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### Gully and the Failure to Stake a 28 U.S.C. § 1331 'Claim'

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# GULLY AND THE FAILURE TO STAKE A 28 U.S.C. § 1331 “CLAIM”

Lumen N. Mulligan\*

*Abstract:* In this piece, I argue that a return to *Gully v. First National Bank in Meridian* as an approach to 28 U.S.C. § 1331 jurisdiction is ill-conceived. In a recent thoughtful article, Professor Simona Grossi draws heavily upon the traditions of the legal process school’s approach to federal courts jurisprudence to support just such a resurrection of *Gully* as the lodestar for § 1331 doctrine. While embracing a return to the legal process school, I argue first that the *Gully* view—read as a call for judges simply to select sufficiently important matters, in relation to plaintiff’s case in chief, for inclusion in federal question jurisdiction—does not have a unique affinity to legal-process-school jurisprudential norms. To the contrary, legal-process-school principles support a more traditional rights-and-causes-of-action approach to § 1331 doctrine, understood as a means of effectuating the principle of congressional control over lower federal court jurisdiction. Second, I contend that *Gully*, understood as espousing a transaction or claim-centric approach to § 1331, lays a poor foundation for this doctrine. Indeed, this interpretation of *Gully* is both inaccurate and anachronistic. In this same vein, I note that the Supreme Court’s contemporary use of the term “claim” subsumes the very notions of right and cause of action that the claim-centric view aims to avoid, and that a claim-centered view is likely to cause more practical havoc than help. Finally, I argue that this return to *Gully* is more emblematic of a pragmatic approach to § 1331 jurisdictional law, which I reject within the confines of the broader contemporary discussion regarding the role of “simple” versus “complex” jurisdictional regimes.

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\* Professor of Law and Director of the Shook, Hardy & Bacon Center for Excellence in Advocacy, University of Kansas School of Law. I wish first to thank Professor Simona Grossi for her thoughtful scholarship and for welcoming this dialogue. I also wish to thank the many people who have generously reviewed this work and offered insightful comments, including: Laura Hines, Elizabeth Kronk-Warner, Peter Montecuallo, Glen Staszewski, David Rubenstein, Ellen Sward, Melanie Wilson, and Corey Yung. All remaining errors, of course, are my own.

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## INTRODUCTION

In a recent thought-provoking piece, Professor Simona Grossi argues from a legal-process-school point of view that 28 U.S.C. § 1331 doctrine should be re-constructed in light of *Gully v. First National Bank in Meridian*.<sup>1</sup> She contends that this *Gully*-inspired approach clarifies federal question jurisdiction law when read either as a call for judges simply to select sufficiently important matters, in relation to plaintiff’s case in chief, for inclusion in federal question jurisdiction or when read in terms of “claims,”<sup>2</sup> a concept that she defines “by reference to the facts that establish a legal right to relief” as that concept is used in the Federal Rules of Civil Procedure and contemporary *res judicata* law.<sup>3</sup> In this piece, I praise Grossi’s renewed focus on legal-process-school norms. Indeed, based upon her call to return to our legal-process roots, I contend that my past work in the § 1331 canon is consistent with these jurisprudential norms. Nevertheless, I argue that neither *Gully*, interpreted as requiring judges to select sufficiently important matters for jurisdictional purposes, nor the concept of claim can serve as useful tools for interpreting the § 1331 canon.

I begin with a brief primer on § 1331 doctrine. In 1875, Congress passed the first general grant of federal question jurisdiction, now codified in § 1331.<sup>4</sup> Even though the language of § 1331 parallels that of

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1. 299 U.S. 109 (1936).

2. Simona Grossi, *A Modified Theory of the Law of Federal Courts: The Case of Arising Under Jurisdiction*, 88 WASH. L. REV. 961, 982 (2013).

3. *Id.*

4. 28 U.S.C. § 1331 (2000). This statute has not always been codified here. Nevertheless, I do not employ the cumbersome “predecessor statute to § 1331” locution when referring to cases dealing with the Act as codified in a different location. Instead, I simply refer to this Act as § 1331, even if at a previous time it was codified at a different location. This approach is sound because, excepting

Article III of the Constitution, modern Supreme Court opinions consistently hold that § 1331 federal question jurisdiction is not identical in scope to the constitutional federal question jurisdiction provision.<sup>5</sup> Indeed, the modern Court interprets § 1331 as granting a much narrower scope of jurisdiction than the Constitution permits.<sup>6</sup> In furtherance of this generally restrictive interpretive principle, all § 1331 jurisdictional cases are subject to the well-pleaded complaint rule.<sup>7</sup> Following this rule, only federal issues raised in a plaintiff's complaint, not anticipated defenses, establish federal question jurisdiction.<sup>8</sup>

Doctrinal orthodoxy further maintains that the Court has since established two independent and irreconcilable tests for determining when a complaint raises a well-pleaded federal question. According to the black-letter view, the overwhelming majority of federal question cases<sup>9</sup> vest under § 1331 because federal law—be it by statute, treaty, Constitution or federal common law<sup>10</sup>—creates the plaintiff's cause of action.<sup>11</sup> Justice Holmes so forcefully advocated for this understanding of § 1331 that this view is often referred to as the “Holmes test.”<sup>12</sup> Conversely, pursuant to the second black-letter test, federal question jurisdiction will lie in rare instances over state-law causes of action that

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statutory amounts in controversy, the Act has been essentially unchanged since 1875. *See, e.g.*, Pub. L. No. 96-486, 94 Stat. 2369 (1980) (striking out the minimum amount in controversy requirement); Pub. L. No. 85-554, 72 Stat. 415 (1958) (raising the minimum amount in controversy requirement to \$10,000). Finally, following most scholars, I exclude the short-lived general grant of federal question jurisdiction passed at the end of President John Adams's term and treat the 1875 Act as the first general federal question grant.

5. *See, e.g.*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494 (1983).

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

7. *See, e.g.*, *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) (“The ‘well-pleaded complaint rule’ is the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts.”).

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

9. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

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

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

12. The classic presentation of the Holmes test was made in 1916. *See id.* at 260 (“A suit arises under the law that creates the cause of action.”).

necessarily require construction of an embedded federal right.<sup>13</sup> As *Smith v. Kansas City Title & Trust Co.*<sup>14</sup> is the Court's classic statement of this position, this line of cases is often referred to as the *Smith* test. In *Smith*, a stockholder-plaintiff brought a breach of fiduciary duty cause of action under state law. This case would not satisfy the Holmes test, as it was not brought under a federal cause of action. But the Court held that federal question jurisdiction arose under § 1331 because an element of the plaintiff's state-law claim required adjudication of the constitutionality of a federal act.<sup>15</sup> The standard account of § 1331 jurisdiction, then, finds that federal question subject matter jurisdiction vests under one of two established tests: either (1) because the plaintiff brings a federal cause of action under the Holmes test; or (2) the plaintiff relies upon a federal right under the *Smith* test.

With this briefest of overviews in hand, I turn next to a summary of Grossi's thoughtful work that challenges many of these traditional understandings of § 1331 jurisprudence. Grossi rejects both the cause-of-action-based and rights-based views presented above and instead argues that § 1331 jurisprudence should focus solely upon the Court's 1936 *Gully* opinion.<sup>16</sup> In so doing, she casts off the Court's current focus on the Holmes test, with its focus on cause of action, which she describes as overly "mechanical"<sup>17</sup> and contrary to the earlier—predominantly nineteenth century—interpretations of the Act.<sup>18</sup> She similarly rejects a view that focuses upon both rights and causes of action as a blend of the Holmes and *Smith* tests, espoused by myself and others,<sup>19</sup> also as overly mechanistic.<sup>20</sup> She contends that her view is superior to others as judged by legal-process-school principles, which she asserts form the best

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13. See *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9 (1983) (finding the Holmes test as a rule of inclusion (citing *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.)); see also *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312–13 (2005) (discussing the *Smith* test); *Merrell Dow*, 478 U.S. at 819–20 (same); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921) ("The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.").

14. 255 U.S. 180 (1921).

15. *Id.* at 199–202.

16. See Grossi, *supra* note 2, at 985–86.

17. *Id.* at 987–1004.

18. *Id.* at 976–80.

19. See, e.g., Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667 (2008) [hereinafter Mulligan, *Unified Theory*].

20. Grossi, *supra* note 2, at 981.

vantage from which to evaluate the normative attractiveness of jurisdictional doctrine.<sup>21</sup> Grossi presents these legal-process norms in terms of five concepts: (1) a focus upon institutional settlement; (2) a purposive approach to judicial decision-making; (3) a commitment to rule of law; (4) a commitment to reasoned elaboration of enduring legal principles; and (5) a special attention to the balancing of neutral principles that transcend the immediate facts of any particular case such as the structural features of the Constitution—namely, federalism, separation of powers, and individual rights.<sup>22</sup>

Relying on these principles, Grossi instructs us to consider *Gully* as the proper cornerstone of § 1331 doctrine. The relevant facts from *Gully* are straight-forward. Mr. Gully, a state tax collector, brought state law causes of action against the First National Bank for overdue state levies.<sup>23</sup> The case did not arise under the Holmes test precisely because the plaintiff did not allege a federal cause of action.<sup>24</sup> Nevertheless, the Bank removed to federal court on the theory that § 1331 jurisdiction arose because a federal statute, which was otherwise not at issue in the suit, initially allowed the state to levy taxes against this nationally chartered bank. One interpretation, then, is that the Bank was pushing for an extension of the *Smith* test.<sup>25</sup> The Supreme Court ultimately found that jurisdiction did not lie in this matter.<sup>26</sup>

The following passage from *Gully*'s jurisdictional discussion forms the crux of Grossi's view of § 1331:<sup>27</sup>

This Court has had occasion to point out how futile is the attempt to define a "cause of action" without reference to the context. To define broadly and in the abstract "a case arising under the Constitution or laws of the United States" has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation,

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21. Grossi, *supra* note 2, at 967–70.

22. *Id.*

23. *Gully v. First Nat'l Bank*, 299 U.S. 109, 111 (1936).

24. *See supra* note 11 and accompanying text (outlining the Holmes test).

25. *See supra* notes 13–14 and accompanying text (outlining the *Smith* test).

26. *Gully*, 299 U.S. at 114–15.

27. Grossi, *supra* note 2, at 1009.

so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.<sup>28</sup>

Grossi reads this passage as espousing a “claim-centered” view of § 1331 jurisdiction. As she puts it, “the law of federal question jurisdiction . . . [should be] governed by a claim-centered [analysis], . . . that focuse[s] on the nature of the claim and the role that federal law play[s] within that claim.”<sup>29</sup> Grossi defines claim “by reference to the facts that establish a legal right to relief,” as that concept is used in the Federal Rules of Civil Procedure and contemporary res judicata law.<sup>30</sup> Given the Court’s kaleidoscope metaphor, it is easy to conclude that this *Gully* approach lacks effective guidance. Grossi disagrees. She argues that

*Gully* offers clear guidance as to the key question that should inform the arising under jurisdiction analysis. That question asks whether the “right or immunity [is] such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.”<sup>31</sup>

Finally, she is of the view that this claim-centered approach comports well with the five legal-process-school norms that she identifies as hallmarks of sound jurisdictional jurisprudence.<sup>32</sup> As such, she advocates a return to the *Gully* approach to § 1331 jurisprudence.

While I applaud Grossi’s call for a renewed fidelity to the legal process school, I cannot agree that a *Gully*-inspired, or claim-centered, construction of § 1331 is the best approach—even from a legal-process-school perspective. As the brief summary of her position suggests, Grossi presents *Gully* in at least two lights. Often she reads *Gully* as a call for judges simply to select sufficiently important matters, in relation to plaintiff’s case in chief, for inclusion in federal question jurisdiction.<sup>33</sup>

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28. *Gully*, 299 U.S. at 117–18 (citations omitted).

29. Grossi, *supra* note 2, at 986.

30. *Id.* at 982.

31. *Id.* at 986 (alteration in original) (quoting *Gully*, 299 U.S. at 112).

32. *Id.* at 1009–12.

33. *Id.* at 1009.

At other times, or as compatible means of expressing the same concept, Grossi reads *Gully* as building a § 1331 doctrine upon the concept of claim, understood “by reference to the facts that establish a legal right to relief” as that concept is used in the Federal Rules of Civil Procedure and contemporary *res judicata* law.<sup>34</sup> I reject both readings of *Gully* as setting the proper course for § 1331 jurisprudence.

In Part I, I consider whether a *Gully*-based approach to § 1331 doctrine, read as a call for judges simply to select sufficiently important matters, in relation to plaintiff’s case in chief, for inclusion in federal question jurisdiction, has a unique affinity with legal-process-school jurisprudential foundations. I argue that it does not. I contend that a rights and causes of action approach, as understood as a means of effectuating the principle of congressional control over lower federal court jurisdiction, is as—if not more—representative of the legal process school as is a *Gully* approach.

In Part II, I address the myriad of difficulties that plague the reading of *Gully* as espousing the concept of claim as the key component of § 1331 jurisprudence. First, I contend that *Gully* itself, as properly interpreted, speaks in terms of rights, not claims. Second, I note that a transactional, *res judicata* construction of claim, which Grossi advocates for, is anachronistic as an interpretation of *Gully*. Third, I recount that the Supreme Court’s contemporary usage of the term “claim” in a § 1331 setting necessarily includes the notions of right and cause of action—the very analytic notions that a claim-centric view aims to avoid. Fourth, other uses of claim in the § 1331 context, such as Professor Paul Mishkin’s,<sup>35</sup> do not employ a *res judicata* construction of the idea because § 1331 jurisprudence must speak to federal sources of law, not simply fact patterns. And fifth, I illustrate that a claim-centered approach to federal question jurisdiction tends to conflate jurisdictional dismissals with on-the-merits dismissals.

In Part III, I postulate that the *Gully* view of § 1331 jurisdiction is more emblematic of a pragmatic approach to jurisdictional law and consider it (and ultimately disagree with it) as a contribution to the broader contemporary discussion on the role of “simple” versus “complex” jurisdictional regimes. Even while I disagree with the role that claim should play in federal question jurisdiction, I welcome Grossi’s reorientation of the federal-courts field back to its legal-process-school roots and the opportunity that her important piece brings

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34. *Id.* at 982.

35. *See infra* note 164.



to reground all of our § 1331 discussions in that seminal philosophy.

I. THE LEGAL PROCESS SCHOOL, *GULLY*, AND § 1331 DOCTRINE

I begin my discussion with the legal process school and attempts to articulate refined statements of § 1331 decisional law. Often Grossi sets *Gully*—read as a call for judges simply to select sufficiently important matters, in relation to plaintiff’s case in chief, for inclusion in federal question jurisdiction—as the only approach to § 1331 jurisprudence that comports with the legal process school. In this Part, I contend that my more reticulated “rights and causes of action” approach, understood as representing the principle of congressional control over lower federal court jurisdiction, better comports with the legal process school than does a *Gully*-centered view.

Grossi’s labeling of her view as a “claim-centered” one is perhaps unfortunate, as it may distract from what seems her broader concern of countering “formalistic” and “mechanistic” § 1331 jurisdictional law.<sup>36</sup> What Grossi seems to intend by this specific charge is that § 1331 jurisprudence fails to steer toward true north, as espoused by proponents of the legal process school, because it makes a fetish of vesting jurisdiction in terms of the analytic jurisdictional units used by the Holmes and *Smith* test (i.e., rights and causes of action) and thereby fails to offer reasoned elaborations of the principles that undergird federal question jurisdiction.<sup>37</sup> She sums up this position well in the following passage that discusses the *Gully* opinion:

The only policy reflected in Justice Cardozo’s analysis is one of careful judgment in determining whether the role played by the federal question in the claim is sufficiently important to justify the exercise of jurisdiction. Thus, the entire analysis focuses on a durable principle, and no mechanical test or formula can improve on that. Rather, as indicated by Justice Cardozo, a mechanical approach carries the risk of creating doctrinal labyrinths from which there is no exit.<sup>38</sup>

Grossi here advocates for a reductionist principle approach to § 1331 jurisdiction that asks whether the federal issue in any given case is sufficiently important, in relation to plaintiff’s case in chief, to justify

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36. Grossi, *supra* note 2, at 981–82, 987–1004, 1009 (criticizing the Court and others as producing a mechanistic approach to federal question jurisdiction).

37. *Id.* at 986, 1009.

38. *Id.* at 1009.

taking federal jurisdiction. Such an approach, says Grossi, embraces key legal-process-school norms by forswearing static, mechanistic decision-making, based upon empty and rigid formalisms, in lieu of a doctrine founded upon an enduring principle of judicial selection of sufficiently important matters.

I share Grossi's view that the current Court's rhetorical insistence upon the Holmes-test formulation of § 1331 jurisdiction often falls short of the mark on many grounds. As I have often argued,<sup>39</sup> the rhetoric of the Holmes test frequently creates more confusion than clarity and that both jurists<sup>40</sup> and commentators<sup>41</sup> desire greater coherence in § 1331 cases. While I also agree that the legal-process tradition from whence these anti-formalist and anti-mechanistic impulses derive has much merit, I disagree that *Gully*, interpreted as the judicial determination that a matter is sufficiently important to justify federal jurisdiction, inherently embraces that school of thought. Moreover, I disagree with Grossi that employing rights and causes of action as the building blocks for § 1331 jurisdiction necessarily runs contrary to the legal-process-school tradition.

To be sure, Grossi is correct that the Court has a proclivity toward formalism in its federal-question jurisdiction doctrine. I follow Professor Scott Idleman's jurisdiction-specific definitions of formalism and functionalism here.<sup>42</sup> By formalism, I mean judicial reasoning that is

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39. See, e.g., Lumen N. Mulligan, *You Can't Go Holmes Again*, 107 NW. U. L. REV. 237, 240–41 (2012) [hereinafter Mulligan, *Can't Go Holmes*].

40. See, e.g., Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 320–22 (2005) (Thomas, J., concurring) (lamenting the lack of clear-cut rules for § 1331 jurisdiction); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) (arguing that uncertain jurisdictional rules have the regrettable effect of allowing “[p]arties [to] often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction”); Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 821 n.1 (1986) (Brennan, J., dissenting) (stating a view, held by many, that § 1331 doctrine as it now stands is “infinitely malleable”).

41. See, e.g., Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1225 (2004) (“One ought not make a fetish of bright line rules, but they have their place, and one place in particular is the law of jurisdiction.”); John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145, 190–92 (2006) (calling for the adoption of a rule, as opposed to a standard, in *Smith*-style cases); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1794 (1992) (arguing that “jurisdictional uncertainty can surely lead to both a waste of judicial time and added expense to the litigants”).

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

especially structural and categorical in its jurisdictional analysis.<sup>43</sup> Such an approach eschews balancing multiple interests on a case-by-case basis in determining whether jurisdiction lies in favor of holding that all suits bearing certain deductively determined attributes fall within the courts' jurisdictional scope. As a result, it is typically asserted that formalist jurisdictional decisions lead to bright line rules. Functionalist jurisdictional reasoning, by contrast, seeks to balance any number of case-specific factors (e.g., docket control, fairness to litigants, federalism concerns, congressional intent, as well as structural concerns) in determining whether jurisdiction lies.<sup>44</sup> As such, functionalist jurisdictional opinions tend to be more pragmatic and circumstantial in focus,<sup>45</sup> thus leading many to conclude that such rulings fail to create jurisdictional results that are cognizable *ex ante*.<sup>46</sup> Whether the federal courts ought, across all contexts, to proceed in a formalist or functionalist manner is a long-standing debate among jurists.<sup>47</sup> But this general debate has found especial purchase in jurisdictional discussions as the Court "indulges the old 'habit' of legal formalism" often in its jurisdictional rulings.<sup>48</sup>

It is beyond a doubt that the Court often allows mere formal distinctions based upon a myopic focus on conceptual units such as cause of action or right to vest federal question jurisdiction. For example, federal common law often incorporates, as an overriding presumption, state law rights as a rule of decision and the courts take federal question jurisdiction due to the mere form of a federally created cause of action.<sup>49</sup> Illustrating this point, in *Kamen v. Kemper Financial*

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*the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

43. Idleman, *supra* note 42, at 344.

44. *Id.* at 345.

45. *Id.*

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

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

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

49. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (holding that federal courts

*Services, Inc.*,<sup>50</sup> the Court took jurisdiction in a case where federal common law was crafted to fill gaps in federal securities law, yet the rule of decision in the case was supplied by state law absent preemption by countervailing federal interests.<sup>51</sup> In such cases, the Court improperly, in my view, relies on formalist reasoning in taking § 1331 jurisdiction.<sup>52</sup> In fact, it is difficult to distinguish such “overriding presumption state law incorporation federal common law cases”<sup>53</sup> from situations where § 1331 jurisdiction is not found—such as *Shoshone Mining Co. v. Rutter*<sup>54</sup> and protective jurisdiction<sup>55</sup>—even though all three of these lines of cases are functional equivalents.<sup>56</sup> Both require the federal court to apply the law of the forum state unless overridden by an

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should “incorporat[e] [state law] as the federal rule of decision” unless “application of [the particular] state law [in question] would frustrate specific objectives of the federal programs”); see also 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4518 n.17 (3d ed. 2008) [hereinafter WRIGHT ET AL.] (describing this presumption approach as the recent trend); *id.* § 4518 nn.31–32 (listing cases demonstrating federal interest needed to avoid cross-reference to state law); *id.* § 4518 n.33–38 (exhaustively listing cases cross-referencing state law as a matter of presumption).

50. 500 U.S. 90 (1991).

51. *Id.* at 98 (describing this as a presumption).

52. See Lumen N. Mulligan, *Jurisdiction by Cross-Reference*, 88 WASH. U. L. REV. 1177, 1226–27, 1241–46 (2011) [hereinafter Mulligan, *Cross-Reference*] (discussing this set of cases and the tendency toward formalism).

53. I do not mean to include all exercises of incorporating state law into federal common law as the functional equivalent of protective jurisdiction. In prior work I more carefully parse out different categories of federal common law that incorporate state law rules of decision. Mulligan, *Cross-Reference*, *supra* note 52, at 1221–23 (discussing incorporation of state law into federal common law causes of action in a discretionary manner as not acting as a functional protective jurisdiction).

54. 177 U.S. 505, 508 (1900).

55. See Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 549–50 (1983) (defining protective jurisdiction). There are two leading theories of protective jurisdiction. First, we have Professor Mishkin’s, in which he contends that Congress may vest jurisdiction over state-law claims if done as part of a broader federal program. Mishkin, *infra* note 164, at 195–96. Second, we have Professor Wechsler, who contends that so long as Congress could preempt state law by substantive legislation pursuant to Article I, it may deploy the lesser power to vest federal jurisdiction over state-law claims. Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948). In this piece, I need not dip too deeply into the debates swirling around protective jurisdiction. For those seeking more information, there is a wealth of literature. See, e.g., Goldberg-Ambrose, *supra*; James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1926 (2004); Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389 (2010); Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CAL. L. REV. 1775 (2007); Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933 (1982).

56. Mulligan, *Cross-Reference*, *supra* note 52, at 1226–27, 1241–46 (discussing this set of cases and the tendency toward formalism).

overwhelming federal interest.<sup>57</sup> Moreover, both are subject to similar federalism<sup>58</sup> and structural concerns.<sup>59</sup> Thus, from a functionalist view, if protective *Shoshone*-style jurisdiction is beyond the boundaries of federal question jurisdiction, then federal common law that deploys an over-riding preference to adopt state law as the rule of decision should be as well.<sup>60</sup> All this is to say that I concur that the Court is often guilty

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57. Compare *id.* at 1226–27 (discussing that federal common law actions that carry a mandatory selection of state law as the rule of decision are subject to federal interest preemption), with *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (holding that forum state law applies in federal common law cases unless overridden by a strong showing of a unique federal interest).

58. Compare Mulligan, *Cross-Reference*, *supra* note 52, at 1191–96 (noting federalism concerns in protective jurisdiction of stripping state courts of authority over state law), with *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (holding that because federal common law displaces state law, such issues properly are matters of congressional concern), *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994) (rejecting federal common law rule for attorney malpractice, *inter alia*, as it would “divest[] States of authority over the entire law of imputation”), Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 494–95 (2007) (“[C]onstitutional preemption is a component of almost all the federal common law decisions that displace state law with a judicially created alternative.”), and Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 615 (2006) (“Federal common law displaces state law, and thus shifts the balance of power from state to federal government.”).

59. Compare Mulligan, *Cross-Reference*, *supra* note 52, at 1191–96 (noting structural concerns in protective jurisdiction of over-expanding federal court jurisdiction), with Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1273 (2001) (“The Constitution’s provisions setting forth the procedures for enacting legislation impose numerous obstacles to the displacement of state law, chief among them the bicameralism and presentment requirements. These requirements protect state prerogatives because the states are represented in the legislative process. At the same time, they assure that the federal lawmaking branches will be accountable for any federal decision to displace state law. When the courts decide to displace state law on the basis of federal common law, the safeguards of the bicameralism and presentment requirements are circumvented and no political actors can easily be held accountable for the displacement.” (footnotes omitted)).

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

of less-than-thoughtful, formalistic jurisdictional reasoning.

A. *Rights and Causes of Action as Expressions of Legal-Process-School Norms*

Despite the Court's sloppy track record in this regard, there is nothing in the concepts of rights or causes of action that inherently leads to such empty formalistic rulings. Relying in large part on the concepts of right and cause of action, I have argued that the Court's § 1331 doctrine may be captured by three distinct standards that afford more precise application than references to *Gully's* kaleidoscopic common sense<sup>61</sup> or the Holmes test. I propose three standards. Standard one applies, in my view, when a party makes a colorable assertion of a federal statutory, constitutional, or treaty right coupled with an assertion of a nonjudicially created federal cause of action.<sup>62</sup> Standard two applies when a plaintiff makes a substantial<sup>63</sup> assertion of a federal statutory or constitutional right coupled with a state-law cause of action, as long as the vesting of jurisdiction in any particular instance comports with congressional intent.<sup>64</sup> Standard three applies when a plaintiff makes a substantial assertion of a pure federal common law right and a cause of action, coupled with a showing that supports the application of the federal common law right.<sup>65</sup>

I argue that these reformulations of § 1331 doctrine are not mere mechanistic manipulations of empty formalisms. Rather, this construction of rights and causes of action presents a means of unearthing an enduring separation-of-powers principle justifying these three standards; namely, that of congressional control over the jurisdiction of the lower federal courts. A discussion of § 1331 jurisprudence in terms of rights and causes of action, then, can focus upon an enduring principle that fits well within the legal process school of thought (i.e., the separation-of-powers principle of congressional control over lower court jurisdiction) and be purposive and dynamic. Indeed, my view comports with all five legal-process norms that Grossi

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

62. Mulligan, *Unified Theory*, *supra* note 19, at 1725–26.

63. I define colorable and substantial in greater detail in my prior work. *Id.* at 1682–85.

64. *Id.* at 1726.

65. *Id.*

identifies.<sup>66</sup>

My rights-and-causes-of-action approach comports with the institutional settlement ideal by recognizing the institutional advantage of Congress in making these delicate, federalism-laden choices about jurisdiction.<sup>67</sup> Absent some argument on the peripheries,<sup>68</sup> jurists and scholars agree that the lower court jurisdiction granted by Article III of the Constitution is not self-executing and that Congress retains near plenary power to vest the lower federal courts with as much or as little of that Article III power as it sees fit.<sup>69</sup> Given that federal question jurisdiction “masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system,”<sup>70</sup> it makes sense that Congress renders these jurisdictional decisions because it is the preeminent actor in resolving federalism questions,<sup>71</sup> at least in regard to the intersection of federalism

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66. Grossi, *supra* note 2, at 967–70.

67. *Id.*

68. See Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 535 (2010) (arguing that *Boumediene v. Bush*, 553 U.S. 723 (2008), represents the first case to hold Congress constitutionally bound to vest lower court jurisdiction).

69. See, e.g., Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 N.W. U. L. REV. 1, 2 (1990) (“[C]ommentators mark out their individual lines defining the precise scope of Congress’s authority, but no one has challenged the central assumption that Congress bears primary responsibility for defining federal court jurisdiction.”); Idleman, *supra* note 42, at 241 (“For both constitutional and institutional reasons, the subject-matter jurisdiction of the federal courts is jealously guarded by its Article III keepers.”); *id.* at 250–51 (“[T]he jurisdiction of the lower federal courts does not flow directly from Article III; rather, the jurisdictional grants of Article III must be first affirmed by statute. . . . Congress—let alone the separation of powers—might be doubly offended by the unauthorized exercise of judicial power.” (footnotes omitted)); James Leonard, *Ubi Remedium Ibi Jus, or, Where There’s a Remedy, There’s a Right: A Skeptic’s Critique of Ex Parte Young*, 54 SYRACUSE L. REV. 215, 277 (2004) (“[T]he jurisdiction of the lower courts is a matter of legislative discretion and not of ‘need’ defined from Article III.”); see also MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 83 (2d ed., The Michie Company 1990) (1980) (stating that federal courts can hear cases only if the Constitution has authorized courts to hear such cases and Congress has vested that power in federal courts); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25 (1981) (“Courts and commentators agree that Congress’ discretion in granting jurisdiction to the lower federal courts implies that those courts take jurisdiction from Congress and not from article III.”). Congress retains broad control of the jurisdiction of the inferior federal courts, and it may grant a narrower scope of subject matter jurisdiction than is found in Article III. See also *infra* note 188 (discussing congressional control over lower court jurisdiction).

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

71. The classic example of so-called process federalism is Herbert Wechsler, *The Political*

and the control of the federal courts' jurisdiction.<sup>72</sup> As a result, the Supreme Court consistently holds that Congress is the better institution to make these judgments than are the federal courts.<sup>73</sup> This institutional advantage flows from the fact that the states are represented there, the actors involved are politically accountable, and the process for passing federal statutes offers several opportunities for the states to give input.<sup>74</sup>

My approach also fits well into the broader legal framework of federal law by acknowledging the deeply rooted separation-of-powers principles upon which Congress's institutional advantage is laid.<sup>75</sup> This separation-of-powers principle unifies all three § 1331 standards under

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*Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954). See also Jesse H. Choper, *The Scope of National Powers Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557 (1977) (arguing that the national political system protects states' interests in Congress and that the federal courts should focus on individual rights); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001) (arguing that separation-of-powers doctrine protects states' interest in Congress by rendering the passage of federal legislation difficult); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (arguing that political parties adequately represent states' interests in Congress); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1476 (2007) ("[A]ssigning Congress primary control over interstate relations accords with precedent, federalism values, functional concerns, and history."); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2031 (2003) ("Congress can draw on its distinctive capacity democratically to elicit and articulate the nation's evolving constitutional aspirations when it enforces the Fourteenth Amendment. Because of the institutionally specific ways that Congress can negotiate conflict and build consensus, it can enact statutes that are comprehensive and redistributive, and so vindicate constitutional values in ways that courts cannot."). Of course, process federalism has its critics. See, e.g., Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1462 (2001) (arguing that process federalism does not adequately protect states' interests and thus the federal courts must play an active role in regard); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1815–48 (2005) (arguing that the federal courts have a primary role to play in questions of federalism doctrine).

72. See *Snyder v. Harris*, 394 U.S. 332, 341–42 (1969) (arguing that the Constitution places the power to "expand the jurisdiction of [the lower federal] courts . . . specifically . . . in the Congress, not in the courts"); Mishkin, *infra* note 164, at 159 ("[I]t is desirable that Congress be competent to bring to an initial national forum all cases in which the vindication of federal policy may be at stake."); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1007 (2000) ("Rather than naturalizing a set of problems as intrinsically and always 'federal,' I urge an understanding of 'the federal' as (almost) whatever Congress deems to be in need of national attention, be it kidnapping, alcohol consumption, bank robbery, fraud, or nondiscrimination." (footnote omitted)).

73. See, e.g., *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) (holding that "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts).

74. See *Vázquez*, *supra* note 58, at 1273.

75. See *Grossi*, *supra* note 2, at 967–70.



the banner of congressional intent. I think federal question jurisdiction is better understood as the interplay of the viability of the federal right that the plaintiff asserts with other messaging of congressional intent that the plaintiff's particular claim should be heard in the federal courts.<sup>76</sup> Under my view, then, Congress controls federal question jurisdiction not only by creating jurisdictional statutes such as § 1331, but also, as the Court recently held in *Mims v. Arrow Financial Services*,<sup>77</sup> by creating rights and causes of action.<sup>78</sup> Each component, both the right and the cause of action, lends strength to a party's assertion that congressional intent supports taking jurisdiction in a given case. Thus, congressional creation of rights, in most cases,<sup>79</sup> constitutes strong evidence of legislative intent to vest the federal courts with § 1331 jurisdiction over suits seeking to vindicate such rights. This determination of legislative intent to vest follows from the creation of rights because Congress both intends that its clearly stated, mandatory obligations will be enforced, and it legislates against a historical backdrop in which the federal courts have been essential to the enforcement of such federal rights.<sup>80</sup> In fact, the notion

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76. Mulligan, *Unified Theory*, *supra* note 19, at 1726.

77. \_\_\_U.S.\_\_\_, 132 S. Ct. 740 (2012).

78. *Id.* at 748–49 (“when federal law creates a private right of action and furnishes the substantive rules of decision, the claim arises under federal law, and district courts possess federal-question jurisdiction under § 1331.”); *cf.* Wasserman, *infra* note 181, at 676 (presenting a similar two-step approach to jurisdictional questions, arguing that “[j]urisdictional grants empower courts to hear and resolve cases brought before them by parties; substantive causes of action grant parties permission to bring those cases before the court”); *see also* Howard M. Wasserman, *Jurisdiction, Merits, and Non-Existant Rights*, 56 U. KAN. L. REV. 227, 257 (2008) (“The reach and scope of federal judicial activity and influence can be constrained by jurisdiction stripping or by the non-existence as law of rights and duties. Either apparently produces the same effect—fewer successful actions will be brought in federal court to vindicate individual federal rights, arguably depriving courts of the opportunity to perform their central and essential constitutional function.”).

As Professor Wasserman explains, the decision to “strip” a jurisdictional statute or limit rights has numerous practical differences. Wasserman, *supra* note 78, at 257–74. However, for the narrower purposes of this Article, which focus just on the vesting of § 1331 jurisdiction, these issues are not as pressing.

79. Congress can create rights without vesting the federal courts with jurisdiction. However, such acts are exceptional. *See, e.g.*, 15 U.S.C. § 2310(d) (2000) (limiting most Magnuson-Moss Warranty Act claims to state court). Indeed, the Court now presumes the contrary outcome absent a clear statement to the contrary. *See Mims*, 132 S. Ct. at 749 (“‘[D]ivestment of district court jurisdiction’ should be found no more readily than ‘divestmen[t] of state court jurisdiction,’ given the ‘longstanding and explicit grant of federal question jurisdiction in 28 U.S.C. § 1331.’” (internal citations omitted)).

80. *See, e.g.*, Federal Farmer XV (Jan. 18, 1788), *reprinted in* THE COMPLETE ANTI-FEDERALIST 315 (Herbert J. Storing ed., 1981) (“It is true, the laws are made by the legislature; but the judges and juries, in their interpretations, and in directing the execution of them, have a very extensive influence for preserving or destroying liberty, and for changing the nature of the government.”); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise*

that the creation of statutory rights expresses a legislative intent to vest § 1331 jurisdiction is so strong that many scholars have noted that the creation of a federal right concomitantly creates § 1331 jurisdiction<sup>81</sup>—a concept to which the Court recently concurred.<sup>82</sup> An allegation of a congressionally created cause of action is also strong evidence that Congress desires that cases of that type be heard in federal court. This determination of legislative intent follows from the creation of a cause of action because this amounts to a finding that Congress has determined the plaintiff is “an appropriate party to invoke the power of the [federal] courts” in the matter at hand.<sup>83</sup> Thus, deploying right and cause of action to evaluate whether § 1331 should vest need not be viewed as an empty exercise in manipulating formalities, but as a constitutionally significant quest for congressional intent.

My view is not static, nor do I focus upon analytic units such as right or cause of action as ends in themselves. Accordingly, this view avoids a

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*in Dialectic*, 66 HARV. L. REV. 1362, 1397 (1953) (“Remember the Federalist papers. Were the framers wholly mistaken in thinking that, as a matter of the hard facts of power, a government needs courts to vindicate its decisions?”); *id.* at 1372–73 (discussing the role of enforcement courts and the constitutional constraints that come into play when Congress confers jurisdiction to enforce federal law); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 712 n.163 (1997) (“[A]ny effort to pare back federal jurisdiction would deny Congress an important and historically effective forum for the implementation of its laws.”); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1611 (2000) (“Congress generally cannot ensure enforcement of its legislative mandates without providing a federal judicial forum where violators of those mandates can be prosecuted.”). Of course this raises the issue of the so-called “parity” debate between the federal and state courts. The crux of this debate has been to determine which system, state or federal, better protects federal rights. I need not dip into this debate, as it is likely incapable of non-normative resolution. *See* Brett C. Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL’Y 233, 237 (1999) (noting that the question “whether state courts are doing a good job of interpreting the Federal Constitution . . . inevitably lead[s] to a conclusion influenced by the normative preconceptions of the person who poses the query”). I need only assert that it makes sense to interpret Congress as generally preferring a federal forum for the protection of federal rights. Congress’s preference may have no factual foundation, but the lack of a foundation for Congress’s intent is neither here nor there when one is focusing upon congressional intent as it is the constitutionally empowered actor here. *See supra* note 71 (discussing process federalism in relation to jurisdiction).

81. *See* Wasserman, *infra* note 181, at 677–78 (“The significance of statutory general federal question jurisdiction is that when Congress enacts a substantive law, federal district courts immediately and necessarily attain jurisdiction to hear claims under that statute, without Congress having to do anything more.”). Of course, this only follows when one discusses statutory, not constitutional, federal question jurisdiction. If there were not a well-established series of lower federal courts, such a presumption may well be unsound.

82. *See Mims*, 132 S. Ct. at 748–49.

83. *Davis v. Passman*, 442 U.S. 228, 239 (1979); *see also infra* notes 158–60 and accompanying text (defining the concept of cause of action).

charge of being an exercise in empty formalism.<sup>84</sup> If Congress has not created a right, then § 1331 jurisdiction will not vest, absent the existence of federal constitutional or common law. Thus, if Congress wishes to forestall the federal courts from taking a stand on an issue, it is not required to actively reign in the judicial branch by positive legislation or jurisdiction stripping; it need only refrain from passing federal legislation in that arena. The default position, then, is that § 1331 jurisdiction does not lie,<sup>85</sup> which helps to preserve exclusive state-court jurisdiction over such questions. This principle of the preservation of exclusive state-court jurisdiction, in turn, fosters federalism values.<sup>86</sup> Further, looking for congressional intent by way of rights and causes of action avoids the critique that a congressional intent model of § 1331 is static and thus incapable of accounting for the changing roles of the federal and state courts since 1875.<sup>87</sup> That is, this reconceptualization allows Congress to retain dynamic control over which cases vest in the federal courts without wholesale reformation of the text of § 1331 itself through the creation of rights and causes of action. From this vantage point of congressional intent, it makes sense that the Court should be more receptive to § 1331 jurisdiction over cases where Congress has crafted both a federal right and cause of action than in suits which lack such strong expressions of intent.<sup>88</sup> By this same fashion, my approach explicitly links jurisdiction to congressional creation of rights, furthering legal process rule of law norms.<sup>89</sup>

Finally, this approach offers a judicially meaningful explanation, which (even if not convincing for those who would construct the doctrine differently) meets the obligation to provide reasoned

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84. Grossi, *supra* note 2, at 968 (noting that the legal process school takes an anti-formalist stance).

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

86. *See, e.g.*, James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1005 (2003) (discussing the value of judicial federalism and the role of state courts in resisting national tyranny); James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1746–60 (2003) (same).

87. *See, e.g.*, Friedman, *supra* note 69, at 3 (discussing the need for an approach to federal jurisdiction that is “flexible enough to take into account changing conceptions of the roles” of various courts).

88. Mulligan, *Unified Theory*, *supra* note 19, at 1732–41 (discussing differing degrees of indicia of congressional intent to vest jurisdiction in statutory, constitutional, treaty, and federal common law cases and how these evidences of intent coincide with increasingly difficult standards to vest § 1331 jurisdiction).

89. Grossi, *supra* note 2, at 967–70.

elaboration for judicial decisions. Thus, my rights-and-causes-of-action-based view, with its congressional intent focus, is not an exercise in judicial policy making.<sup>90</sup> Rather, it is a reasoned effort to effectuate the fundamental norm of congressional control over lower court jurisdiction in the face of ever-evolving fact patterns, legal landscapes and imperfect information.

*B. The Gully Approach to § 1331 Fails to Live Up to the Standards of the Legal Process School*

While my rights-and-causes-of-action approach, with its focus on congressional intent, fits well within the legal process school, taking federal question jurisdiction by focusing upon a judicial determination that a federal issue is sufficiently important, in relation to plaintiff's case in chief,<sup>91</sup> as *Gully* at times suggests, can claim no unique assertion to serve as an enduring jurisdictional principle under the legal process school of thought. Indeed, this view, which places ultimate decisional focus on the judge's policy determination that a matter is sufficiently important to merit federal jurisdiction, runs afoul of several key legal process norms all at once. By focusing on judicial determinations of importance of the federal issue, it fails to recognize the institutional advantage Congress holds in making jurisdictional rules and thereby runs afoul of key separation of powers principles that undergird the legal process school. Furthermore, the legal process school posits that rule of law principles are founded on the notion that jurisdictional rules are in reality rules regulating substantive rights.<sup>92</sup> As such, it is puzzling that this *Gully* approach explicitly rejects deploying rights as a key element in the § 1331 analysis.<sup>93</sup> This point is all the more troubling, from a legal-process-school perspective, given that Professors Henry Hart and Albert Sacks, founders of the school, relied heavily on the distinction between rights and causes of action as foundational in their work<sup>94</sup> (or as they termed them, primary and secondary rights).<sup>95</sup>

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90. Compare with *id.* at 969.

91. *Id.* at 1009.

92. *Id.* at 969.

93. *Id.* at 982–83.

94. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* at 130 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also *id.* (“The duty . . . is the central conception of regulatory law . . .”); cf. *id.* at 127–28 n.4 (reproducing Professor Hohfeld's tables of jural opposites and jural correlatives).

95. See Mulligan, *Can't Go Holmes*, *supra* note 39, at 244–45 (noting that the terminology of “primary right” maps on to what in this piece I label “right” and secondary rights maps onto what in

Finally, even if anti-formalist, this *Gully*-centered view offers little by way of reasoned elaboration of § 1331 doctrine. The approach leaves the whole of § 1331 jurisdiction to the judicial gut-check of is “the claim . . . sufficiently important to justify the exercise of jurisdiction”<sup>96</sup> and relies upon kaleidoscope metaphors.<sup>97</sup> Such an approach is little more than an invitation for individual judges to deploy their own preferences regarding “importance” in determining when § 1331 vests. The *Gully* approach hardly makes a credible assertion that it embodies a “reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers.”<sup>98</sup> To the contrary, my congressional-intent approach explicitly traces jurisdictional decisions back to congressional choice as expressed by the creation of rights and causes of action.

At times, Grossi seems to assume that any finer-grained analysis that might cabin such unmitigated policy preferences in this area would improperly transform an enduring principle for taking § 1331 jurisdiction into a meaningless doctrinal maze.<sup>99</sup> The legal process school, however, does not eschew the crafting of detailed and precise doctrine. As Professor Richard Fallon explains, the legal process “paradigm also captures ideals of judicial decisionmaking . . . [wherein] judges and lawyers seek uniting and controlling principles and develop distinctions, as they must, to explain why some cases and fact situations are governed by one principle, some by another.”<sup>100</sup> That is to say, one of the lodestars for legal-process-school scholars is that “analyzing legal doctrines . . . [can] generate fresh insights by exposing previously unrecognized patterns, connections, assumptions, implications, tensions, symmetries, or asymmetries.”<sup>101</sup> That is, it is the job of the legal-process-school scholar to find, if they are there, refined

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this piece I label as “cause of action”); *infra* note 153 and accompanying text (defining rights in Hohfeldian terms).

96. Grossi, *supra* note 2, at 982–83.

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

98. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 966 (1994).

99. Grossi, *supra* note 2, at 1009.

100. Richard Fallon, *Comparing Federal Courts “Paradigms,”* 12 CONST. COMMENT. 3, 10 (1995).

101. Richard Fallon, *Why and How to Teach Federal Courts Today*, 53 ST. LOUIS U. L.J. 693, 706 (2009).

patterns and connections in what may at first blush appear to be unrefined decisional law. Summing up § 1331 jurisprudence as the quest for “sufficiently important” federal questions and refusing more refined analysis of the doctrine as too mechanistic or formalistic, as Grossi at times characterizes as the *Gully* view, seems more a rejection of the legal process school than an embrace. Or as Fallon puts it, “the Hart & Wechsler paradigm by no means precludes all distinctions—only unprincipled ones.”<sup>102</sup>

At other times, perhaps predicting these difficulties, Grossi seeks greater precision from *Gully*. In so doing she looks to the following language from the opinion:

To bring a case within the statute [i.e., § 1331], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . .<sup>103</sup>

Here, Grossi argues that

*Gully* offers clear guidance as to the key question that should inform the arising-under jurisdiction analysis. That question asks whether the “right or immunity [is] such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.”<sup>104</sup>

This construction of *Gully*, however, seems more akin to my rights-centric view than not. Note this presentation of her view—the one that may escape the legal-process-school charges of undue vagueness and violation of separation-of-powers principles—explicitly incorporates the concept of rights as the factor that offers clear guidance for courts. But if this inclusion of rights is essential to the presentation of a coherent legal-process-school-inspired view of § 1331 jurisdiction, then this *Gully*-based project fails on its own terms. Grossi insists that her approach is not reliant upon, and must not be reliant upon, the notions of rights or causes of action.<sup>105</sup> She may not look, then, to rights as a concept in an

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102. Fallon, *supra* note 100, at 15.

103. *Gully v. First Nat’l Bank in Meridian*, 299 U.S. 109, 112–13 (1936).

104. See Grossi, *supra* note 2, at 986 (quoting *Gully*, 299 U.S. at 112).

105. *Id.* at 981–82.

attempt to salvage otherwise unworkable platitudes from *Gully* into a functioning § 1331 jurisprudence. As I discuss below in more detail, to the degree that Grossi concludes that *Gully* really espouses a rights-centric view of federal question jurisdiction, I agree. But this interpretation of *Gully* is antithetical to her stated project of divorcing § 1331 jurisdiction from the “mechanistic” concepts of rights and causes of action.

## II. READING *GULLY* AS A CLAIM-BASED APPROACH

While she often advocates for a view of § 1331 doctrine that looks only for judicially determined important federal questions, in relation to plaintiff’s case in chief, at other points Grossi argues more specifically for a “claim-centric” interpretation of § 1331 doctrine. Turning now to this latter construction of her view, I part with Grossi on two broad grounds. First, I assert that this claim-centered approach is at once both an inaccurate and anachronistic interpretation of *Gully*. Second, putting these historical points aside, I note that the Supreme Court’s contemporary use of the term “claim” subsumes the very notions of right and cause of action that the claim-centric view aims to avoid, and that a claim-centered view is likely to cause more practical havoc than help.

### A. *There Is No Golden-Age of a Claim-Centric § 1331 to Which We Can Return*

I turn first to the issues surrounding the attribution of the claim-centered view to *Gully*. Here I make two points. First, I argue that *Gully* actually represents a rights-focused, not claim-focused, construction of § 1331. Second, I contend that the term “claim,” as Grossi defines it, is anachronistic in relation to the *Gully* opinion.

#### 1. *Gully Speaks in Terms of Rights, Not Claims*

To begin, the *Gully* opinion speaks predominately in terms of “rights,” not “claims” as Grossi asserts. *Gully* uses the term “claim” in a jurisdictional discussion only once.<sup>106</sup> The term “right,” however, is employed nine times. Moreover, in this one jurisdictional use of the term claim, it is used in the context of a discussion of rights: “If we follow the ascent far enough, countless *claims of right* can be discovered to have their source or their operative limits in the provisions of a federal statute

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106. *Gully v. First Nat. Bank*, 299 U.S. 109, 118 (1936).

or in the Constitution itself with its circumambient restrictions upon legislative power.”<sup>107</sup> As the *Gully* Court itself makes clear, it takes a rights-focused approach to § 1331 doctrine.

Indeed, the following rights-centered quotation best sums up the *Gully* view:

We recur to the test announced in *Puerto Rico v. Russell & Co.*, supra: “The federal nature of the right to be established is decisive—not the source of the authority to establish it.” Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far.<sup>108</sup>

I have discussed the *Russell* opinion’s importance to a rights-centered model of § 1331 jurisprudence often,<sup>109</sup> contending that it is a foundational case for a rights-centered approach to § 1331 jurisdiction. As such, I am of the view that *Gully*’s reliance on it cannot be easily dismissed or re-explained in claim-centered terms.

In *Russell*,<sup>110</sup> the Court clearly held that, despite the Holmes test, the focus for § 1331 jurisdiction is the assertion of a federal right, not a federal cause of action.<sup>111</sup> In this case, Puerto Rico sought to collect a tax debt in court because a federal statute required the collection of such claims by a suit at law, as opposed to an attachment proceeding, and it created a federal cause of action to do so.<sup>112</sup> Puerto Rico began a suit at law in the Puerto Rican courts to collect the tax.<sup>113</sup> The defendant removed to federal district court, relying upon the Holmes test, contending that the case arose under § 1331.<sup>114</sup> The similarity of the jurisdictional posture of *Russell* to *Gully* reinforces the importance of *Russell*’s holding in properly interpreting *Gully*. Declining federal question jurisdiction in *Russell*, the Court held that § 1331 may only be “invoked to vindicate a right or privilege claimed under a federal statute.

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107. *Id.* (emphasis added).

108. *Id.* at 116.

109. See Mulligan, *Can’t Go Holmes*, supra note 39, at 258; Mulligan, *Cross-Reference*, supra note 52, at 1197 & n.108; Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 NW. U. L. REV. 175, 196–97 (2010) [hereinafter Mulligan, *Tribunals*]; Mulligan, *Unified Theory*, supra note 19, at 1690–91, 1706–07.

110. 288 U.S. 476 (1933).

111. *Id.* at 483–84.

112. *Id.*

113. *Id.* at 477.

114. *Id.* at 477–78.



It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law."<sup>115</sup> The Court further reasoned that "[t]he federal nature of the right to be established is decisive [for jurisdictional purposes]—not the source of the authority to establish it."<sup>116</sup> *Gully*, as the Court clearly states, is but an application of this rights-centered model of § 1331 jurisdiction.

The Court has relied upon this same anti-Holmes, rights-centered theory of § 1331 jurisdiction as espoused in *Russell* in at least three other cases. In *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*,<sup>117</sup> the Court considered whether claims brought under the Urban Mass Transportation Act, which creates a federal cause of action to enforce collective-bargaining agreements, arose under § 1331. The Court held they do not because the statute mandated that the rule of decision in these suits must be determined by state contract law.<sup>118</sup> Similarly, in *Gully*, the Court refused statutory federal question jurisdiction over a suit to collect state taxes from a nationally chartered bank, despite the existence of a federal statute allowing the levy of such a tax, reasoning that "the federal nature of the right to be established is decisive—not the source of the authority to establish it."<sup>119</sup> And earlier, in *Shulthis v. McDougal*,<sup>120</sup> the Court held that a congressionally created equitable quiet title cause of action lacked statutory federal question jurisdiction because state law controlled the land rights in question.<sup>121</sup> The courts of appeals have also relied upon this rights-focused § 1331 analysis.<sup>122</sup>

As such, even if a claim-centered approach to § 1331 jurisdiction is

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115. *Id.* at 483.

116. *Id.*

117. 457 U.S. 15 (1982).

118. *Id.* at 29.

119. *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 114 (1936) (quoting *Russell*, 288 U.S. at 483).

120. 225 U.S. 561 (1912).

121. *Id.* at 569–70.

122. *See, e.g.*, *Bay Shore Union Free Sch. Dist. v. Kain*, 485 F.3d 730, 734–35 (2d Cir. 2007) (holding that the federal courts lacked § 1331 jurisdiction because the Individuals with Disabilities Education Act empowered plaintiff to sue but the rights at issue were entirely a matter of state law); *City Nat'l Bank v. Edmisten*, 681 F.2d 942, 945–46 (4th Cir. 1982) (holding that the National Bank Act "is not a sufficient basis for federal question jurisdiction simply because it incorporates state law" when the act makes usury, as defined by local state law, illegal, and the nondiverse parties were only contesting the meaning of North Carolina's usury law); *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248, 250 (9th Cir. 1974) (holding no federal question arises where "the real substance of the controversy . . . turns entirely upon disputed questions of law and fact relating to compliance with state law, and not at all upon the meaning or effect of the federal statute itself").

normatively attractive, which is a point I will return to below,<sup>123</sup> the text of the *Gully* opinion cannot be reinterpreted as supporting such a position. Indeed, Grossi inexplicably takes the opinion's rights-centered language and simply insists that it means "claim." For example, she quotes the following from *Gully*: "The *right or immunity* [is] such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."<sup>124</sup> She interprets this language in the following manner: "In other words, the goal is to determine whether resolution of the plaintiff's *claim* turns on a question of federal law."<sup>125</sup> Unless right and claim are synonyms—which Grossi insists they are not<sup>126</sup>—interpretations of *Gully* such as this are not supportable by the text. Indeed, the very cases Grossi provides as illustrative of the prevalence of *Gully* and the claim-centric view all quote or rely upon the rights-centered language presented above.<sup>127</sup> The notion, then, that *Gully* itself stands for a jurisdictional analysis that is independent of the rights-centered approach found in cases such as *Russell*, which *Gully* quotes and relies extensively upon, asks more of the opinion than it can possibly offer;<sup>128</sup> as does the related claim that in the mid-twentieth century *Gully* was the leading § 1331 case.<sup>129</sup>

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123. See *infra* Part II.B.

124. *Gully*, 299 U.S. at 112 (emphasis added); Grossi, *supra* note 2, at 986.

125. Grossi, *supra* note 2, at 986 (emphasis added).

126. *Id.* at 981–82.

127. *Id.* at 987 n.148 (citing *Phillips Petrol. Co. v. Texaco, Inc.*, 415 U.S. 125, 128 (1974); *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661, 675 (1974); *Skelly Oil Co. v. Phillips Petrol. Co.*, 339 U.S. 667, 672 (1950)).

128. See *supra* note 109 (listing past discussions of *Russell*).

129. Grossi, *supra* note 2, at 987 ("[T]he Supreme Court's approach to federal question jurisdiction began to diverge from *Gully*'s path in 1983 with the decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*."). This truly startling assertion, which Grossi supports with three case citations, cannot bear the weight of the evidence. See, e.g., *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 409 (1981); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100–01 (1972); *Int'l Ass'n of Machinists, AFL-CIO v. Cent. Airlines, Inc.*, 372 U.S. 682, 696–97 (1963); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (Brennan, J., dissenting in part and concurring in part); *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 217 (1934); *Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 266 U.S. 200, 207–08 (1924); *Lambert Run Coal Co. v. Balt. & Ohio R.R.*, 258 U.S. 377, 382 (1922); see also 13D WRIGHT ET AL., *supra* note 49, § 3562, at 183 (noting that the Holmes test is the "starting point," even if not the whole story, for § 1331 analysis). The first edition of *Wright, Miller and Cooper*, however, does support Grossi's claim. See 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3562, at 405 (1st ed. 1975) ("The case now most relied on in determining whether federal question jurisdiction exists is *Gully*."). This assertion, however, appears to be a factual error. A Westlaw search for "Holmes test" references prior to *Franchise Tax Board* in the "All Cases" database, returns 258 case citations, not to mention nearly 300 secondary authority citations. A similar date-bounded search for citations to *Gully* prior to the *Franchise Tax Board* decision returns 181 case citations. Further, the early

## 2. “Claim” in the Context of *Gully* Is Anachronistic

This discussion so far begs the question, if a claim is not a right nor a cause of action, just what does Grossi mean by claim? Grossi states, “Under the Federal Rules of Civil Procedure (and under the modern law of res judicata or preclusion), a claim is defined by reference to the facts that establish a legal right to relief.”<sup>130</sup> That is to say, she defines a § 1331 claim in fact-based terms as the notion of claim is used by the Federal Rules of Civil Procedure and contemporary preclusion doctrine.

Before considering the normative merits of this position, it is important to note that the *Gully* opinion itself, to the very limited extent it might be re-imagined as employing the concept of claim, surely did not do so using this contemporary, transactional-based, Federal Rules definition of claim. The *Gully* opinion was handed down in November of 1936. The Federal Rules of Civil Procedure, however, were first enacted in December 1938.<sup>131</sup> Moreover, American courts did not take a transactional approach to res judicata in the 1930s. Rather, the then-leading approach was the “single right” view.<sup>132</sup> The leading federal res judicata case at the time of *Gully* was the 1927 *Baltimore Steamship Co. v. Phillips*<sup>133</sup> opinion, which espoused the single-right approach wholeheartedly.<sup>134</sup> Moreover, the earliest academic urgings for a transactional approach to claim preclusion came in the 1940s,<sup>135</sup> with broader court acceptance only occurring much later.<sup>136</sup> Regardless, then, of whether Grossi’s view of claim is normatively attractive, it would be an anachronistic error to attribute this view to the *Gully* opinion.

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*Wright, Miller and Cooper* was not an unabashed proponent of *Gully*. See 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3562, at 405 (1st ed. 1975) (“Unfortunately although there is much that is valuable in *Gully*, there is also much that is questionable or misleading.”).

130. Grossi, *supra* note 2, at 982.

131. See Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1198–99 (2012) (discussing the original procedures for enacting the Federal Rules of Civil Procedure).

132. See 18 WRIGHT ET AL., *supra* note 49, § 4407 n.30 and accompanying text.

133. 274 U.S. 316 (1927).

134. *Id.* at 321.

135. See CHARLES E. CLARK, HANDBOOK ON THE LAW OF CODE PLEADING 477 (West Publ. 2d ed. 1947) (suggesting measuring a cause of action as “a group of operative facts giving rise to one or more rights of action”); William W. Blume, *The Scope of A Civil Action*, 42 MICH. L. REV. 257, 282–83 (1943) (arguing for a rule requiring joinder of “all claims which arise from the same transaction or occurrence, or which involve common questions of law or fact”). Of course, Clark was a key author of the Federal Rules, and his thoughts on this matter influenced their wording.

136. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1981).

Similarly, at times Grossi suggests that her view of claim recaptures nineteenth century interpretations of federal question jurisdiction.<sup>137</sup> These older views were broader than contemporary § 1331 opinions, as they tended to import the full scope of Article III jurisdiction into the federal question statute.<sup>138</sup> Even under this understanding, Grossi's transactional approach to claim remains an anachronism. Near the time of the ratification of the Constitution, the Supreme Court held Article III federal question jurisdiction "to mean that a federal court may exercise jurisdiction over cases in which an actual federal law was determinative of a right or title asserted in the proceeding before it."<sup>139</sup> Professor Bellia offers the leading pieces discussing the original-meaning interpretations of Article III federal question jurisdiction.<sup>140</sup> Bellia contends that, from an originalist perspective, Article III arising under jurisdiction is best comprehended in the context of writ pleading prevalent at the time of the founding.<sup>141</sup> In fact, the federal courts did not address Article III's federal question jurisdiction provisions entirely anew. Indeed, English law used the term "arising" on occasion, typically meaning that the action must rely upon the source of law from which it arises or the action must arise from a bounded physical territory.<sup>142</sup> Relying on this past practice, the federal courts constructed the meaning of Article III federal

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137. See, e.g., Grossi, *supra* note 2, at 976–80.

138. Ann Woolhandler & Michael G. Collins, *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151, 2160–68 (2009).

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

140. Bellia, *supra* note 139 (arguing that Article III is best interpreted in light of writ pleading concepts and that this insight produces important ramifications for understanding Article III federal question jurisdiction under *Osborn*, standing doctrine, and inferred cause of action doctrine). But note that professors Stewart and Sunstein reject the view that

[t]hese objections to judicial creation of private remedies can be summarized in what we term the formalist thesis. That thesis holds that legal rights cannot be derived from conceptions of natural justice, background understandings, or theories of sound government. Unless the right to be vindicated is granted by the Constitution or a statute, courts lack authority to recognize it; the only basis of legal rights is a textual instrument drawn by a sovereign lawmaking authority.

Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1221 (1982).

141. Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 780–81 (2004).

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

question jurisdiction.<sup>143</sup> Thus, the Court, before issuing *Osborn v. Bank of the United States*,<sup>144</sup> concluded that Article III arising under jurisdiction requires that “federal law created or protected the right or title” at issue.<sup>145</sup> A transactional concept of claim, then, is simply not within that eighteenth century jurisdictional world view.<sup>146</sup>

*B. Contemporary Usage of Jurisdictional Claim Does Not Support a Claim-Centered View of § 1331 Doctrine*

Of course, the claim-centered view need not be wedded to *Gully*, an (in)famously sphinx-like opinion, in order to be persuasive. Rather, it could be grounded in contemporary usage. Even under this reading, I must respectfully disagree with the claim-centered approach’s viability as an interpretation of § 1331. First, the Court’s contemporary use of the term claim includes cause of action and right as component parts of the concept, rendering any attempt to contrast claim as entirely distinct from right and cause of action futile. Second, as others who deploy claim in a jurisdictional context note, a § 1331 claim, if we are to use such terms, must not be defined in a fact-focused manner because federal question jurisdiction is inherently linked to the question of sources of law, not fact patterns. Finally, I assert that a claim-centric view, even if removed from an affiliation with *Gully*, is prone to cause more practical

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143. See *Bellia*, *supra* note 139, at 272; see also *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 10–11 (1799) (construing diversity jurisdictional statute against the background of English jurisdictional law); *Shedden v. Custis*, 21 F. Cas. 1218, 1219 (C.C.D. Va. 1793) (No. 12,736) (opinion of Jay, Circuit Justice) (noting in a diversity case adopting English jurisdictional law that “[t]he English practice has been rightly stated by the defendant’s counsel, and those rules are more necessary to be observed here than there, on account of a difference of the general and state governments”).

144. 22 U.S. (9 Wheat.) 738 (1824).

145. *Bellia*, *supra* note 140, at 328. *Bellia* predominantly relies upon two cases here. First, *Owings v. Norwood’s Lessee*, 9 U.S. (5 Cranch) 344, 347–48 (1809), in which the Court finds a lack of federal question jurisdiction to hear a property claim under the Treaty of Paris ending the Revolutionary War because the treaty merely promises to recognize state-law property rights—if the treaty had created the property rights, then the suit would arise under the treaty. Second, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821), in which the Court, in relation to the question of Article III federal question jurisdiction, held: “A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.” *Id.*

146. *Bellia*, *supra* note 141, at 838 (“At common law, courts did not create remedies whenever a defendant deprived a plaintiff of a statutory benefit; they afforded common law remedies that existed under state law or general principles for certain injuries that happened to arise from a statutory violation. Again, to advocate a return to the common law approach, but to substitute a benefit- or rights-based conception of the cause of action, is to claim a broader judicial power than courts historically exercised.”).

headaches and confusions than it will solve.

1. *The Court's Current Use of Claim Subsumes Causes of Action and Rights*

Even if we move away from *Gully* and older usage of claim toward a contemporary use of the term as the best understanding for what triggers § 1331 jurisdiction, the claim-centric view is fraught. Grossi contends that a claim is a functionally different concept from cause of action<sup>147</sup> and from right.<sup>148</sup> She defines claim in fact-based terms referencing a transactional approach to *res judicata* doctrine.<sup>149</sup> This definition, however, is misapplied in relation to her project given that the Supreme Court's own definition of claim, as used in a federal question subject matter jurisdictional setting, is one that subsumes the concepts of right and cause of action as component parts of a claim.

In fairness to everyone who struggles with § 1331 doctrine, the Supreme Court has not consistently deployed terminology in this arena, which in turn fosters confusion. The Court is not always imprecise, however. In *Davis v. Passman*,<sup>150</sup> for instance, it produced clear definitions of right, cause of action, and claim in relation to § 1331 jurisdiction.<sup>151</sup> The Court continues to adhere to this basic framework established in *Passman*, which does not run in line with a transactional, *res judicata* conception of a jurisdictional claim.

A "right," under this view, is an obligation owed by the defendant to which the plaintiff is an intended beneficiary.<sup>152</sup> This notion of obligation can be thought of in a Hohfeldian sense in that the obligation imposes a correlative duty upon the defendant to either refrain from interfering with, or to assist, the plaintiff.<sup>153</sup> An obligation standing alone, in the Court's view, is not sufficient for status as a right. In

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147. Grossi, *supra* note 2, at 982 ("I would rather focus the jurisdictional inquiry on what constitutes a 'claim.'").

148. *Id.*

149. *Id.* ("[A] claim is defined by reference to the facts that establish a legal right to relief.").

150. 442 U.S. 228, 238–39 (1979).

151. *Id.* at 239 & n.18, 243–44.

152. *Id.*

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

addition, an obligation must be mandatory.<sup>154</sup> And the language at issue must not be “too vague and amorphous” or “beyond the competence of the judiciary to enforce.”<sup>155</sup> This three-part test—mandatory obligation, clear statement, and enforceability<sup>156</sup>—remains the Court’s rubric for determining when a right exists.<sup>157</sup>

A plaintiff has a “cause of action” if he or she falls into a class of litigants empowered to enforce a right in court.<sup>158</sup> As the *Passman* Court put it, “a cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court.”<sup>159</sup> The concept of cause of action relates to the notion of a right insofar as plaintiffs must have rights before they can be persons empowered to enforce them. But the concept of cause of action is not identical with the notion of a right. That is to say, one may have a right, yet lack the power to enforce the right. For example, under certain statutory schemes one’s rights may only be secured by an administrative agency.<sup>160</sup> All this is to say, Congress may vest individuals with rights but withhold causes of action to enforce those rights by way of private suit.

A “claim,” according to *Passman*, constitutes its own concept. As the

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

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

156. This last prong is, or nearly is, identical to the concept of remedy. But whether a court can issue an effective remedy is best understood as a matter of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (discussing redressability). Including redressability in the rights analysis is double counting at best. A more troubling result could be the collapse of the distinction between rights and remedy as this final statement appears to incorporate redressability as part of the rights analysis. Given that the Court has consistently striven since the 1970s to distinguish between rights and remedies, *see* Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 84–104 (2001), however, it would be a disservice to read this collapse into this Article’s jurisdictional analysis unless it is absolutely necessary. I will, therefore, focus on the notions of mandatory obligation and clear statement.

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

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

159. *Id.* at 239 n.18.

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

*Passman* Court held, in order to have a claim, one must have a cause of action.<sup>161</sup> But again, cause of action is but a necessary, not a sufficient, condition to having a claim. To be clear, the *Passman* Court uses cause of action in the sense that a plaintiff is a member of a class entitled to enforce rights in court, not in the sense that the term was used under the former code and writ pleading schemes. Those older usages of the term were rejected by the authors of the Federal Rules of Civil Procedure.<sup>162</sup> Thus, in order to have a federal claim in this contemporary sense, a plaintiff must: (1) assert a federal right; (2) be a member of the class of persons entitled to enforce the right (i.e., assert a cause of action); and (3) possess the other attributes of a claim, which means an assertion of a transaction or occurrence that is sufficient, if true, to justify a remedy.

At least under contemporary judicial usage, the notion of claim includes right and cause of action as definitional sub-components. This judicial usage of claim in the § 1331 context makes an attempt to divorce entirely claim from right and cause of action conceptually impossible as the very notion of claim includes the concepts of a right and cause of action as component parts. That is to say, one cannot assert that a claim-based understanding of federal question jurisdiction escapes assumed difficulties inherent in a rights-based or cause-of-action-based construction of § 1331 jurisdiction because the former subsumes the latter by definition. Indeed, even though Grossi intends for her view of claim to differ from a rights-based or cause-of-action-based view, her own definition of claim—which she states “is defined by reference to the facts that establish a *legal right to relief*”<sup>163</sup>—incorporates the concept of right. In this regard, the claim-centric construction of § 1331 fails on its own terms.

## 2. *Other Conceptions of a § 1331 Claim Are Not Fact Focused*

Of course, claim as a concept is not always a false start in the § 1331 context. Mishkin famously forwarded the view that one of the primary purposes of federal question jurisdiction in the district courts is to protect federal rights, which often require a receptive forum to resolve factual issues without the need to resolve unclear questions of federal

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

162. *Id.* at 237–39. *But see* Bellia, *supra* note 139, *passim* (arguing that the understanding of cause of action as it was used under common law writ pleading illuminates the original meaning of constitutional federal question jurisdiction).

163. Grossi, *supra* note 2, at 982 (emphasis added).



law.<sup>164</sup> Mishkin's point here was to reject the view that federal district courts should be available in § 1331 cases only if the case presented an open question of federal law that required resolution.<sup>165</sup> Thus, Mishkin thought that § 1331 jurisdiction should be viewed as power over "federal claims," not just unresolved federal legal questions, so as to highlight this purely fact-finding purpose.<sup>166</sup> But even in this context, Mishkin did not contend that § 1331 jurisdiction vested in relation to facts alone. Rather, in his view, so long as there is a federal right as an ingredient to the case, the federal courts should stand ready to vindicate federal rights even in purely fact-bound cases where the status of the federal law at issue had been resolved in some prior case.<sup>167</sup> That is to say, Mishkin did not take a fact-centric approach to the taking of federal question jurisdiction as Grossi defines the term; rather, he held only that the federal district courts should stand ready to serve solely as fact finders in cases where federal rights are at issue.

Moreover, defining a § 1331 claim in transactional, *res judicata* terms simply makes no sense. One of the points of a transactional approach to claim preclusion (i.e., *res judicata*) is that the source of law the plaintiff relies upon is immaterial to the preclusive effect of adjudicating the original suit in relation to future filings. As *Wright & Miller* describes:

A second action may be precluded on the ground that the same claim or cause of action was advanced in the first action even though a different source of law is involved. Claim preclusion may apply to theories advanced under different statutes, under common law and statute, or under the laws of different sovereigns. At one time it may have seemed that claim preclusion would be limited by a requirement that the different laws be designed to protect the same interests. Today, the general transactional approach should be employed. The fact that different sources of law are involved simply requires that particular care be taken in addressing the questions raised by the presence of different parties, continuing conduct, unduly complex litigation, and jurisdictional limitations.<sup>168</sup>

The notion, then, that § 1331 jurisdiction can be explained in terms of

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164. Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 169-76 (1953).

165. *Id.*

166. *Id.* at 171.

167. *Id.* at 170 (contrasting the roles that the district courts and Supreme Court play in relation to federal question jurisdiction).

168. 18 WRIGHT ET AL., *supra* note 49, § 4411.

a fact-based conception of a res judicata claim is a non-starter. A claim for res judicata purposes is indifferent to the source of law or legal theory applied. Federal question jurisdiction, however, is decidedly not indifferent to the source of the law or the legal theory applied. Indeed, § 1331 jurisdiction can only be determined in reference to the source of law or legal theory applied, contrary to the way in which a res judicata claim is deployed. For example, in 1970, before ERISA<sup>169</sup> was passed, a suit by an employee for breach of contract in relation to an employee benefit plan would not arise under § 1331. After the passage of ERISA, such a suit does arise under § 1331.<sup>170</sup> This change in jurisdictional outcome cannot be explained using the concept of a res judicata claim, as the facts in both suits are the same by postulation. Rather it is a change in the source of the law or legal theory—again notions irrelevant to a res judicata claim—that explains the jurisdictional outcome.

A theory of § 1331 jurisdiction based upon a res judicata conception of claim—one that is not supposed to be founded upon cause of action, right, or other construction of federal legal interest,<sup>171</sup> but upon “reference to the facts” as the notion of a claim is used “under the modern law of res judicata”—must fail for several reasons. First, claim in a res judicata sense is necessarily comparative. That is to say, a res judicata conception of claim only makes sense in the context of asking whether the same claim brought in suit number one is now brought in suit number two.<sup>172</sup>

In some jurisdictional settings this res judicata, claim-based approach is sound. In 28 U.S.C. § 1367 supplemental jurisdiction, for example, the courts rightly use a transactional notion of claim in making the decision to take jurisdiction over pendent and ancillary claims by comparing those supplemental claims to claims already before the federal court.<sup>173</sup> Section 1331 doctrine, however, must determine whether federal question jurisdiction lies without comparison to some past suit or claim

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169. Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974).

170. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) (holding common law causes of action filed in state court preempted by ERISA which fell within scope of such provision were removable to federal court under the well-pleaded complaint rule).

171. Grossi, *supra* note 2, at 982.

172. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (addressing “[w]hen a valid and final judgment rendered in a [prior] action extinguishes the plaintiff’s [present] claim”).

173. 28 U.S.C. § 1367(a) (2012) (“[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”).

brought by the same plaintiff, rendering the comparative nature of the approach inapt in this setting. Second, while the *res judicata* claim is rightly a fact-focused concept, § 1331 jurisdictional doctrine must, as the ERISA example illustrates, provide some means for determining when a federal *legal* question is at stake. Merely focusing upon the facts of a case will not accomplish this task. Rather, § 1331 doctrine must provide some means—if not a right and/or cause of action, then some other legal notion—of determining whether a federal legal question arises. As discussed above,<sup>174</sup> the idea of arising under jurisdiction, as that concept was imported from British law to American law, has always been a legal, not a fact-focused, question. Grossi, moreover, implicitly acknowledges as much, noting that the goal of § 1331 doctrine is to determine whether a question of federal law is at issue.<sup>175</sup> This acknowledgement, then, illustrates precisely why a *res judicata* conception of claim simply cannot be the analytic unit that resolves this jurisdictional issue. The analytic building block for § 1331 jurisdiction must be a legal matter. Grossi, by rejecting right and cause of action and defining claim in factual terms, fails to offer such a legally focused starting point.

### 3. *Confusing Jurisdictional and On-The-Merits Dismissals*

The claim-centered view, moreover, tempts us to take our eye off the jurisdictional ball, which could well lead to unfortunate conflating of concepts that would have real-world negative consequences. The *Passman* Court's presentation of claim as facts plus rights plus cause of action is not only the blackletter view, but it makes sense within the context of procedure writ more broadly as a means (not always successful, to be sure) of distinguishing between jurisdictional and on-the-merits dismissals.<sup>176</sup> "As frequently happens where jurisdiction depends on subject matter, the question [of] whether jurisdiction

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174. See *supra* notes 140–45 and accompanying text.

175. Grossi, *supra* note 2, at 986 ("In other words, the goal is to determine whether resolution of the plaintiff's claim turns on a question of federal law.>").

176. See Douglas D. McFarland, *The True Compass: No Federal Question in a State Law Claim*, 55 U. KAN. L. REV. 1, 27 n.160 (2006) ("Understanding the fact-based, transactional nature of a claim is important throughout the federal rules and federal jurisdictional statutes. Kinship of the 'claim' to the commonly encountered 'transaction or occurrence' is apparent."). On the other hand, Professor John Oakley has attempted to distinguish causes of action from claims in the following way: a cause of action should refer to "a transaction or occurrence," and a claim for relief should refer to "the legal theories upon which relief depends." John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 76 TEX. L. REV. 1829, 1858–59 (1998).

exists . . . [is often] confused with the question whether the complaint states a cause of action[, which the Federal Rules now refer to as a claim].”<sup>177</sup> But as the Court has often held,

[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover . . . [because] the failure to state a proper cause of action[, which the Federal Rules refers to as a claim] calls for a judgment on the merits.<sup>178</sup>

Indeed, even in cases of federal question jurisdiction, proper subject matter jurisdiction vests a federal court with the power to decide both successful and unsuccessful suits.<sup>179</sup> Although the Supreme Court’s admonishments never to conflate these two concepts are well intended, many lower federal courts are quick to note that “[w]hile distinguishing between a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) and a dismissal for failure to state a claim under Rule 12(b)(6) appears straightforward in theory, it is often much more difficult in practice.”<sup>180</sup> Constructing a theory of subject matter jurisdiction upon a transactional, fact-centered approach to claim would only make this already difficult distinction nearly untenable.

Moreover, preserving this distinction matters—a lot. The standard view of the distinction between jurisdictional and merits dismissals employs both formal and pragmatic distinctions between the two concepts. On the formalities side, subject matter jurisdiction speaks to a

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177. *Montana-Dakota Util. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 249 (1951); *see also* Fogel v. Chestnut, 668 F.2d 100, 105–07 (2d Cir. 1981) (Friendly, J.) (providing an insightful discussion of the standard view).

178. *Bell v. Hood*, 327 U.S. 678, 682 (1946); *see also* *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (“It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, i.e., the courts’ statutory or constitutional *power* to adjudicate the case.”); *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979) (similar); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 71–72 (1978) (similar); *Montana-Dakota Util.*, 341 U.S. at 249 (similar).

179. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

180. *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996); *see also* *Primax Recoveries, Inc. v. Gunter*, 433 F.3d 515, 517 (6th Cir. 2006); *Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161, 1166 (10th Cir. 2004); *Carlson v. Principal Fin. Grp.*, 320 F.3d 301, 305–06 (2d Cir. 2003); *Schwenker v. Molalla River Sch. Dist. No. 35*, No. 06-506-ST, 2006 WL 3019828, at \*3 (D. Or. Oct 19, 2006); Joshua Schwartz, Note, *Limiting Steel Co.: Recapturing a Broader “Arising Under” Jurisdictional Question*, 104 COLUM. L. REV. 2255, 2261 (2004) (noting that “[c]ourts are often hard pressed to define the difference between jurisdiction and the merits and have been forced to concede that . . . [the distinction] is often much more difficult [to make] in practice”) (quoting *Nowak*, 81 F.3d at 1187); RESTATEMENT (SECOND) OF JUDGMENTS: *Subject Matter Jurisdiction* § 11 cmt. e (1982) (“[Q]uestion[s] often can plausibly be characterized either as going to subject matter jurisdiction or as being one of merits . . .”).

court's ability to resolve claims and defenses in either the affirmative or negative.<sup>181</sup> A failure to state a claim, by contrast, presupposes that a court has power to resolve a case but that the plaintiff's complaint contains some sort of legal infirmity or pleading defect on its face.<sup>182</sup> Under the standard view, in a federal-question jurisdiction case, the issue of subject matter jurisdiction is both analytically distinct from,<sup>183</sup> and prior to,<sup>184</sup> the issue of the plaintiff's ability to state a claim in the

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181. See *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1620 (2003) (arguing that jurisdiction is "a matter of something like legitimate authority"); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 670-78 (2005); Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1470-77 (2006) (listing the three major theories which seek to explain the concept of jurisdiction as power, legitimacy, and legislative control).

182. See, e.g., *Bell*, 327 U.S. at 682 ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."); 5B WRIGHT ET AL., *supra* note 49, § 1356 (discussing purpose of Rule 12(b)(6) motions).

183. See, e.g., *Baker v. Carr*, 369 U.S. 186, 198-200 (1962) (discussing the fundamental difference between a dismissal on the merits and a jurisdictional dismissal); *Ehm v. Nat'l R.R. Passenger Corp.*, 732 F.2d 1250, 1257 (5th Cir. 1984) ("A dismissal under both rule 12(b)(1) and 12(b)(6) has a 'fatal inconsistency' and cannot stand. 'Federal jurisdiction is not so ambidextrous as to permit a district court to dismiss a suit for want of jurisdiction with one hand and to decide the merits with the other. A federal district court concluding lack of jurisdiction should apply its brakes, cease and desist the proceedings, and shun advisory opinions. To do otherwise would be in defiance of its jurisdictional fealty.'" (quoting *Opelika Nursing Home, Inc. v. Richardson*, 448 F.2d 658, 667 (5th Cir. 1971))); *Johnsrud v. Carter*, 620 F.2d 29, 32-33 (3d Cir. 1980) (holding that "[d]ismissal on jurisdictional grounds and for failure to state a claim are analytically distinct . . . , implicating different legal principles" and different burdens of proof); *John Birch Soc. v. Nat'l Broadcasting Co.*, 377 F.2d 194, 197 n.3 (2d Cir. 1967) (affirming only on 12(b)(1) grounds when the district court dismissed the case on the grounds of a failure to state a claim and lack of subject matter jurisdiction because "[t]he dismissal of these actions on jurisdictional grounds should not be construed to imply affirmance of the substantive grounds for dismissal adopted by the District Court"); cf. *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 364 (1st Cir. 2001) ("It is pellucid that a trial court's approach to a Rule 12(b)(1) motion which asserts a factual challenge is quite different from its approach to a motion for summary judgment."); *Winslow v. Walters*, 815 F.2d 1114, 1116 (7th Cir. 1987) ("Seeking summary judgment on a jurisdictional issue, therefore, is the equivalent of asking a court to hold that because it has no jurisdiction the plaintiff has lost on the merits. This is a nonsequitur.").

184. See, e.g., *Steel Co.*, 523 U.S. at 94-95 (holding that the notion of hypothetical jurisdiction is contrary to law); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884) (noting that "the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes"); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 250 (1867) (holding that "[i]f there were no jurisdiction, there was no power to do anything but strike the case from the docket"); *Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 149 (1st Cir. 2002) ("When a court is confronted with motions to dismiss under both Rules 12(b)(1) and 12(b)(6), it ordinarily ought to decide the former before broaching the latter."); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988); *Jones v. Georgia*, 725 F.2d 622, 623 (11th Cir. 1984) ("When a district court has pending before it both a 12(b)(1) motion and a 12(b)(6) motion,

transactional, fact-laden sense that Grossi employs. As such, a 12(b)(1) motion serves a distinctly different purpose from a 12(b)(6) motion. The former is, by and large,<sup>185</sup> a modern equivalent of a plea in abatement.<sup>186</sup> A 12(b)(1) motion, then, does not attack the merits of the plaintiff's claim or sufficiency of the pleadings, but merely the propriety of the federal forum.<sup>187</sup> By challenging the propriety of the federal forum, the movant necessarily argues that the federal court lacks the power under either the Constitution or laws of the United States to hear the case.<sup>188</sup> A 12(b)(6) motion, by contrast, is the modern equivalent of a demurrer.<sup>189</sup> Again in contrast to a jurisdictional challenge, the 12(b)(6) motion speaks to the merits of the claim (i.e., do the facts as pleaded provide legal relief<sup>190</sup>) or the plaintiff's conformity to Rule 8(a)(2).<sup>191</sup>

While a coherent theory of § 1331 should assist in distinguishing between jurisdictional and Federal Rule of Civil Procedure 12(b)(6)

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the generally preferable approach, if the 12(b)(1) motion essentially challenges the existence of a federal cause of action, is for the court to find jurisdiction and then decide the 12(b)(6) motion.”).

185. A motion to dismiss for lack of subject matter jurisdiction can merely attack the sufficiency of the jurisdictional statement required by Rule 8(a)(1). *See* 5C WRIGHT ET AL., *supra* note 49, § 1363. But such dismissals are not the focus of the present discussion.

186. Wasserman, *supra* note 181, at 649–53 (discussing the “first phase” of litigation where jurisdictional questions are properly addressed); 5B WRIGHT ET AL., *supra* note 49, § 1349 (“Rules 12(b)(1) through 12(b)(5) and 12(b)(7) essentially are defenses to the district court’s ability to proceed with the action. They are modern counterparts to the common law pleas in abatement and do not go to the merits of a claim.”).

187. 5B WRIGHT ET AL., *supra* note 49, § 1349; BLACK’S LAW DICTIONARY 1172 (7th ed. 1999).

188. *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (describing subject matter jurisdiction as the power of the court); *see also supra* note 6. Congress retains broad control of the jurisdiction of the inferior federal courts, and it may grant a narrower scope of subject matter jurisdiction than is found in Article III. *See, e.g.*, Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982) (espousing the traditional view that Congress is not required by Article III to vest full constitutional subject matter jurisdiction in the inferior federal courts). *Contra* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 209 (1985) (arguing that Congress must vest some of the Article III heads of jurisdiction in the federal judiciary). *See also* Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981) (arguing that there are non-Article III limits to Congress’s discretion in vesting inferior federal courts with subject matter jurisdiction). Exercising this control over inferior courts, Congress withheld general federal question jurisdiction from them until 1875. *See* Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470.

189. 5B WRIGHT ET AL., *supra* note 49, § 1349 (“Rule 12(b)(6) is the successor of the common law demurrer and the code motion to dismiss and is a method of testing the sufficiency of the statement of the claim for relief.”).

190. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“[W]e hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that [a statutory violation occurred].”).

191. *Id.*

dismissals, reverting to a claim-centered view of § 1331 jurisdiction only exacerbates this problem. Such a transactional, fact-centered approach invites increased conflation of jurisdictional dismissals with on-the-merits ones. This distinction is not merely a formalist one, but one that produces important pragmatic consequences.<sup>192</sup> First, treating an issue as jurisdictional has the consequence of generally raising the issue at the outset of the litigation process.<sup>193</sup> Despite this early treatment, jurisdictional issues, unlike a 12(b)(6) motion,<sup>194</sup> are unwaivable and must be raised *sua sponte* by the court.<sup>195</sup> Factual findings related to jurisdiction, unlike the presumption of truthfulness a well-pleaded complaint enjoys in a 12(b)(6) motion,<sup>196</sup> are often made by the court and subject to deferential review on appeal.<sup>197</sup> Furthermore, the party alleging jurisdiction, not the movant, bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence.<sup>198</sup> Because of the fundamental nature of subject matter jurisdiction, a judgment on the merits issued by a court lacking jurisdiction is *ultra vires* without any binding power.<sup>199</sup> Similarly, jurisdictional dismissals, unlike the general treatment for 12(b)(6) dismissals,<sup>200</sup> are not judgments on the merits and, therefore, are dismissals without prejudice,<sup>201</sup> which are not subject to *res judicata* doctrine,<sup>202</sup> except on the narrow issue of

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192. See generally Wasserman, *supra* note 181, at 662–69.

193. See, e.g., *id.* at 662; Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 47 (1994).

194. FED. R. CIV. P. 12(b)(2).

195. FED. R. CIV. P. 12(h)(3); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006); *United States v. Cotton*, 535 U.S. 625, 630 (2002) (“[S]ubject matter jurisdiction, because it involves the court’s power to hear a case, can never be forfeited or waived.”); Dane, *supra* note 193, at 36–37.

196. See, e.g., *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 325 (1991).

197. *Arbaugh*, 546 U.S. at 514 (“[I]f subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own.”); Wasserman, *supra* note 181, at 662.

198. See, e.g., FED. R. CIV. P. 8(a)(1); *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (amount in controversy in diversity action); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (sovereign immunity of Indian tribe); *Hedgepeth v. Tennessee*, 215 F.3d 608, 611 (6th Cir. 2000); *Marcus v. Kansas Dep’t of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999).

199. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998); Dane, *supra* note 193, at 32–35.

200. *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981); see also FED. R. CIV. P. 41(b).

201. See, e.g., *Vandor, Inc. v. Militello*, 301 F.3d 37, 38–39 (2d Cir. 2002); *Mo. Soybean Ass’n v. EPA*, 289 F.3d 509, 513 (8th Cir. 2002); *Leaf v. Sup. Ct. of Wis.*, 979 F.2d 589, 595 (7th Cir. 1992).

202. Dane, *supra* note 193, at 42.

the jurisdictional ruling itself.<sup>203</sup> Finally, a dismissal for want of jurisdiction will also divest a federal court of pendent jurisdiction over plaintiff's related state-law claims.<sup>204</sup>

In sum, the claim-focused approach to § 1331 jurisdiction, seen as a *res judicata* construct, faces many problems, especially if such a reading is presumed to follow as an interpretation of *Gully*. First, *Gully* itself, as properly interpreted, speaks in terms of rights, and not claims. Second, a transactional claim preclusion construction of claim is anachronistic as an interpretation of *Gully*. Third, the Court's contemporary usage of the term claim in a § 1331 setting subsumes the notions of right and cause of action. Fourth, other uses of claim in the § 1331 context, such as *Mishkin*'s, do not employ a *res judicata* construction of the idea because § 1331 jurisprudence must speak to federal sources of law, not simply facts. And fifth, Grossi's approach tends to conflate jurisdictional dismissals with on-the-merits dismissals.

### III. GULLY AS JURISDICTIONAL PRAGMATISM

Relying on *Gully*, I have argued, neither comports with legal-process-school norms nor is it helpfully amenable to re-construction in terms of a *res judicata*-like claim. Rather than a celebration of the legal process school, this *Gully*-inspired approach seems more a bow to a pragmatic approach to § 1331 jurisdiction. To this end, I lastly consider the *Gully*-inspired view as a type of pragmatism, read in light of Grossi's primary thesis as a call for judges simply to select sufficiently important matters, in relation to plaintiff's case in chief, for inclusion in federal question jurisdiction. I address this aspect of the *Gully* approach as a part of the current debate that questions whether simplicity or complexity in jurisdictional rules present the best course.<sup>205</sup> Viewed from this

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203. *Ricketts v. Midwest Nat'l Bank*, 874 F.2d 1177, 1182 n.4 (7th Cir. 1989); *Magnus Electronics, Inc. v. Argentina*, 830 F.2d 1396, 1400 (7th Cir. 1987); *Bromwell v. Mich. Mut. Ins. Co.*, 115 F.3d 208, 212–13 (3d Cir. 1997); *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 94 F.3d 747, 754 (2d Cir. 1996); 18 WRIGHT ET AL., *supra* note 49, § 4403.

204. See, e.g., 28 U.S.C. § 1367(a); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993); *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 817 n.15 (1986); *Hagans v. Lavine*, 415 U.S. 528, 545–50 (1974).

205. Compare *Dodson*, *supra* note 46 (in a leading article in this topic, arguing that clarity in jurisdictional law is often over-valued), with Rory Ryan, *It's Just Not Worth Searching for Welcome Mats with A Kaleidoscope and A Broken Compass*, 75 TENN. L. REV. 659, 661 (2008) (agreeing with “Justice Holmes and his growing fan club . . . [that while s]impler may not always (or even often) be better . . . it is in this [§ 1331] context.”). I have weighed in briefly on this matter. Lumen N. Mulligan, *Clear Rules—Not Necessarily Simple or Accessible Ones*, 97 VA. L. REV. IN BRIEF 13, 13 (2011) (arguing that “a clarity-enhancing rule, even if complex and inaccessible, may be a more promising endeavor than the search for a regime that is at once clear, simple, and accessible”)



perspective, I conclude that this pragmatic view fails in the § 1331 context as prompting simplicity to the detriment of clarity.

It is useful, I suggest, to consider this *Gully* approach to § 1331 as part of a large dialogue regarding the role of clarity and simplicity in jurisdictional regimes. On one side of this debate, scholars such as Professor John Preis contend that “[j]ust about nobody, it seems, thinks that jurisdictional rules should be fuzzy.”<sup>206</sup> Following this line, thinkers such as Professor Rory Ryan argue for

[t]he Holmes test . . . [and its] narrow . . . bright lines . . . [which n]o doubt, at the fringes . . . will exclude some cases that seem to be proper candidates for initial resolution in federal court. Bright-line rules will do that. In this context, it’s worth it.<sup>207</sup>

The *Gully* view, read as a call for judges simply to select sufficiently important matters for inclusion in federal question jurisdiction, in relation to plaintiff’s case in chief, takes the opposite pole in calling for a pragmatic approach to vesting § 1331 jurisdiction.<sup>208</sup>

I begin, then, with the concept of pragmatism. By pragmatism I mean a jurisprudence “with its ideal of decisionmaking that ‘works’ and achieves satisfactory results”<sup>209</sup> without fleshing out any further doctrinal detail justifying these “right” results. A call to reconstruct § 1331 law as individual judges determining when a case is sufficiently important to warrant federal jurisdiction<sup>210</sup> full stop, at least in my view, seems best interpreted as just such a call for decisionmaking that “works.” To be sure, pragmatism, especially in equity matters, is often the proper course.<sup>211</sup> But just as often, “‘pragmatism’ is an honorific title for wooliness masquerading alternately as profundity and common

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[hereinafter Mulligan, *Clear Rules*].

206. Preis, *supra* note 41, at 167.

207. Ryan, *supra* note 205, at 663.

208. See *supra* note 45 and accompanying text (noting that functionalist jurisdictional theories may be characterized as pragmatic approaches).

209. Fallon, *supra* note 100, at 16–17.

210. Grossi, *supra* note 2, at 1009.

211. See, e.g., *Holland v. Florida*, 560 U.S. 631, 649–50 (2010) (“[W]e have also made clear that often the ‘exercise of a court’s equity powers . . . must be made on a case-by-case basis.’ In emphasizing the need for ‘flexibility,’ for avoiding ‘mechanical rules,’ we have followed a tradition in which courts of equity have sought to ‘relieve hardships which, from time to time, arise from a hard and fast adherence’ to more absolute legal rules, which, if strictly applied, threaten the ‘evils of archaic rigidity.’ The ‘flexibility’ inherent in ‘equitable procedure’ enables courts ‘to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.’” (alterations in original) (internal citations omitted)).

sense. Without fuller elaboration, ‘pragmatism’ [often] is not a helpful answer to any practical question.”<sup>212</sup>

Engagement with this broader discussion of jurisdictional simplicity versus clarity requires some further definitional refinement. I contend that three related concepts—simplicity, clarity, and accessibility—must be understood and deployed to enrich this discussion. I cast the quest for simple jurisdictional rules as the search for noncomplex ones. A leading definition of legal complexity is defined along at least two axes: density and institutional differentiation.<sup>213</sup> Dense regimes are those systems with numerous and widely encompassing rules or standards. And institutionally differentiated regimes are ones in which varying types of decisionmaking processes and bodies are used. A rule is simple, then, to the degree it lacks density and differentiation. Clarity presents itself as a distinct concept. Clarity, which I also define by way of contrast, is the opposite of indeterminacy. Indeterminate legal rules and standards are those that produce unpredictable outcomes *ex ante*. That is to say, clear regimes are those that lend themselves to the production of predictable outcomes prior to litigation. Indeed, clarity is most often understood at law in terms of predictability *ex ante*.<sup>214</sup> Accessibility presents yet a third notion. Accessible regimes are those that are not technical, meaning they do not rely upon rules or standards that require expertise and specialized sophistication to deploy. By accessibility I mean the ease with which the substance of a rule is understandable by non-experts.<sup>215</sup> A legal regime,

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212. Fallon, *supra* note 100, at 17.

213. Peter H. Schuck, *Legal Complexity: Some Causes, Consequences and Cures*, 42 DUKE L.J. 1, 3 (1992). Professor Schuck also includes third and fourth “complexity” concepts: technicality and indeterminacy. But he notes that indeterminacy may equally well be seen as a consequence of, as opposed to an element of, complexity. *Id.* at 4 (“Indeterminacy’s relation to legal complexity is itself complex. . . . Indeterminacy, then, may be a consequence, as well as a defining feature, of complexity.”). As I attempt to illustrate below, the notions of technicality and indeterminacy appear to more readily map on to notions distinct from complexity, and I differ slightly from Schuck and use it in this sense. Also, I do not suggest this take on complexity is the unequivocal definition. Others, for instance, have defined procedural simplicity in terms of aesthetic attraction. See Janice Toran, *‘Tis a Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 356 (1990).

214. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 639–40 (1987) (Scalia, J., dissenting) (“In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it ‘sacrifices clarity and predictability for flexibility.’” (citation and footnote omitted)); 2009 *Term Leading Cases*, 124 HARV. L. REV. 309, 317 (2010) (discussing clarity in predictive terms); Robert J. Pushaw, Jr., *Limiting Article III Standing to “Accidental” Plaintiffs: Lessons from Environmental and Animal Cases*, 45 GA. L. REV. 1, 9 (2010) (similar); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1856 (2010) (similar).

215. Cf. Schuck, *supra* note 213, at 3.

then, might be simple and accessible yet unclear, or complex and inaccessible yet clear, and so on.

Armed with these concepts, I take us back to the *Gully* and § 1331 doctrine. Grossi sums up the *Gully* approach in the following way:

The only policy reflected in Justice Cardozo's analysis is one of careful judgment in determining whether the role played by the federal question in the claim is sufficiently important to justify the exercise of jurisdiction. Thus, the entire analysis focuses on a durable principle, and no mechanistic test or formula can improve on that. Rather, as indicated by Justice Cardozo, a mechanical approach carries the risk of creating doctrinal labyrinths which there is no exit.<sup>216</sup>

Using terms with a bit of precision, as outlined above, I believe that Grossi's view of § 1331 jurisdiction has the virtue of simplicity. It is neither dense nor institutionally differentiated. It requires only a judge to make a singular determination. Further, it presents an accessible concept to non-experts in that it avoids technical rules or standards. Indeed, her view is readily explainable as a general proposition. Grossi's view, however, lacks clarity (i.e., it does not produce results that are predictable *ex ante*). Grossi's protestations to the contrary,<sup>217</sup> it is unassailably the overwhelming consensus that the *Gully* kaleidoscopic approach leads to unclear—meaning unpredictable *ex ante*—§ 1331 doctrine.<sup>218</sup>

But finding that the *Gully*-based view is not clarity enhancing is not a strike against the view *per se*. Indeed, it is only when such unpredictability creates net-systemic costs that a lack of clarity should be avoided. Thus, following Professor Scott Dodson, I agree that jurisdictional clarity is but an instrumental value that promotes, to varying degrees, three competing core norms: (1) decreased costs to

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216. Grossi, *supra* note 2, at 1009.

217. *Id.* (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 118 (1936), and arguing that it offers clear guidance by referencing claims); *see also supra* note 104 and accompanying text (discussing this issue).

218. *See Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 822 n.1 (1986) (Brennan, J., dissenting) (“[I]f one makes the test sufficiently vague and general, virtually any set of results can be ‘reconciled’ [with it post hoc].”). Professor Rory Ryan similarly notes that “Justice Cardozo directed us to evaluate the kaleidoscopic situations to find the substantial issues. Factors are articulated for analyzing the substantiality inquiry, but the factors are as amorphous as the overall test.” Ryan, *supra* note 205, at 674. Justice Brennan and Professor Ryan have a lot of company in reaching this conclusion about the *Gully* standard. *See* Ryan, *supra* note 205, at 659 n.4 (offering an impressive list of scholarship on this point, providing scores of articles ranging over seven decades). An inability to create clear results *ex ante* is a standard feature of functionalist, or pragmatic, jurisdictional approaches. *See supra* note 46 and accompanying text (discussing this point).

litigants and courts; (2) enhanced legitimacy of the judiciary; and (3) promotion of inter-governmental relations by demarcating lines of authority for trial and appellate courts, state and federal court systems, and judicial and legislative power.<sup>219</sup> Thus, clarity should trump the other related norms of simplicity and accessibility only if, in context, the value of such trade-offs produces a net gain.

In many contexts, accessibility or simplicity may outweigh the norm of clarity. For example, take the Supreme Court's jurisdiction to grant certiorari from the state court systems under 28 U.S.C. § 1257. The Court's interpretation of the term "finality" in this statute is malleable at best, leading to unclear and unpredictable results.<sup>220</sup> Unlike original district court jurisdiction, however—where the finding of jurisdiction, abstention excepted, leads to the court hearing the case, assuming personal jurisdiction, venue, and service—the existence of the Supreme Court's appellate jurisdiction under § 1257 is merely a precursor to the main event of the exercise of its discretion to issue a writ of certiorari. Given the discretionary nature of case selection at the Supreme Court, clear jurisdictional rules under § 1257 are not likely to enhance the legitimacy of the Court's decisionmaking process,<sup>221</sup> or reduce litigant costs. Moreover, given the hierarchical nature of the Supreme Court vis-à-vis the state-court systems, a more unpredictable "threat" of Supreme Court review might further federalism considerations as much as hinder them.<sup>222</sup> Jurisdictional clarity in this context, then, is unlikely to foster any of the three values upon which it is grounded. As such, there is little reason to pursue it as an end in the § 1257 setting.

Interestingly, Grossi's approach would appear to be much more at home as an interpretation of § 1257 doctrine as opposed to § 1331 jurisprudence. The Supreme Court in its earlier § 1331 cases often crafted § 1331 opinions by inappropriately borrowing from analyses of Supreme Court appellate jurisdiction.<sup>223</sup> As Professor William Cohen

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219. See Dodson, *supra* note 46, at 45–49.

220. See *id.* at 41–42.

221. See, e.g., Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1713–30 (2000) (questioning whether certiorari is consistent with the traditional conceptions of judicial review, the nature of judicial power, and the rule of law).

222. See *id.* at 1731–32 (arguing the selective application of Supreme Court review of state courts as aiding the development of selective incorporation doctrine); Dodson, *supra* note 46, at 48–49.

223. LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 91 (1994) (lamenting Supreme Court doctrine that "needlessly confuse[s] matters with outdated jargon and misleading generalizations," and advocating "jurisdictional rules that can easily be applied at the outset of litigation"). Further, many of these stock phrases were inappropriately transferred from old cases

pointed out in his classic 1967 work, all the key phrases in *Gully* (which Grossi relies upon to craft her theory) are “uncritically transferred, in earlier cases, from the standard which appropriately governs the Supreme Court’s appellate jurisdiction.”<sup>224</sup> The claim-construction of federal question, then, could well fit any number of legal process norms and “simplicity vs. clarity” norms in the § 1257 context.

Section 1331 cases, however, are different. This is not to say that pointless formalism rules the day. Indeed, making a decision within a formalist framework is not inherently bad.<sup>225</sup> Rather, it is simply a means of constraining a decisionmaker.<sup>226</sup> Whether this is a sound course must be viewed contextually by weighing the benefits of formalistic reasoning, typically predictability (or what I call clarity), against its costs.<sup>227</sup> From this point of view, jurisdictional formalism is akin to rule utilitarianism. Under rule utilitarianism, “[i]nstead of [evaluating] individual decision procedures [at each moment of decisionmaking], we evaluate codes of . . . rules.”<sup>228</sup> The rule-based, as opposed to the case-by-case, method is then preferable to the degree that all things considered including transaction costs of a case-by-case method, the rule-based approach produces better outcomes.<sup>229</sup> In the § 1331 setting, then, the question would be does the *Gully*, pragmatic approach further essential separation of power norms, federalism norms, clarity norms, and the like better than its competitors, such as by congressional intent by way of rights and causes of action view.<sup>230</sup>

My aim in this article has been to show that the *Gully* approach fails in this regard. I have previously argued that, in the § 1331 setting, it is

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involving appellate jurisdiction, rendering their use in the § 1331 context highly suspect. See William Cohen, *The Broken Compass: The Requirement that a Case Arise “Directly” Under Federal Law*, 115 U. PA. L. REV. 890, 904 (1967); Mishkin, *supra* note 164, at 160–63.

224. Cohen, *supra* note 223, at 904.

225. Schauer, *supra* note 42, at 543 (“In sum, it is clearly true that rules get in the way, but this need not always be considered a bad thing.”).

226. *Id.* at 537–38.

227. *Id.* at 540.

228. TIM MULGAN, UNDERSTANDING UTILITARIANISM 120 (2007); accord David O. Brink, *Mill’s Ambivalence About Rights*, 90 B.U. L. REV. 1669, 1671 (2010).

229. Brink, *supra* note 228, at 1671–73.

230. This weighing of these benefits, moreover, must be seen against understanding that selecting a formalist or pragmatic decision regime is not an either-or proposition. See Schauer, *supra* note 42, at 547 (“Under such a theory of presumptive formalism there would be a presumption in favor of the result generated by the literal and largely acontextual interpretation of the most locally applicable rule.”). I conceive of my approach to § 1331 jurisdiction, which uses the formalistic notions of rights and causes of action within a setting of differing standards, as just such a hybrid approach. But a fuller discussion of this notion is beyond the scope of this piece.

clarity—not necessarily simplicity or accessibility—that is of the highest value.<sup>231</sup> Such a prioritization, moreover, is consistent with the legal process school. “[G]ood legal reasons, as defined by the [Legal Process] paradigm, should provide at least some bases (though frequently indeterminate ones) on which to predict the outcomes of authoritative decisionmaking.”<sup>232</sup> The *Gully* view of § 1331 jurisdiction falls short on this predictability *ex ante* score, with little else beyond simplicity as a counterbalance. In short, this pragmatic, claim-centered approach to determining when federal question jurisdiction vests in the district courts fails because “pragmatism as an unelaborated concept affords no answer to the fundamental Legal Process question of who should have what power to make authoritative judgments—pragmatic or otherwise—on behalf of the legal system.”<sup>233</sup> But these are precisely the questions that a viable § 1331 doctrine must answer.

## CONCLUSION

Professor Grossi’s call to return to our legal-process-school traditions represents an important and powerful contribution to the field. Nevertheless, her invitation to re-imagine § 1331 jurisdiction via *Gully* as a call for judges simply to select sufficiently important matters, in relation to plaintiff’s case in chief, for inclusion in federal question jurisdiction or in terms of *res judicata* claims holds less appeal. Most fundamentally, the *Gully* view does not have a unique affinity to legal-process-school foundations. To the contrary, the legal process school supports a rights and causes of action approach, as understood as a means of effectuating the principle of congressional control over lower federal court jurisdiction. Moreover, claim as a notion is both inaccurate and anachronistic as an interpretation of *Gully*. Furthermore, the Supreme Court’s contemporary use of the term claim subsumes the very notions of right and cause of action that the claim-centric view aims to avoid. And a claim-centered view is likely to cause more practical troubles than solve interpretive difficulties. Ultimately, this *Gully* view seems more at home as a species of jurisdictional pragmatism than as an exemplar of the legal-process school.

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231. Mulligan, *Clear Rules*, *supra* note 205, at 17.

232. Fallon, *supra* note 100, at 10.

233. *Id.* at 17.

