient of federal law. The federal common law of foreign relations is invoked at a general level, but it does not provide the substantive law governing any aspect of these cases. Thus, these cases lack even the minimum federal element necessary to satisfy the requirements of Article III.

Under Mishkin's formulation of protective jurisdiction, the crucial element necessary for protective jurisdiction is an "articulated and active" federal policy regulating an area of law.[97] Each of the courts finding jurisdiction based on the federal common law of foreign relations relied on the importance of the case to the foreign relations interests of the United States. For example, in *Marcos* the court argued that "an examination shows that the plaintiff's claims necessarily require determinations that will directly and significantly affect American foreign relations."[98] Similarly, in *Torres* the court emphasized the important federal interests raised by the plaintiff's tort suit.[99] Thus, the exercise of jurisdiction in each case is "protective" of the federal interest in American foreign policy.

Wechsler's formulation of protective jurisdiction presents a different wrinkle. His theory turns not on active federal regulation of an area, but rather on Congress's Article I powers. If Congress has the power to enact substantive law in a given area, it can take the lesser step of providing jurisdiction over state claims.[100] In each case finding jurisdiction under the common law of foreign relations, it is possible that Congress could enact substantive law governing the dispute under the Commerce Clause.[101]

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97 Mishkin, 53 Colum L Rev at 192 (cited in note 16).

98 *Marcos*, 806 F2d at 352.

99 See *Torres*, 113 F3d at 543 (noting that the plaintiff's tort suit struck at Peru's "sovereign interest" and therefore implicated "important foreign policy concerns").

100 Note that this theory is similar to the approach advocated by Justice Jackson before the label "protective jurisdiction" was developed. See *National Mutual Insurance Co v Tidewater Transfer Co*, 337 US 582, 602 (1949):

> [T]he power to make this defendant suable by a District citizen is not claimed to be outside of federal competence. If Congress has power to bring the defendant from his home all the way to a forum within the District, there seems little basis for denying it power to require him to meet the plaintiff part way in another forum.

101 This is true despite the Supreme Court's recent cases limiting the reach of the Commerce Clause. See *United States v Morrison*, 529 US 598, 627 (2000) (invalidating portions of the

Thus, *Marcos* and *Torres* present crucial elements of both Wechsler's and Mishkin's versions of protective jurisdiction. Moreover, the federal common law of foreign relations does not provide the element of federal law necessary to satisfy either § 1331 or Article III. As discussed above, the fact that these suits were based upon state law suggests that they cannot be understood as an application of the well-pleaded complaint rule.[102] Each case involved a cause of action based on state rather than federal law: *Marcos* was a state law action for conversion, while *Dole* and *Torres* were both state tort suits. Thus, at a minimum, there is no statutory basis for jurisdiction in these cases, since § 1331 does not apply.

The more difficult question is whether these cases even fall within the constitutional bounds of Article III's "arising under" jurisdiction. The expansive definition that Chief Justice Marshall provided in *Osborn* would allow jurisdiction in any case where federal law forms an ingredient. Therefore, Article III would be satisfied if the federal common law of foreign relations were raised by either party. However, even under this expansive view of Article III's reach, it is difficult to identify the federal ingredient in either *Torres* or *Marcos*. Neither court directly addressed what substantive law applied in the case.[103] In *Torres*, as well as several district court cases, the courts were able to avoid this question because they simply dismissed the suits on the basis of forum non conveniens.[104] Even the *Marcos* court, which actually considered the merits of the plaintiff's request for a preliminary injunction, did not specify whether state or federal law applied.[105] In order to avoid this question, the Second Circuit simply purported to apply both state and federal substantive law:

> If the overall claim is one based on state law, it is clearly sufficient under the New York law stated above. Even if the claim is one under federal common law, it would still be sufficient if state law is adopted as the federal common law, as is appropriate in

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Violence Against Women Act on the grounds that it exceeded Congress's powers under the Commerce Clause and Fourteenth Amendment); *Lopez*, 514 US 549 (holding that the Gun-Free School Zones Act exceeded congressional authority under the Commerce Clause).

[102] See Part II.B.

[103] See *Torres*, 113 F3d 540; *Marcos*, 806 F2d at 354–56. But see *In re World War II Era Japanese Forced Labor Litigation*, 114 F Supp 2d 939, 943–44 (ND Cal 2000) (finding jurisdiction based on the federal common law of foreign relations and relying on the Treaty of Peace with Japan for the governing substantive law).

[104] See *Torres*, 113 F3d at 541. See also *Sequihua v Texaco*, 847 F Supp 61, 65 (SD Tex 1994) (declining to exercise jurisdiction over tort claims brought by Ecuadorian citizens on grounds of comity and forum non conveniens).

[105] See *Marcos*, 806 F2d at 354–56.

> cases such as this where adoption of state law does not conflict with federal policy.[106]

This judicial sidestep allowed the court to rely on state law in the end. Indeed, the crucial factor in each case is that the federal common law does not appear to govern any aspect of the dispute. The role of the common law in each case is illusory; it is offered not to provide a rule of decision, but only to signal that the case has possible foreign policy implications. The result is to allow federal question jurisdiction over state causes of action where no federal law is implicated. Quite obviously, there is no basis for jurisdiction in such a case; since there is no federal law at issue (and therefore no "arising under" jurisdiction), and the cases do not otherwise fall within Article III, there is no constitutional ground for jurisdiction. Since Congress cannot authorize—and courts cannot permit—jurisdiction beyond the bounds of Article III, these cases represent an unconstitutional extension of judicial power.

C. Problems with Protective Jurisdiction over Cases Implicating U.S. Foreign Affairs

Classifying these cases as a form of protective jurisdiction helps crystallize several problems with resting jurisdiction solely on a suit's possible impact on U.S. foreign relations.[107] Specifically, this approach raises federalism concerns, unnecessarily interjects uncertainty into the determination of jurisdiction, and expands judicial discretion in matters outside the federal judiciary's traditional areas of expertise.

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[106] Id at 356. Note that this judicial parsing was also necessary because the court never resolved whether the state cause of action was completely preempted and thus governed by federal common law. See id at 354.

[107] At least one other commentator has recognized that cases resting jurisdiction on the federal common law of foreign relations use a form of protective jurisdiction. See Erin Elizabeth Terrell, Note, *Foreign Relations and Federal Questions: Resolving the Judicial Split on Federal Court Jurisdiction*, 35 Vand J Transnatl L 1637 (2002) (using the term "quasi-protective jurisdiction"). The author goes on to argue that Congress should expand § 1331 to allow for federal jurisdiction in cases where the State Department certifies that there are important U.S. interests at stake. But this solution simply begs the question (which the commentator addresses only in passing): would such an extension be constitutional? In my view, such a statute would not pass constitutional muster. The only federal law at issue would be the jurisdictional statute. There is a plausible argument under *Verlinden B.V. v Central Bank of Nigeria*, 461 US 480 (1983), that a complex statute that requires a court to apply substantive federal law in every case before determining jurisdiction would present a federal question. However, a statute that simply tells courts to defer to the State Department is unlikely to qualify as substantive federal law sufficient to satisfy Article III.

Such a statute also raises separation of powers concerns by allowing jurisdiction only with the blessing of the executive branch. The problems inherent in such an approach led to its abandonment in the area of foreign sovereign immunity with the passage of the Foreign Sovereign Immunities Act of 1976, Pub L No 94-583, 90 Stat 2891, codified in relevant part at 28 USC § 1602 et seq (2000).

1. Federalism concerns.

As discussed above, jurisdiction in *Marcos* and *Torres* cannot be easily reconciled with the well-pleaded complaint rule. The federal common law of foreign relations, if relevant to these suits at all, is raised only by defendants who argue that these suits are important to U.S interests. Moreover, if the federal common law is not implicated by these suits at all—which I have argued is the better reading of both *Sabbatino* and these cases—there is no federal law for the purposes of Article III. Without federal law to interpret, there is no need for the uniformity created by allowing federal courts to hear these claims. In essence, federal courts are using protective jurisdiction to deprive state courts of the opportunity to interpret and apply state law based on a federal interest that is purely speculative.

Interfering with a state's interpretation of its own law is a serious matter, and the Supreme Court has required explicit statutory authorization before concluding that Congress intended to interfere with state prerogatives.[108] However, courts resting jurisdiction on some speculative concern for U.S. foreign relations are setting aside these federalism concerns without *any* statutory basis, let alone an explicit congressional authorization.[109] In the paradigmatic case of protective jurisdiction there is at least a congressional statute that purports to authorize federal jurisdiction over state law claims.[110] Jurisdiction based on the federal common law of foreign relations adds an additional constitutional problem: the courts, not Congress, have identified the federal interest that requires the protection of federal jurisdiction.

Finally, as Judge Kozinski pointed out, there is no reason to believe that these cases will have significantly less impact on U.S. foreign

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[108] See, for example, *Gregory v Ashcroft*, 501 US 452, 461 (1991) (applying a "plain statement rule" to determine whether Congress intended to infringe on states' sovereignty as "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere"); *Atascadero State Hospital v Scanlon*, 473 US 234, 243 (1985) ("[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express the intention in the statutory language ensures such certainty.").

[109] Even if one accepts the theory of protective jurisdiction, it probably represents the outer boundary of the constitutional grant of federal question jurisdiction. Typically, courts try to avoid deciding or creating unnecessary constitutional questions. Thus, at the very least, courts should avoid interpreting *Sabbatino* in such a way as to push the limits of Article III. See, for example, *NLRB v Catholic Bishop of Chicago*, 440 US 490, 500 (1979) (discussing the canon of constitutional avoidance).

[110] A possible recent example of such a statute is the Air Transportation Safety and System Stabilization Act § 408(b)(3), Pub L No 107-42, 115 Stat 230 (2001), codified at 49 USC § 40101 (2000 & Supp 2002). Under the Act, all lawsuits arising out of the events of September 11 must be brought in the Southern District of New York. See Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism and the Federal Courts*, 54 Fla L Rev 361, 384–85 (2002) (arguing that this jurisdictional grant is an appropriate exercise of protective jurisdiction).

affairs if litigated in federal rather than state courts.[111] More plausibly, jurisdiction based on the federal common law of foreign affairs will merely serve as a vehicle for defendants to evade state court jurisdiction.[112] While defendants may generally prefer federal court, there is little reason to believe that state courts will be any less competent to handle cases with a speculative impact on U.S. foreign affairs. Indeed, given that the core of these cases will still be governed by state substantive law, the opposite may be true.

Neither *Sabbatino* itself nor subsequent Supreme Court case law has ordained such a sweeping judicial intrusion on state autonomy. To the contrary, the Court has emphasized in recent years that the political branches, not the courts, have responsibility for striking the right balance between state and federal interests in foreign affairs.[113] For example, the Court recently rejected a challenge to California's multinational corporate tax on the grounds that it undermined U.S. foreign relations and frustrated efforts of the federal government to speak with "one voice."[114] Despite the international outcry created by the California statute, the Court declined to preempt the state law, emphasizing that it was the responsibility of "Congress—whose voice, in this area, is the Nation's—to evaluate whether the national interest is best served by tax uniformity, or state autonomy."[115] Moreover, Congress has consistently shown sensitivity to state autonomy in regulating foreign affairs. For example, the Senate has frequently attached a "federalism understanding" to human rights treaties as a condition of consent.[116] These measures are designed to ensure that these treaty obligations do not alter the balance of power between state and fed-

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111 See *Patrickson*, 251 F3d at 803.

112 See Lumen N. Mulligan, Note, *No Longer Safe at Home: Preventing the Misuse of Federal Common Law of Foreign Relations as a Defense Tactic in Private Transnational Litigation*, 100 Mich L Rev 2408, 2450 (2002) (arguing that defendants "have used the federal common law of foreign relations to manufacture federal question jurisdiction to escape on the merits defenses of state tort actions brought by foreign plaintiffs").

113 The Supreme Court's recent decision in *American Insurance Association v Garamendi*, 123 S Ct 2374 (2003), does not tip the balance toward wholesale federalization of foreign affairs. *Garamendi* stands for the rather well-established proposition that executive agreements preempt conflicting state law. See, for example, *United States v Pink*, 315 US 203, 230–31 (1942); *United States v Belmont*, 301 US 324, 327, 331 (1937). See also note 46.

114 See *Barclays Bank PLC v Franchise Tax Board of California*, 512 US 298, 331 (1994) (upholding the constitutionality of California's multinational corporate tax). See also Bradley and Goldsmith, 92 Am J Intl L at 677–78 (cited in note 80) (discussing the Court's decision in *Barclays*).

115 *Barclays*, 512 US at 331.

116 See Bradley and Goldsmith, 92 Am J Intl L at 677 (cited in note 80) ("The Senate has consistently attached both a 'federalism understanding' and a 'non-self-executing' declaration as a condition of its consent to these treaties."). Professors Goldsmith and Bradley also note that the federal government incorporated state concerns into the implementation of the GATT and NAFTA trade agreements. Id at 678.

eral governments.[117] The courts resting jurisdiction on the federal common law of foreign relations have overlooked the deference to states typically accorded by the political branches. None of the opinions even mentions the intrusion on states as a factor weighing against the exercise of jurisdiction. In sum, allowing jurisdiction based solely on a suit's speculative impact on U.S. foreign affairs is inconsistent with the respect for federalism traditionally shown by both the courts and Congress.

2. Jurisdictional uncertainty.

Beyond the federalism concerns, there is a larger problem with this form of protective jurisdiction. Because of their inexperience with foreign affairs, courts lack the institutional capability to systemically evaluate whether the federal common law of foreign relations is triggered in a given case. Federal question jurisdiction based on the invocation of the federal common law of foreign relations must inevitably turn on each court's individual analysis of whether a case implicates U.S. foreign relations. Even assuming courts are generally competent to make such an evaluation (a dubious assumption, as discussed below), it is unclear what factors a court should consider in determining whether a case implicates important U.S. interests. This open-ended inquiry unnecessarily interjects an element of uncertainty into federal question jurisdiction.

This uncertainty is illustrated by the approach adopted by the Fifth and Eleventh Circuits. In *Torres*, the court relied on the Peruvian government's protests to determine that the case was important to U.S. foreign affairs.[118] The Eleventh Circuit adopted this reasoning in *Pacheco de Perez v AT&T*,[119] but concluded that jurisdiction was inappropriate because the Venezuelan government had not weighed in.[120] Left to assess U.S. foreign affairs interests on its own, the Eleventh Circuit has essentially held that federal question jurisdiction now turns on whether a foreign government complains.[121] Inviting foreign governments to play a role in a federal court's determination of jurisdiction actually increases the possibility that a foreign government will

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117 See id at 677.

118 113 F3d at 543 (noting that the Peruvian government's "vigorousness in opposing this action . . . has alerted us to the foreign policy issues implicated by this case").

119 139 F3d 1368, 1378 (11th Cir 1998).

120 See id.

121 Compare *Patrickson*, 251 F3d at 804:

> Assuming that foreign relations are an appropriate consideration at all, the relevant question is not whether the foreign government is pleased or displeased by the litigation, but how the case affects the interests of the United States. This is an inherently political judgment, one that courts—whether state or federal—are not competent to make.

be offended: inevitably, there will be instances where jurisdiction is not exercised, despite official protests. Such a case-by-case approach would eliminate any predictability in federal question jurisdiction, which runs counter to the entire purpose of the well-pleaded complaint rule.

3. Expanding judicial discretion under the guise of protecting federal interests.

The final problem with jurisdiction based on some speculative impact on U.S. foreign affairs is that it unnecessarily aggregates power to the federal courts at the expense of the political branches and state courts. Jurisdiction based on the federal common law of foreign relations is premised on the idea that important federal interests require a federal forum. This approach also assumes that federal courts will be more sensitive to U.S. foreign affairs than their state counterparts. As discussed above, this supposition is, at best, unsupported.[122] More important, however, is that the courts are reserving for themselves the determination of whether a case is important enough to merit jurisdiction.

This judicial land grab presents several problems. First, it seems in tension with several other judicial doctrines designed to minimize judicial interference in U.S. foreign affairs. For example, the political question doctrine serves to limit adjudication of foreign affairs disputes implicating the other branches.[123] Similarly, *Sabbatino*'s act of state doctrine serves to minimize the possibility that courts will interfere with U.S. foreign relations by questioning the validity of a foreign sovereign's act in its own territory.[124] Each of these doctrines is designed to limit the judicial role in cases implicating international relations. Jurisdiction under the federal common law of foreign affairs would have precisely the opposite effect. It would make a district

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122 See Part III.A.

123 See *Baker v Carr*, 369 US 186, 211–13 (1962) (discussing the political question doctrine in the context of foreign relations). Although the political question doctrine is dormant in the domestic context, it is alive and well in foreign affairs cases. See, for example, *Antolok v United States*, 873 F2d 369, 379 (DC Cir 1989) (refusing to reach the merits of a claim because "the District Court was without jurisdiction over this matter of international relations by reason of the political question doctrine"); *Smith v Reagan*, 844 F2d 195, 199 (4th Cir 1988) (applying the political question doctrine to a claim brought under the Hostage Act). See generally Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U Colo L Rev 1395, 1403 (1999) ("[A]lthough the political question doctrine has fallen into general desuetude since *Baker*, it is frequently applied in the foreign relations field.").

124 See Part I.B.2. The *Charming Betsy* canon is another example. This canon of interpretation states that courts will not presume that Congress intended to violate international law. See *Murray v The Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804) (stating that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains").

court's independent analysis of the U.S. interests a prerequisite to jurisdiction in every case.

Second, even if one accepts that courts are empowered to make these determinations as a doctrinal matter, there is no reason to believe they are well-positioned to do so.[125] Judges 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 required for an informed decision. These pragmatic concerns counsel against expanding a constitutionally questionable jurisdictional approach that frees courts to make judgments for which they are ill-equipped.

CONCLUSION

Although several courts have found jurisdiction based on the federal common law of foreign relations, these decisions cannot be fully explained as applications of the well-pleaded complaint rule. These courts have failed to recognize that state causes of action raise federal questions only in narrow circumstances. Moreover, these cases fail to identify even the minimal ingredient of federal law sufficient to satisfy Article III. Under close scrutiny, jurisdiction based on the federal common law of foreign relations cannot be justified as an exercise of federal question jurisdiction.

These cases are best explained as a type of protective jurisdiction—suits based on state law heard in a federal forum to protect American foreign interests. When jurisdiction under the federal common law of foreign relations is properly understood as protective jurisdiction, it cannot be squared with the statutory requirements of § 1331 nor the broader constitutional limits of Article III. Allowing

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[125] See Goldsmith, 70 U Colo L Rev at 1396–97 (cited in note 123). Professor Goldsmith argues that the Supreme Court initially made a similar mistake in the political question and act of state areas. By moving back toward a formal (rather than functional) approach to applying these doctrines, courts have begun to minimize the judicial role in foreign affairs once again. This trend is not certain to continue. In Professor Goldsmith's analysis, the end of the Cold War was an important factor in the reinvigoration of formalism in foreign affairs. During times of heightened tension, the risks of over- and underinclusiveness presented by a rule-based approach might seem too great. Id at 1409. Thus, the dangers of a post-September 11th world may increase the appeal of functionalism once again.

It is also possible that the Supreme Court's recent decision in *Garamendi*, 123 S Ct 2374, heralds a return toward a more functional approach in foreign affairs cases. The Court eschewed a rule-based approach and focused on the effects the California statute would have on the federal government's ability to conduct diplomacy. However, it is possible that *Garamendi* merely represents Justice Souter's stylistic preferences. A more narrow reading of the opinion is that the Court was not abandoning formalism, but simply evaluating the conflict between the California statute and various executive agreements.

protective jurisdiction based solely on a suit's speculative impact on U.S. foreign affairs unnecessarily interferes with state sovereignty. Finally, this form of protective jurisdiction creates uncertainty by allowing the scope of federal jurisdiction to turn on a federal court's often misguided and uninformed view of what is best for U.S. foreign policy interests.