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Federal Questions and the Human Rights Paradigm*

Kenneth C. Randall**

INTRODUCTION

The present decade has witnessed a new and prolific genre of civil litigation: federal actions concerning human rights violations committed outside the United States, usually brought by aliens against other aliens or foreign states. Cases that exemplify this type of litigation include an action against a Paraguayan police officer who tortured a Paraguayan national to death in Paraguay;1 two actions involving human rights violations by the former military junta in Argentina;2 a class action against a Third Reich henchman in Croatia who committed war crimes and crimes against humanity, executing tens of thousands of Jews;3 an action on behalf of a Swedish diplomat whom Soviet officials illegally imprisoned and probably executed;4 and various human rights actions against Ferdinand Marcos, the deposed President of the Philippines.5 Victims of terrorism also have pursued similar actions.6

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1. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
6. E.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984)
Although these human rights cases appear compelling, the plaintiffs must nonetheless invoke federal court jurisdiction. Despite the persistent efforts of human rights advocates, however, United States courts frequently have held that they lack subject matter jurisdiction over these cases. Although explanations for dismissing the actions have differed, depending partly on the jurisdictional statute at issue, the result is the same: the federal courthouse door is closed to the victims of heinous international law violations.

This Article explores the topic of domestic adjudicatory jurisdiction over international human rights violations. Those offenses, committed by either state or nonstate actors, include torture, genocide, summary execution, slavery, apartheid, and war crimes. This Article also addresses domestic adjudicatory jurisdiction over cases involving terrorist acts, such as hijacking, hostage taking, and offenses against internationally


7. Of the cases identified in notes 1-4 and 6, supra, courts sustained jurisdiction in Filartiga, 630 F.2d at 878, Forti, 672 F. Supp. at 1538, Von Dardel, 623 F. Supp. at 250, and Letelier, 488 F. Supp. at 674; courts denied jurisdiction in Handel, 601 F. Supp. at 1424, Siderman de Blake, and Tel-Oren, 726 F.2d at 775. Judicial response to the numerous Marcos actions has varied, as Recent Developments, supra note 5, indicates. A broader sampling of cases shows, however, that courts reject jurisdiction in the human rights and terrorism context more often than not. See infra note 49. Even when jurisdiction exists, a court may choose not to exercise it. See infra note 20.

8. Adjudicatory jurisdiction refers to the legitimate authority of a particular judicial or administrative tribunal to subject certain actors, things, or events to its processes. See Restatement (Third) of the Foreign Relations Law of the United States § 401 (1986) [hereinafter Restatement]. A rough equivalent of that term is subject matter jurisdiction.


10. State will refer to country or nation-state, unless a quoted passage or this Article indicates otherwise.

11. Regarding the capability of both state and nonstate actors to commit such acts and terrorism, see infra notes 221, 252-53 and accompanying text.
protected persons, when those offenses affect the physical integrity of individual victims. This Article will refer to all such international law violations as human rights claims or human rights cases. The term human rights paradigm will encompass the norms prohibiting such violations.

In particular, this Article focuses on the extent to which courts can and should use federal question jurisdiction to uphold district court authority over human rights claims. Human rights law derives primarily from the treaties created following World War II and from international custom. Both custom and treaties, at least when recognized in the United States, are part of federal law and thus may give rise to federal questions. Federal question jurisdiction is codified at 28 U.S.C. section 1331, which provides that the “district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” This Article will refer

12. Political goals or ideological values more “legitimate” than those underlying typical human rights violations sometimes motivate terrorists. For example, freedom fighters, in an effort to achieve self-determination, may resort to terrorism to further legitimate political goals. In contrast, no legitimate goal justifies human rights violations. See Randall, Further Inquiries, supra note 9, at 525-27. As part of the United Nations’s overall program against the use of force, however, international law attempts to curtail terrorist acts as a means of achieving even legitimate political goals. Several recent United Nations instruments, promulgated with overwhelming support, reflect this perspective both by condemning terrorist acts and by soliciting state participation in conventions condemning hijacking and other terrorism. E.g., G.A. Res. 61, 40 U.N. GAOR Supp. (No. 53) at 301, U.N. Doc. A/40/53 (1986); S.C. Res. 579, 40 U.N. SCOR (2637th mtg.) at 24, U.N. Doc. S/INF/41 (1985) (unanimously adopted), reprinted in 25 I.L.M. 243 (1986). Regardless of its goal, terrorism, like human rights violations, affects the lives and physical integrity of individuals who often are innocent victims. This Article, then, employs the rubric of human rights claims to encompass cases of both human rights violations and terrorist acts committed against individuals. See generally Paust, The Link Between Human Rights and Terrorism and Its Implications for the Law of State Responsibility, 11 HASTINGS INT’L & COMP. L. REV. 41 (1987).

13. For an explanation of human rights claims, see supra note 12. For a discussion of the term human rights paradigm, see infra Part IV.

14. The United States Constitution provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land.” U.S. CONST. art. VI, cl. 2. Treaties are thus expressly part of federal law. The supremacy clause does not expressly mention customary international law; however, the legal community agrees that the phrase Laws of the United States includes federal common law. Because the legal community views custom as similar to, or as part of, federal common law, international custom also falls within the meaning of laws of the United States. See Henkin, International Law as Law in the United States, 82 MICH. L. REV. 1555, 1566 (1984).

to that provision alternatively as *federal question jurisdiction*, *arising under jurisdiction*, or *section 1331*.

Part I sketches a statutory overview of federal jurisdiction and human rights cases. The potential importance of section 1331 jurisdiction over such cases will become evident in light of current interpretations of other jurisdictional provisions.

Part II analyzes the judiciary's diverse interpretations of arising under jurisdiction, under article III of the Constitution and under section 1331. Because the case law in this area is truly a quagmire, it would be folly to suggest that any interpretation has talismanically defined *arising under*.\(^\text{16}\) The analysis will show, however, that section 1331 sometimes extends federal jurisdiction over at least three genuses of cases: those in which "positive" federal law—that is, constitutional, statutory, or international law—explicitly or implicitly creates a cause of action; those in which the federal judiciary's creation or adoption of law—that is, federal common law or federal court use of municipal law\(^\text{17}\) under the "protective jurisdiction" theory—creates a cause of action; and those in which federal law issues require resolution, even though municipal law creates a cause of action.

Part III examines how human rights claims interact with the three genuses of cases. The literature typically has discounted federal question jurisdiction over international law claims, uncritically assuming that "it is rare that the relation of a treaty to the plaintiff's claim will be sufficiently direct to satisfy the test of 'arising under.'"\(^\text{19}\) This Article will argue, how-

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\(^{16}\) See, e.g., Franchise Tax Bd. v. Laborers Vacation Trust, 463 U.S. 1, 8 (1982) ("the statutory phrase 'arising under . . .' has resisted all attempts to frame a single, precise definition for determining which cases fall within, and . . . outside, the original jurisdiction of the district courts"); Cannon v. Loyola Univ., 609 F. Supp. 1010, 1014 (N.D. Ill. 1985) ("the doctrine interpreting the meaning of 'arising under' is a quagmire, to say the least"); aff'd, 784 F.2d 777 (1986), cert. denied, 107 S. Ct. 880 (1987); Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" under Federal Law*, 115 U. PA. L. REV. 890, 905 (1967) (neither "conceptual standards or self-applying talismanic phrases" nor "opaque mysticism" of common-sense standards clearly define federal question jurisdiction).

\(^{17}\) *Municipal law* refers to nonfederal law, that is, the law of either domestic or foreign states (e.g., California or Paraguay).

\(^{18}\) See *infra* notes 161-66 and accompanying text.

\(^{19}\) C. WRIGHT, A. MILLER & E. COOPER, 13B *FEDERAL PRACTICE AND PROCEDURE* § 3563, at 64 (2d ed. 1984) (footnote omitted) [hereinafter *FEDERAL PRACTICE*]; see also id. at n.46 (citing cases rejecting § 1331 jurisdiction under same rationale). To the extent that a particular customary norm bears a relation to a treaty, see generally *infra* notes 226-32 and accompanying text, it fol-
ever, that many human rights claims do involve federal questions. The seeds of this argument correspond to the three genuses of section 1331 jurisdiction:

1. International customary and treaty law, as positive federal law, creates a private cause of action for certain human rights claims. The term cause of action has two definitions. Sometimes the term focuses upon the violation of a particular legal right. Under this definition, every individual has the right to be free from summary execution, torture, slavery, genocide, and apartheid, based on “self-executing” positive international law.

If the term cause of action, instead, refers to whether a particular actor may invoke the federal court’s power, positive international law explicitly creates a cause of action for summary execution and torture. Positive international law also impliedly grants victims the right to invoke federal court power over war crimes, genocide, apartheid, hijacking, and certain terrorist acts. This conclusion uses the analysis that courts have employed to determine whether various criminal statutes contained implied civil causes of action. Under either definition, when positive international law provides an explicit or implicit cause of action, section 1331 jurisdiction is available.

2. Even if positive international law, standing alone, does not create a private cause of action, the common-law and protective-jurisdiction theories may support section 1331 jurisdiction over human rights claims. The common-law theory arises from the idea that federal decisional law should govern human rights claims. Certain treaties, which create a cause of action, but which the United States has not adopted, may generate a customary-law cause of action cognizable under federal common law. The interstices of other treaties, which do not create a cause of action, but which the United States has adopted, also may give rise to a human rights cause of action.

Alternatively, under the protective-jurisdiction theory, federal judges may adopt or “federalize” nonfederal causes of action for human rights claims. Protective jurisdiction is legitimate in certain section 1331 cases with strong article I foreign policy implications, such as human rights claims. An active federal policy condemning terrorism and human rights

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laws, under the rationale indicated in Federal Practice, that such custom also would be insufficiently related to most private claims to satisfy the arising under test.
abuses buttresses this conclusion. Choice-of-law principles will identify the appropriate nonfederal rules of decision.

3. The third genus provides section 1331 jurisdiction when plaintiff's claim raises a substantial issue of federal law, even though nonfederal law grants the cause of action. Courts use this approach liberally in cases with significant foreign policy implications. Most human rights cases involve federal issues, such as the availability of jurisdictional immunity, the effect of the act of state doctrine, and the legitimacy of judicial authority under international law. Each of these issues significantly affects foreign relations. Because of this impact, section 1331 jurisdiction should succeed even if the rule of decision is not federal, as, for example, when the rule is the tort law of the situs.

Assuming that federal question jurisdiction exists, courts should exercise it over most human rights claims. Judicial abstention doctrines, such as the political question doctrine, the act of state doctrine, and the doctrine of forum non conveniens, normally should not bar the use of federal authority in this context based on separation of powers, comity, or pragmatic considerations, as demonstrated elsewhere.20

20. Courts examine both whether they have jurisdiction and, if so, whether they should exercise that jurisdiction. Having and exercising jurisdiction are distinct from one another. In examining the preliminary jurisdictional issue, the essential inquiry is whether article III permits jurisdiction in the federal courts. That inquiry, which involves separation of powers and federalism considerations, is central to Parts II and III of this Article.

When jurisdiction exists, a federal court may consider whether various doctrines counsel against exercising that jurisdiction. For instance, the political question doctrine, concerning nonjusticiable questions touching sensitive political nerves, and the act of state doctrine, concerning certain sovereign acts committed within the foreign sovereign's territory that are beyond judicial purview, may militate against adjudication of a case. Both doctrines derive from overlapping separation of powers concerns, although the act of state doctrine also derives from international comity. Both doctrines, although not addressed in this Article, should be considered in human rights cases, once jurisdiction is invoked. See Randall, Civil Jurisdiction, supra note 9, at 104-08; Randall, Further Inquiries, supra note 9, at 509-10, 522-27, 529-30. The pervasive condemnation in law, politics, and scholarship of human rights violations and terrorism should facilitate the exercise of jurisdiction under the political question and act of state doctrines. Id. Such broad consensus permits judicial adjudication in sufficiently defined areas of international law, avoids conflicts with the executive branch and Congress, and satisfies foreign policy considerations. Unless the executive branch expressly requests courts to refrain from exercising jurisdiction in a given case, the federal judiciary usually acts in concert with its coordinate branches and the nation's international commitments when it adjudicates human rights claims.

Moreover, the pragmatic and evidentiary concerns of the forum non con-
The focus of Part IV shifts from the examination of jurisdiction within the United States to an examination of domestic jurisdiction within the international legal system. Part IV argues that by sustaining jurisdiction over extraterritorial human rights claims, domestic courts act appropriately as the agents of the world legal order.21 This thesis draws support from the universality principle, which allows any state to exercise jurisdiction over certain egregious offenses, regardless of specific links between the forum and the offense.22 Similarly, the *jus cogens* and *erga omnes* doctrines identify certain human rights norms and prohibitions of terrorism as fundamental to the world legal order; these doctrines also help signify the legitimacy, if not the obligation, of domestic jurisdiction over violations of those norms and prohibitions. More broadly, however, Part IV argues that the post-World War II human rights movement signifies a *structural* revision of the world legal order.23 Although state sovereignty remains the hallmark of the legal order, it is now meaningful to speak of a human rights paradigm, by which the conventional statist perspective has yielded to the creation of individually enforceable rights. Ultimately, the human rights paradigm obligates domestic courts, including the federal judiciary, to assume authority over violations of international rights.

I. FEDERAL JURISDICTION AND HUMAN RIGHTS CLAIMS: A STATUTORY OVERVIEW

At the threshold, a human rights litigant must allege an adequate statutory basis for federal subject matter jurisdiction

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21. See *infra* note 402 and accompanying text.
23. See *infra* Part IV(C).
under title 28 of the United States Code. Section 1331 may be vital to human rights claimants suing both state and nonstate defendants, given the judiciary’s restrictive interpretations of sections 1330, 1332(a)(2), and 1350 of title 28.

In actions against states, the Foreign Sovereign Immunities Act of 1976 (‘‘FSIA’’) is particularly relevant. Section 1330 grants district court jurisdiction over claims against states in a narrow range of cases, designated as exceptions to sovereign immunity in section 1605 of the FSIA. Those exceptions have supplied little relief to the victims of extraterritorial human rights violations, primarily because most human rights claims sound in tort. The FSIA’s ‘‘tort exception’’ to sovereign immunity forecloses federal jurisdiction unless the tort in question occurred within United States territory. Hence, neither a torture victim brutalized by government officials in Argentina nor the representatives of an Israeli executed by Libyan-backed terrorists in Tel Aviv could use the FSIA’s tort exception to sue a responsible state. In addition, the FSIA’s ‘‘waiver exception’’ to sovereign immunity may not suffice; only one court has found an implied waiver of immunity based on the sovereign’s


25. Although those provisions have been the most relevant to human rights claims, they are not the only conceivably relevant bases of subject matter jurisdiction.


28. 28 U.S.C. § 1605(a)(5) (1982) (denying immunity to states when damages are sought ‘‘for personal injury or death, or damage to or loss of property, occurring in the United States and caused by tortious action or omission’’). Moreover, an entire tort, including defendant’s conduct and plaintiff’s injuries, must have occurred in the United States to preclude jurisdictional immunity. E.g., Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 379 (7th Cir. 1985) (describing nearly unanimous precedent interpreting § 1605(a)(5) to require occurrence of entire tort in United States).


30. 28 U.S.C. § 1605(a)(1) (1982) (denying immunity when state ‘‘has waived its immunity either explicitly or by implication’’).
ratification of a humanitarian treaty.\textsuperscript{31} Courts also rarely accept the argument that sovereign immunity is unavailable per se whenever human rights offenses and other international law violations are at issue.\textsuperscript{32}


Related to the waiver argument is an argument based on § 1604, which notes that sovereign immunity is "[subject to existing international agreements to which the United States is a party." 28 U.S.C. § 1604 (1982) (emphasis added). For instance, the appellant in Frolova argued that under § 1604, the U.N. Charter and the Helsinki Accords governed and precluded the Soviet Union's claim of immunity from a challenge to its denial of emigration; that is, the Soviet Union's immunity was subject to, and thus precluded by, those agreements. The Seventh Circuit rejected this argument, holding that individuals could not directly enforce those instruments. \textit{Frolova}, 761 F.2d at 373-76. \textit{See also} Comment, \textit{The Foreign Sovereign Immunities Act and International Human Rights Agreements: How they Coexist}, 17 U.S.F. L. Rev. 71 (1982) (examining both § 1604 and § 1605(a)(1) arguments).

\textsuperscript{32} \textit{Compare} Von Dardel, 623 F. Supp. at 253-54 (stating that immunity under FSIA does not extend to "clear violations of universally recognized principles of international law," including offenses against diplomat) \textit{and} Letelier v. Republic of Chile, 489 F. Supp. 665, 673 (D.D.C. 1980) (holding that discretionary function exception to tort exception to sovereign immunity, § 1605(a)(5)(A), does not apply to assassination of former Chilean Ambassador, which "is clearly contrary to the precepts of humanity as recognized in both national and international law") \textit{with} Berkovitz, 735 F.2d at 331 (rejecting argument that "unfriendly nature of political assassination," even coupled with animosity between United States and Iran, provides exception to sovereign immunity) \textit{and} Frolova v. Union of Soviet Socialist Republics, 558 F. Supp. 358, 363 n.3 (N.D. Ill. 1983) (rejecting argument that, when Soviet Union denies emigration of plaintiff's spouse, it impliedly waives its jurisdictional immunity because "the Soviet Union violated international law"). \textit{Aff'd}, 761 F.2d 370, (7th Cir. 1985). \textit{Amerada Hess Shipping Corp. v. Argentine Republic}, 830 F.2d 421 (2d Cir. 1987), \textit{cert. granted}, 108 S.Ct. 1466 (1988), also may be relevant to this point. \textit{See infra} notes 36-37.
Moreover, the conventional wisdom has been that the
FSIA *exclusively* controls the extent to which federal jurisdic-
ation is available over states.\(^3\) Under this view, if jurisdiction is unavai-
nable under one of the FSIA's exceptions, other provi-
sions of title 28 may not be alleged.\(^3\) Given the FSIA's narrow
exceptions and its exclusive jurisdictional grant, the statute has
not supported human rights jurisdiction over states in most
cases.\(^3\)

A recent Second Circuit opinion, however, deviated from
the judicial trend and held that the FSIA is not the exclusive
basis of jurisdiction over states. *Amerada Hess Shipping Corp.
v. Argentine Republic*\(^3\) indicated that the FSIA neither re-
pealed nor preempted the availability of other jurisdictional
provisions of title 28 when a sovereign violates international
law.\(^3\) Thus, in both the important Second Circuit and in other

\(^{33}\) See, e.g., Hercaire Int'l, Inc. v. Argentina, 821 F.2d 559, 563 (11th Cir.
1987); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 372 (7th Cir.
1985); McKeel v. Islamic Republic of Iran, 722 F.2d 582, 586-87 (9th Cir. 1983),
cert. denied, 469 U.S. 880 (1984); Goar v. Compania Peruana de Vapores, 688
F.2d 417, 421 (5th Cir. 1982); Houston v. Murmansk Shipping Co., 667 F.2d
1151, 1153 (4th Cir. 1982); Rex v. Compania Peruana de Vapores, 660 F.2d 61,
69 (3d Cir. 1981), cert. denied, 456 U.S. 926 (1982); Ruggiero v. Compania
Peruana de Vapores, 639 F.2d 872, 875-78 (2d Cir. 1981); Carl Marks & Co. v.
Union of Soviet Socialist Republics, 665 F. Supp. 323, 328, 333, 335 (S.D.N.Y.
1987), aff'd, 841 F.2d 26 (2d Cir. 1988); Jackson v. People's Republic of China,
596 F. Supp. 326, 327 (S.D. Ala. 1984), aff'd, 794 F.2d 1490 (11th Cir. 1986),
765, 766 (W.D. Mich. 1984); see also Verlinden B.V. v. Central Bank of Nig., 461
U.S. 480, 489, 491 n.16 (1983) (dictum) ("Congress clearly intended [FSIA] to
govern all actions against foreign sovereigns").

\(^{34}\) See *McKeel*, 722 F.2d at 586-87 (stating that Congress's policy favoring
"uniformity in decision" implies that courts may exercise jurisdiction over for-
gn states only under FSIA).

\(^{35}\) Randall, *Civil Jurisdiction*, supra note 9, at 91-93; see Recent Develop-

\(^{36}\) 830 F.2d 421 (2d Cir. 1987) (2-1 decision), cert. granted, 108 S. Ct. 1466
(1988).

\(^{37}\) *Amerada Hess* involved a suit by the owner and time charterer of a
Liberian oil tanker against Argentina, concerning the defendant's armed and
unprovoked attack on the tanker in international waters during the Falklands
War. Having determined that Argentina had violated international law, id. at
423-24, the Second Circuit upheld jurisdiction under 28 U.S.C. § 1350, despite
the absence of jurisdiction under the FSIA, id. at 426-28, and in the face of the
Supreme Court's contrary dictum in *Verlinden*, id. at 426; see also supra note
33 (citing *Verlinden*'s dictum). The court expressly limited its holding to cases
involving international law violations. *Id.* at 428-29. Although § 1350 provided
the jurisdictional alternative to the FSIA in *Amerada Hess*, the case's holding
apparently permits jurisdiction over actions involving sovereign defendants
under other provisions, such as §§1331 and 1332(a)(2). See *infra* notes 43-51
and accompanying text for a discussion of § 1350. The Second Circuit sug-
circuits that may follow Amerada Hess, the victims of statesponsored human rights violations and terrorism may allege subject matter jurisdiction under statutory provisions alternative to, and more hospitable than, the FSIA. Section 1331 is one such alternative that may be used in human rights cases against states.

In cases brought against nonstate defendants,38 section 1331's importance increases, because courts have narrowly construed other jurisdictional provisions, such as sections 1332(a)(2) and 1350. Section 1332(a)(2) creates jurisdiction over all civil actions in which the matter in controversy exceeds $10,000 and arises between "citizens of a [domestic] State and citizens or subjects of a foreign state."39 That provision, correctly called alienage jurisdiction,40 creates federal jurisdiction over extraterritorial tort claims involving damages of more than $10,000, without regard to whether international human rights law was violated.41 Alienage jurisdiction, however, will not permit one alien to sue another alien in federal court.42 Alienage jurisdiction does extend to suits between United States citizens and aliens in human rights cases. Because most

38. Such defendants can include individuals, government officials, terrorist groups, or hijackers.


41. See id. at § 23 n.9.

human rights litigation, however, typically postures alien against alien, section 1332(a)(2) has been of little utility to human rights plaintiffs. Consequently, the importance of section 1331, which contains no alienage or other party restriction, increases in human rights cases.

The Alien Tort Statute, section 1350, also has been limited by certain courts in the human rights context. Originally a provision in the Judiciary Act of 1789, section 1350 creates district court jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Based on this language, victims of extraterritorial torts involving human rights violations under the law of nations or a treaty may bring claims against nonstate and state actors alike. Although the Alien Tort Statute has been invoked rarely during its 200-year history, the Second Circuit revived it in 1980, in Filartiga v. Pena-Irala. In that case, Dr. Joel Filartiga, a prominent critic of the Stroessner regime, brought an action against a former Paraguayan police official who had fatally tortured Filartiga's son in Paraguay. Jurisdiction was sustained under section 1350 and, on remand, the plaintiff was awarded a judgment of more than $10 million. Although Filartiga introduced a new human rights era in civil litigation, courts subsequently have sustained jurisdiction only sporadically under section 1350. The circuits remain both di-

46. See supra notes 38-37 and accompanying text (discussion of Amerada Hess, in which § 1350 allowed jurisdiction although FSIA did not). Section 1350 actions against states are possible only if Amerada Hess is followed.
47. 630 F.2d 876 (2d Cir. 1980).
49. Filartiga engendered a significant increase in reliance on section 1350. Randall, Alien Tort Statute, supra note 9, at 4-7 & nn.15, 17. Although parties
vided and confused over section 1350's proper contours, and some proposed legislation and recent studies advocate amending or replacing the provision.

Amid such clatter and confusion, section 1331 offers an alternative basis for federal jurisdiction over human rights claims. In rejecting section 1350 jurisdiction, some federal judges have viewed the Alien Tort Statute as obscure, arcane, or limited to cases involving eighteenth century international law violations. Those judges may be more inclined to sustain jurisdiction under the more familiar federal question provision. Section 1331, which is surely not limited to eighteenth century offenses, is also advantageous because it allows both citizens and aliens to commence human rights cases.

Other courts have rejected section 1350 jurisdiction, however, under the rationale that international law does not itself explicitly provide a federal cause of action to human rights subsequently have alleged § 1350 in various contexts, id. at 7 n.17, Filartiga represents the archetypal case of the modern genre of human rights claims. As this author's prior research indicates, however, in approximately the first six years following Filartiga's decision, courts sustained jurisdiction under § 1350 in only two of 16 cases reported on LEXIS. Id. at 7 n.19. For a discussion of more recent sources that indicate sporadic success of § 1350 over human rights claims, see Recent Development, Foreign Sovereign Immunity, supra note 35, at 223 n.9; Recent Developments, supra note 5, at 433 n.1.

The disagreement over § 1350's application is punctuated by the separate concurrences authored by panel members in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), cert. denied, 740 U.S. 1003 (1985), dismissing a case involving extraterritorial terrorist acts in Israel. Judges Edwards, Bork, and Robb each wrote a lengthy concurring opinion explaining why he was correct, and his colleagues were wrong, about why § 1350 did not create jurisdiction in the case. As Judge Bork concluded: "the three opinions we have produced can only add to the confusion surrounding [the Alien Tort Statute] . . . . Though we agree on nothing else, I am sure my colleagues join me in finding that regrettable." Id. at 823 (Bork, J., concurring).

Randall, Civil Jurisdiction, supra note 9, at 111-12; Randall, Further Inquiries, supra note 9, at 511-12. Such legislative efforts and suggestions have not yet come to fruition.

See, e.g., Tel-Oren, 726 F.2d at 827 (Robb, J., concurring) ("We ought not to parlay a two hundred years-old statute into an entrée into so sensitive an area of foreign policy" as extraterritorial terrorism. "We have no reliable evidence whatsoever as to what purpose this 'legal Lohengrin' . . . was intended to serve." (citing IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975))); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (rejecting jurisdiction under Alien Tort Statute, "a kind of Legal Lohengrin: although it has been with us since the first Judiciary Act . . . no one seems to know whence it came").

Such violations include piracy and offenses against ambassadors. See, e.g., Tel-Oren, 726 F.2d at 812-16 (Bork, J., concurring).
claimants.\textsuperscript{54} When courts have employed that same rationale to examine federal question jurisdiction over human rights claims, section 1331 has not offered a useful alternative to section 1350.\textsuperscript{55} An approach that focuses solely on the presence of an explicit cause of action fails, however, as Parts II and III will show, because such an approach misconstrues both the concept of a cause of action and the concept’s application in the human rights context. Although this Article’s analysis of human rights causes of action also may support section 1350 jurisdiction over such claims, this Article focuses on section 1331 as a useful and important jurisdictional alternative in human rights cases brought against state and nonstate defendants.

II. FEDERAL QUESTION JURISDICTION

A. Osborn, Verlinden, and Confusion: An Introduction

Article III of the Constitution provides the starting point for any analysis of federal jurisdiction. Section 2, clause 1 of article III provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”\textsuperscript{56} The ratio decidendi of federal jurisdiction over cases arising under those sources, the “Supreme Law of the Land,”\textsuperscript{57} is clear. In the words of Alexander Hamilton, as “Publius,” it “seems scarcely to admit of controversy that the judiciary authority of the Union ought to extend . . . to all those cases which arise out of the laws of the

\textsuperscript{54} Even more preliminarily, there is disagreement concerning whether §1350 requires a cause of action to arise under international law. For analysis of that debated issue, see Randall, Further Inquiries, supra note 9, at 477-95. Examples of opinions indicating that §1350 requires an international law cause of action, and finding jurisdiction unavailable in the absence of such a cause of action, include Tel-Oren, 726 F.2d at 816-19 (Bork, J. concurring); Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir.), cert. denied, 429 U.S. 835 (1976); Jaffe v. Boyles, 616 F. Supp. 1371 (W.D.N.Y. 1985).

\textsuperscript{55} E.g., Tel-Oren, 726 F.2d at 800-22 (Bork, J., concurring) (jurisdiction rejected under §§1331 and 1350 due to absence of cause of action under international law). Some federal judges view §1331, but not §1350, as requiring a cause of action under international law. See Tel-Oren at 779 (Edwards, J., concurring). Before those judges, therefore, §1331 alone poses the “cause of action” hurdle to human rights claimants.

\textsuperscript{56} U.S. Const. art. III, § 2, cl. 1. Article III explicitly refers to cases arising under treaties, and encompasses, by implication, cases arising under customary international law. Henkin, supra note 14, at 1559-60. This conclusion depends upon customary law’s inclusion as federal law under the supremacy clause. See supra note 14.

\textsuperscript{57} U.S. Const. art. VI, cl. 2.
If there are such things as political axioms," he continued, "the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national law decides the question."59

The arising under provision of the Constitution encompasses both original and appellate jurisdiction.60 This Article focuses on original jurisdiction. With one limited exception, however, Congress did not give federal courts general original jurisdiction over all actions arising under federal law until 1875.61 Before 1875, the arising under provision was relevant only when Congress had granted jurisdiction within more narrow contexts; the courts had to determine whether the arising under or another constitutional provision authorized jurisdiction in those limited contexts.

Within such a context, Chief Justice Marshall enunciated the first important interpretation of original federal question jurisdiction in Osborn v. Bank of the United States.62 In Osborn, Ohio had imposed a tax on a congressionally chartered federal bank.63 The bank sued to enjoin the state auditor from collecting the tax, claiming that the tax was unconstitutional.64 Notably, the bank’s charter granted the bank "the right ‘to sue

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59. Id. at 476.
60. The Supreme Court has appellate jurisdiction over arising under cases; Congress also may give appellate and original jurisdiction to lower federal courts. See U.S. CONST. art. I, § 8, cl. 9; art. III, § 1.
61. Regarding the 1875 codification, see infra notes 76-80 and accompanying text. Regarding the one pre-1875 grant of general original federal question jurisdiction, see Holt, The First Federal Question Case, 3 LAW & HIST. REV. 169, 170 (1988) ("only one case was ever brought under [the Judiciary Act of 1801] in which its limits and meaning might have been tested, . . . but that case helps to demonstrate the vast possibilities inherent in the constitutional concept of ‘federal questions’"). But cf. Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. PA. L. REV. 741, 850-51 (1984) ("the federalist supporters of the Judiciary Act of 1789 may well have believed that they had granted to the federal courts the whole of the judicial power of the United States, at least the whole of that power as it was understood during the ratification process").
62. 22 U.S. (9 Wheat.) 738 (1824). For Justice Marshall’s earlier consideration of the Supreme Court’s appellate jurisdiction over arising under cases, see Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379 (1821) ("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.").
64. See id. at 757.
and be sued,' 'in every circuit court of the United States.'” Justice Marshall viewed that language as a grant of federal jurisdiction and held that article III supported such jurisdiction. Justice Marshall’s result in *Osborn* was obvious. Because the bank challenged the constitutionality of a state tax law, the claim clearly arose under federal law.

Justice Marshall, however, going beyond the immediate facts in *Osborn*, explained that the Constitution also supported federal jurisdiction in *any* case involving the bank. The bank’s right to sue and to be sued arose from its charter. Consequently, federal law would answer any future questions concerning the bank’s right to sue. Because a defendant could raise such questions at the beginning of every lawsuit, Justice Marshall did not believe that a single case could resolve a challenge to the bank’s right to sue. Justice Marshall held that “[t]he question [concerning the bank’s right to sue] ... forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on.” Hence, the constitutionality of jurisdiction depends “on the character of the cause,” which, in turn, depends on whether a federal question theoretically may arise as an ingredient in a case.

The breadth of *Osborn*’s original ingredient test was necessary to sustain jurisdiction in a companion case, *Bank of the

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65. Id. at 817.
66. See id.
67. See id. at 817-28.
68. See id. at 821-25.
69. Id. at 824. If the bank were the defendant in a case, it might question its ability to be sued under its charter.
70. Id. (emphasis added); see also id. at 822 (“If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, ... then all the other questions must be decided as incidental to this, which gives that jurisdiction.”).
71. Id. at 822.
72. For criticism of Justice Marshall’s approach, one need look no further than Justice Johnson’s dissent in the case. Justice Johnson argued that “the principle of a possible occurrence of a [federal] question, as a ground of jurisdiction, [transcends] the bounds of the constitution, [which may cause] an enormous accession, if not an unlimited assumption, of jurisdiction.” Id. at 889 (Johnson, J., dissenting) (emphasis omitted). According to Justice Johnson, the Constitution does not support jurisdiction “until a [federal] question actually [arises], until such a case [is] actually presented.” Id. at 885. *But cf.* Note, *The Outer Limits of “Arising Under”,* 54 N.Y.U. L. Rev. 978, 986-88 (1979) (arguing that *Osborn* did not recognize jurisdiction over hypothetical federal questions, but required “a federal proposition in formulating the complaint”).
**United States v. Planters' Bank.** In that case, the national bank sued on a promissory note, seeking relief under Georgia state law. Justice Marshall summarily determined that subject matter jurisdiction was constitutional in *Planters' Bank*, reasoning that the jurisdictional “question was fully considered by the court in the case of *[Osborn]*, and it is unnecessary to repeat the reasoning used in that case.” The upshot of *Planters' Bank* is that a simple contract case brought by the national bank, involving Georgia law as the rule of decision, arises under federal law because the case might theoretically involve a federal question. Because the defendant might challenge the bank’s ability to sue and to enter into a contract, a case conceivably could raise questions concerning its charter. Federal law thus might be an ingredient in the recipe of the case.

*Osborn’s* significance grew with the passage of the 1875 Judiciary Act. Section 1 of that Act created original jurisdiction over “all suits of a civil nature, at common law or in equity . . . arising under the Constitution or the laws of the United States, or treaties made, or which shall be made, under their authority.” That provision tracks the arising under language of article III of the Constitution. According to the available legislative history, the provision’s drafters intended it to grant federal court jurisdiction over all cases contemplated by article III’s arising under component. The 1875 Judiciary Act im-

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75. Id. at 905. Justice Johnson dissented, id. at 910, as he had in *Osborn*, see supra note 72.


77. Id. § 1 (emphasis added). Although this provision, like its current counterpart, 28 U.S.C. § 1331, embodies the general federal question jurisdiction of district courts, Congress also has continued to grant jurisdiction over specific categories of cases involving federal questions. FEDERAL PRACTICE, supra note 19, at §§ 3568-3585, surveys the more limited jurisdictional grants drawing constitutional support from article III.

78. Prior legislation “did not confer the whole [judicial] power which the Constitution conferred.” But “[t]his bill does. This bill gives precisely the power which the Constitution confers—nothing more, nothing less.” 2 CONG. REC. S4986 (1874) (statement of Sen. Carpenter). These comments by the bill’s drafter concern the Judiciary Act of 1875 in its entirety and they apparently constitute the full evidence of Congress’s intent concerning the bill’s arising under component. See also Franchise Tax Bd. v. Laborers Vacation
posed a federal question amount in controversy requirement,\textsuperscript{79} and directed dismissal or remand if a suit did “not really and substantially involve a dispute or controversy properly within [the court’s] jurisdiction.”\textsuperscript{80} Congress, however, has erased both qualifications.\textsuperscript{81}

Since 1875, courts have bemoaned the purported complexity of using statutory federal question jurisdiction.\textsuperscript{82} As recently as 1982, the Supreme Court referred to Osborn as a

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\textsuperscript{79} 1875 Judiciary Act, supra note 76, at § 1 (requiring more than $500 in controversy).

\textsuperscript{80} Id. at § 5.

\textsuperscript{81} The amount in controversy requirement was partially removed in 1976, Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (removing monetary requirement in actions brought against United States, its agencies, and employees acting in official capacity), and entirely removed in 1980, see Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369. In 1948, Congress effectively omitted the language directing dismissal or remand of cases which did “not really and substantially” befit federal jurisdiction. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 836-37 (2d ed. 1973) [hereinafter HART & WECHSLER]. Hence, arguments that the amount in controversy and really and substantially requirements narrowed statutory federal question jurisdiction from its constitutional counterpart and Osborn, see Chadbourn & Levin, supra note 73, at 649-50, naturally lose force when those requirements disappear.

\textsuperscript{82} See supra note 16 and authorities cited therein. Diverse remedial suggestions from commentators reflect the myriad judicial problems involving federal question jurisdiction. See Chadbourn & Levin, supra note 73, at 664-74 (suggesting that judiciary should focus more restrictively on whether dispute over federal question is real and substantial); see generally Cohen, supra note 16, at 905-15 (suggesting that federal question jurisdiction should arise only in cases governed “directly” by federal law); Hornstein, Federalism, Judicial Power and the “Arising Under” Jurisdiction of the Federal Courts: A Hierarchical Analysis, 56 IND. L.J. 563, 566 (1981) (suggesting that arising under jurisdiction should depend upon whether case’s federal element is sufficiently anterior to other elements in dispute); Mishkin, The Federal “Question” in the District Courts, 53 COLUM. L. REV. 157, 184-96 (1953) (suggesting that federal question jurisdiction should exist over all cases where well-articulated federal policy is at stake, subject to certain pragmatic limitations); Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 LAW & CONTEMP. PROBS. 216, 223-34 (1948) (suggesting that federal jurisdiction should extend beyond Osborn to all cases that Congress could regulate, including those areas where Congress has been dormant); Note, supra note 72, at 979 (suggesting that federal question jurisdiction should extend to any case in which plaintiff’s complaint discloses actual and substantial reliance on legal proposition touching federal primary relationships).
"controlling decision on the scope of article III 'arising under' jurisdiction." A modicum of logic therefore might indicate that courts have jurisdiction under section 1331 in any case possibly involving an original ingredient of federal law. If only section 1331 were that simple. Instead, as Chief Justice Burger indicated in *Verlinden B.V. v. Central Bank of Nigeria:* "Although the language of § 1331 parallels that of the 'Arising Under' Clause of Art. III, this Court never has held that statutory 'arising under' jurisdiction is identical to Art. III 'arising under' jurisdiction." In short, despite the dictates of legislative history and literalism, "Art. III 'arising under' jurisdiction is broader than federal question jurisdiction under § 1331."

Consequently, *Osborn* controls only those cases in which article III's arising under clause supports a statutory basis of original jurisdiction other than section 1331. In *Verlinden*, for example, a Dutch corporation sued the Central Bank of Nigeria, alleging an anticipatory breach of a letter of credit established for Nigeria's contractual obligation to purchase cement; Dutch law governed the dispute. The complaint alleged subject matter jurisdiction under the FSIA. The Supreme Court held that even if a foreign plaintiff sues a foreign sovereign in federal district court on a nonfederal cause of action, jurisdiction comports with article III's arising under clause. Although *Verlinden* itself was a cement contract case, Justice Burger generally suggested that all "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident." Echoing *Osborn*'s original ingredient test, Justice Burger concluded: "At the threshold of every action . . . against a foreign state, . . . the [district] court must

84. Id.
85. Id. at 494.
86. Id. at 495.
87. Id. at 482.
89. See *Verlinden*, 461 U.S. at 491-97. Article III's alienage provision did not support jurisdiction in this case involving only foreign parties. See supra text accompanying notes 39-42.
satisfy itself that one of the [FSIA's] exceptions applies . . . . Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Art. III jurisdiction."

Conversely, cases in which original jurisdiction stems from section 1331 require something more than an original or threshold ingredient of federal law. The Supreme Court has interpreted section 1331's arising under language more restrictively than the statute's constitutional counterpart, due to the "demands of reason and coherence, and the dictates of sound judicial policy which have emerged from [the statute's] function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding." Hence, in section 1331 cases, the judiciary purportedly must limit Osborn's analytical parameters.

Although one is a statutory provision and the other a constitutional provision, the distinction between section 1331 and article III is no more than a judicial myth. This argument reaches beyond section 1331's language and legislative history. In actuality, a court does not face an inherently different task when jurisdiction is alleged under section 1331, the FSIA, or a clause in a bank's charter. The jurisdictional statute in each case is just that, a jurisdictional statute, deriving its support from the same constitutional provision. Accordingly, a court always should consider whether a particular case arises under federal law. Every case requires resolution of the same issue: do the allegations present an issue of federal interest, as encompassed by constitutional, international, or other federal law? That issue does not necessitate applying a different arising under analysis contingent upon the jurisdictional statute alleged by plaintiff. The doctrinal conceptualization of arising under need not differ. Instead, regardless of the jurisdictional statute, courts should employ a single, functional analysis (Osborn's or another) to determine whether the facts, laws, and circumstances of any given case cause it to arise under the Con-

91. Verlinden, 461 U.S. at 493-94 (emphasis added).
93. For a critical and useful analysis of the relationship between the arising under components of § 1331 and article III, see Note, supra note 72, at 988-95 (criticizing as mythical the difference between the statutory and constitutional language and concluding that the only defensible limitation on Osborn is the judicial requirement that § 1331 cases indicate a substantial reliance on a federal proposition).
94. See supra notes 76-81 and accompanying text.
constitution, laws, or international law of the United States.95 Nevertheless, because the dichotomy drawn by the Supreme Court between section 1331 and article III seems here to stay, this Article will not argue directly against that dichotomy any further.96 The analysis instead will try to navigate the muddy waters of the section 1331 case law. This requires more than a reliable compass or guide, because, by the Supreme Court's own admission, "the statutory phrase 'arising under...' has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts."97

B. THREE GENUSES OF FEDERAL QUESTION CASES

Risking the dangers of oversimplification involved in drawing any legal categories, this Article will show that courts have recognized section 1331 jurisdiction in at least three genuses of

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95. Mishkin strenuously argues that the statutory arising under provision deserves a different analysis than that applied to the constitutional arising under provision, because the former grants original lower court jurisdiction, while the latter encompasses both original and appellate jurisdiction. See Mishkin, supra note 82, at 163-76. According to Mishkin, the Constitution's arising under clause must be interpreted broadly enough to comprehend appellate cases that, during litigation, present a crucial federal issue. In such cases, the Supreme Court must have the final say under its appellate jurisdiction. Id. at 163. But because "it may often be difficult to determine the presence and materiality of a federal question until some point long after the litigation has started," the inclusion within original lower court jurisdiction of "all cases which might conceivably turn finally upon an issue of national law would create an impossible situation." Id.

Mishkin's argument reduces to the following: Because courts apply arising under jurisdiction in different contexts, each application requires a different interpretation. The distinction Mishkin draws between the original and appellate applications of arising under jurisdiction falters, however, because it fails to acknowledge that courts may use a single doctrinal approach to analyze arising under jurisdiction in different contexts. In short, "[i]t is not the meaning of 'arising under' that varies but the posture of the case." See Note, supra note 72, at 989-90.

96. For indirect suggestions that the dichotomy is fallable, see infra notes 182-88 and accompanying text (suggesting that protective jurisdiction theory equally supports cases relying on § 1331 jurisdiction and cases based on other statutory applications of arising under jurisdiction). See also infra notes 189-202 and accompanying text (noting that third genus of § 1331 case law is conceptually similar to Osborn).

97. Franchise Tax Bd. v. Laborers Vacation Trust, 463 U.S. 1, 8 (1983). The compass metaphor derives from Gully v. First Nat'l Bank, 299 U.S. 109, 118 (1936) (Cardozo, J.) (stating that in statutory federal question cases, courts have distinguished basic and collateral federal controversies and would "be lost in a maze if we put that compass by"). Cohen, however, considered Gully's analytical compass broken. See Cohen, supra note 16, at 903-05.
cases. Whether warranted or not, one rule remains constant in each genus: the well-pleaded complaint rule, which, despite Osborn, holds that the existence of a federal question must be determined only from the plaintiff’s complaint, bill, or declaration. By formulating and analyzing the three genuses, this subsection will provide a doctrinal framework in which to organize the otherwise amorphous case law. Part III then will use that framework to assess section 1331 jurisdiction specifically over human rights claims.

Though sometimes overlapping and sometimes contradictory, the three genuses generally move from narrow to broad interpretations of arising under jurisdiction. Indeed, the final interpretations actually complete a full circle back to Osborn’s approach. More specifically, this subsection’s organizing principle is the relationship between a cause of action and positive federal law. Between the first and third genuses, the rights and remedies available to plaintiffs become increasingly attenuated from positive federal law, until there is no pretense that plaintiff’s cause of action arises under federal law.

88. See, e.g., Laborers Vacation Trust, 463 U.S. at 9-10 (noting that despite diverse interpretations of arising under jurisdiction, “[o]ne powerful doctrine has emerged . . . the ‘well-pleaded complaint’ rule”); Gully, 299 U.S. at 113 (stating that federal question “must be disclosed upon the face of the complaint, unaided by the answer”); Taylor v. Anderson, 234 U.S. 74, 75-76 (1914) (stating that whether cases arise under constitutional or other federal law “must be determined from what necessarily appears in the plaintiff’s statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose”). For a recent, insightful critique of the rule, see Doernberg, There’s No Reason for It; It’s Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction, 38 HASTINGS L.J. 597, 599 (1987) (directing attention to fact that even if case turns on important question of federal law, federal question jurisdiction does not exist unless federal question appears in plaintiff’s “well-pleaded complaint”). This fixation on the complaint ignores Osborn, which premised jurisdiction on the possibility that a defendant might challenge the national bank’s right to sue. See supra notes 62-72 and accompanying text.

The well-pleaded complaint rule applies to both the original and removal jurisdiction of district courts. See Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808 (1986) (removal jurisdiction). Moreover, though this Article focuses on the district courts’ original jurisdiction, its analysis also applies to removal jurisdiction, because “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant” to federal district court. 28 U.S.C. § 1441(a) (1982). Particularly, any civil action in which the district courts have original federal question jurisdiction “shall be removable without regard to the citizenship or residence of the parties.” Id. § 1441(b).

99. Although this part of the Article aims to craft an original framework of federal question cases, it stems, at least in part, from Merrell Dow, 478 U.S.
1. First Genus: Cases Involving Express or Implied Causes of Action under Positive Federal Law

   a. *American Well Works*

   Under the first genus, section 1331 creates original jurisdiction over cases in which positive "federal law creates the cause of action."\(^{100}\) The term *positive federal law* refers to constitutional law, federal statutory law, and international law. Positive law contrasts with the judicially formulated sources considered under the second genus.\(^{101}\) The first genus derives from Justice Holmes's 1916 opinion in *American Well Works Co. v. Layne & Bowler Co.*,\(^{102}\) one of the earliest decisions effectively limiting the arising under statute, thus distancing the statute from both its constitutional counterpart and from *Osborn*.\(^{103}\) Although critics have assailed Justice Holmes's opinion and offered alternative jurisdictional approaches,\(^{104}\) Holmes's opinion remains valid and may have particular importance to human rights claims.\(^{105}\)

   In *American Well Works*, the plaintiff manufactured and

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\(^{100}\) Merrell Dow, 478 U.S. at 808.

\(^{101}\) Rather than representing a jurisprudential term of art, *positive federal law* here encompasses the legal sources that the legislative and executive branches of the United States have enunciated or recognized. Ordinarily expressed in writing, these legal sources of positive law also include certain legal practices, such as international custom. Although both of the first two genuses identify causes of action under federal law, the second requires greater judicial creation and cognition of the cause of action. Causes of action under the second genus thus arise less directly under the positive federal law.

\(^{102}\) 241 U.S. 257 (1916).

\(^{103}\) See id. at 260 ("A suit arises under the law that creates the cause of action.").

\(^{104}\) See, e.g., Franchise Tax Bd. v. Laborers Vacation Trust, 463 U.S. 91, (1982) (claiming that "even the most ardent proponent of the Holmes test has admitted that it has been rejected as an exclusionary principle"). For other criticism of, and alternatives to, Justice Holmes's approach, see sources cited in note 82, supra.

\(^{105}\) Not only does Justice Holmes's oft-criticized approach still provide the analytical starting point in many § 1331 cases, but courts have also rejected § 1331 jurisdiction in several recent human rights cases under the specific rationale that international law does not explicitly create plaintiff's cause of action, see supra notes 54-55 and accompanying text, infra notes 244-67 and accompanying text, a rationale premised on Justice Holmes's approach.
sought to patent a certain pump. An element of libel and slander is the falsity of defendant’s statements, which here necessarily would have involved an examination of defendant’s patents under federal law. Justice Holmes nevertheless ruled that the defendant’s alleged “wrong is its manifest tendency to injure the plaintiff’s business,” which is somehow “equally actionable whether it produces the result by persuasion, by threats, or by falsehood....” Hence, plaintiff’s allegation “depends upon the law of the State where the act is done, not upon the patent law, and therefore the suit arises under the law of the State.” Finally, in the most famous passage in this genus of the case law, Justice Holmes concluded: “A suit arises under the law that creates the cause of action.” Although the Court has separated the concepts of “jurisdiction” and “cause of action” in other instances, Justice Holmes indicated here that the availability of federal jurisdiction depends on the existence of a federal cause of action.

Although courts regularly repeat Justice Holmes’s famous passage, his use of the term cause of action has proved problematic. The meaning of cause of action is ambiguous because, as the Supreme Court has noted, a “‘cause of action’ may mean one thing for one purpose and something different for another.” Thus, the first genus employs one elusive term,

107. Id.
110. See Restatement (Second) of Torts § 558 (1977). But see id. § 581A (truth constitutes an affirmative defense in defamation actions, although first amendment case law may be eroding practical effect of this rule).
112. Id. at 259.
113. Id. at 260.
114. Id.
115. See infra note 123.
116. See supra note 113 and accompanying text and text accompanying note 114.
117. See supra text accompanying note 114.
cause of action, to define another, arising under. An examination of the Supreme Court’s opinion in *Davis v. Passman* will clarify the term cause of action.

b. *Davis v. Passman*

Petitioner Shirley Davis, a deputy administrative assistant to United States Representative Otto Passman, lost her job when Passman concluded that a man should fill her position. Justice Brennan, writing for the majority, held that section 1331 provided original district court jurisdiction over the case. He ruled that Davis had “a cause of action under [the equal protection component of] the Fifth Amendment, and . . . her injury may be redressed by a damages remedy.” In reaching this conclusion, Justice Brennan examined two important definitions of cause of action, which, by extrapolation, help define Justice Holmes’s approach to the first genus.

Justice Brennan’s first definition focuses on the plaintiff’s legal rights: a cause of action “refers roughly to the alleged in-
vasion of 'recognized legal rights' upon which a litigant bases his claim for relief.'

To fit the first genus, positive federal law must recognize the right. At the jurisdictional level, the first definition of cause of action requires only a positive federal right. Apparently, federal law need not create an explicit remedy for the invasion of the plaintiff's right.

Justice Brennan's second definition refers to the "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." Justice Brennan's opinion here distinguishes between constitutional law claims and claims involving other federal laws. Federal law may explicitly or implicitly authorize a private party to invoke the power of the court. Cases involving implied private causes of action naturally require greater examination.

The Supreme Court has considered whether courts should infer a private cause of action from various federal statutes that are primarily criminal or regulatory in nature. Because the "ultimate question is one of congressional intent," courts must consult each statute's language and legislative history to determine whether Congress intended a private cause of action. In *Cort v. Ash* the Supreme Court enunciated four criteria.

124. *Davis*, 442 U.S. at 238.
125. *Right* here apparently refers simply to a benefit or the entitlement to be free from a certain injury.
127. *Id.* at 240 n.18.
128. *Id.* at 241-42.
131. 422 U.S. at 66.
that a court should use to clarify congressional intent:

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?132

Cort's first criterion concerns the implication of a federal right; its second and third criteria concern whether federal law implies a remedy. Assuming an understanding of the term right,133 Davis suggests that remedy means simply congressionally sanctioned private enforcement of implied statutory rights in federal court.134 In other words, after satisfying Cort's first criterion by proving that positive law implies a private right, the plaintiff must satisfy Cort's second and third criteria by showing Congress's intent to permit that right to be enforced through a civil suit. The fourth Cort criterion considers whether federal or state law appropriately generates a cause of action, under Davis's second definition.

Courts apply Davis's second definition of cause of action differently when the Constitution, in contrast to other federal laws, provides the positive federal law in a case. Although the Bill of Rights provisions do not explicitly permit individuals to invoke judicial power, the Cort criteria should not determine whether constitutional provisions imply a cause of action. Instead, "[a]t least in the absence of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department' . . . we presume that justiciable constitutional

132. Cort, 422 U.S. at 78 (emphasis added) (quoting Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916) (deleting emphasis from original)). The quest to determine congressional intent subsumes the Cort criteria. For criticism of those criteria, see Cannon, 441 U.S. at 730 (Powell, J., dissenting).

133. See supra note 125. It is acknowledged, however, that the term right may refer to several legal and philosophical meanings. See generally Henkin, International Human Rights as "Rights," 1 CARDOZO L. REV. 425 (1979) (discussing several concepts of rights with emphasis on human rights).

134. Cort's remedy criteria do not require that federal law implies that any particular form of relief is appropriate. The issue of whether the plaintiff has an implied remedy and a private cause of action "is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." Davis v. Passman, 442 U.S. 228, 239 (1979). Hence, remedy refers only to the propriety of invoking the judicial power to enforce the plaintiff's implied rights. If the plaintiff invokes jurisdiction this way, issues related to the case's merits and plaintiff's relief remain.
Particularly litigants who "have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights."[136]

2. Second Genus: Cases Involving Causes of Action that Federal Judges Create or Adopt

The second genus of the federal question case law is but a variation of the first. Again, a federal cause of action is necessary: plaintiff must show the invasion of a federally recognized right and the authorization to enforce that right in federal court. Under the second genus, however, the federal cause of action springs less directly from positive law and more from the substantive law that the federal judiciary creates or adopts. This subsection first considers the judiciary's creation of federal common-law causes of action and then reviews the judiciary's adoption of nonfederal causes of action under the protective jurisdiction theory.

a. Federal Common Law

The term federal common law refers "generally to federal rules of decision where the authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command."[137] *Erie Railroad v. Tompkins*[138] declared that "there is no federal general common law."[139] In *Hinderlider v. La Plata River Co.*, [140] decided the same day as *Erie*, the Supreme Court unanimously maintained that federal common law would regulate water apportionment in the specific context of domestic interstate streams.[141] Hence, a general federal common law was out, particularly in diversity cases. A more specialized federal common law, however, was still in—that is, a federal common law in nondiversity cases that involve federal interests which are insufficiently regulated by positive federal

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136. *Id.* Otherwise, "such rights are to become merely precatory." *Id.*

137. *Hart & Wechsler, supra* note 81, at 770.

138. 304 U.S. 64 (1938).

139. *Id.* at 78 (emphasis added).

140. 304 U.S. 92 (1938).

141. *Id.* at 110 (stating that "whether the water of an interstate stream must be apportioned between the two states is a question of ‘federal common law.’").
law. As indicated by a prominent commentator, "Erie led to
the emergence of a federal decisional law in areas of national
concern." The term laws contained in both article III and section
1331 includes a reference to the federal common law. A
plurality of the Supreme Court in Romero v. International Ter-

minal Operating Co. suggested that section 1331 jurisdiction
applies to cases arising under the federal common law. The
Court unanimously affirmed this position in Illinois v. City of
Milwaukee. Illinois sued four Wisconsin cities and two city
and county sewage commissions for allegedly polluting Lake
Michigan. The Court, through Justice Douglas, held that its
original jurisdiction over controversies between domestic states
was not exclusive in the case because only one state, Illinois,
was a party, and because it was not mandatory that the plaintiff
join Wisconsin as a defendant. In short, the cities and sewage
commissions, Wisconsin's political subdivisions, were not
"states" within the Court's grant of original jurisdiction. In
addition, the Court declined to exercise its original jurisdiction
because section 1331 provided original district court jurisdiction
in the case.

For the notion that section 1331 includes claims founded on
federal common law, Justice Douglas relied on Romero's plu-

rarity opinion: "federal courts have an extensive responsibility
to entertain and decide controversies arising under the laws of
any state whenever their own jurisdiction is not exclusive of
that of the state."

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142. Some exceptions may exist to the usual rule disallowing federal com-
mon law in diversity cases and allowing federal common law in nondiversity
cases. See HART & WECHSLER, supra note 81, at 766 (noting that Erie prohibits
federal common law, for any state law governs on its own, regardless of basis
for jurisdiction); 13B FEDERAL PRACTICE, supra note 19, § 3563, at 60-61 ("Fed-
eral law, when it exists, controls in federal court even in diversity cases . . .").
144. U.S. CONST. art. III.
146. That conclusion is necessarily the starting point of analysis in the
cases discussed infra in notes 147-55 and accompanying text.
148. Id. at 389 (Brennan, J., dissenting in part and concurring in part).
150. Id. at 93.
151. Id. at 93-98 (holding that original jurisdiction was not mandatory
under 28 U.S.C. § 1251(a) (1964), which provides that "'the Supreme Court
shall have original and exclusive jurisdiction of: (1) All controversies between
two or more States.'").
152. Id. at 98-101 (holding that because original jurisdiction of Supreme
Court is not exclusive, these suits may be brought in or removed to district
courts).
of fashioning rules of substantive law . . . . These rules are as fully 'laws' of the United States as if . . . enacted by Congress.' Justice Douglas held that the Illinois cause of action arose under the federal common law: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . . ." Largely because Congress had tried to abate the pollution of interstate waters, Justice Douglas concluded that the case demanded a specialized federal rule of decision.

The creation of federal common-law causes of action in *Illinois v. City of Milwaukee* and other cases draws support from a few authorities. When it helps to implement a principle of constitutional or other federal law, common law draws force from such positive substantive law. In such cases, the line between the first and second genera of the case law blurs, as *Illinois v. City of Milwaukee* illustrates. The distinction between the first genus—in which the judiciary may infer a cause of action from positive law—and the second genus—in which the judiciary may create one with support from the positive law—depends subtly on the breadth of the interstices of the positive law at issue and the amount of judicial creativity required. As perfectly put by leading commentators: "Statutory [or constitutional] interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative advertisement to the issue at hand attenuates."

Alternatively, with less reference to positive law, the federal judiciary simply may create common law in areas "that are federalized by force of the Constitution itself." Professor Hill persuasively reasons that there exist specific "areas in which Congress is enabled to act [but which] are foreclosed to state action by the terms of the Constitution itself." The federal courts may formulate common law in such an area, when positive law does not resolve the case at hand. According to Hill, this "constitutional preemption" permits federal courts to

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153. *Id.* at 99 (citations omitted) (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (1958)).
155. *Id.* at 101-05.
156. See *supra* text accompanying note 155. Justice Douglas's decision drew support from regulatory environmental legislation.
157. HART & WECHSLER, supra note 81, at 770.
159. *Id.* (Congress, for example, may coin money and declare war, but states may not).
make law particularly in disputes involving one or more states of the Union, admiralty controversies, cases involving the federal government and its instrumentalities, and cases involving international law or foreign relations.\textsuperscript{160}

b. \textit{Protective Jurisdiction}

The protective jurisdiction theory provides another version of the second genus. According to Professor Wechsler, federal jurisdiction should extend "to all cases in which Congress has authority to make the rule to govern disposition of the controversy but is content instead to let the states provide the rule so long as jurisdiction to enforce it has been vested in a federal court."\textsuperscript{161} Instead of enacting substantive legislation based on its authority under article I, section 8 of the Constitution, Congress may allow federal courts to borrow nonfederal rules of decision from the fifty states or foreign nations. In such instances, "[a] case is one 'arising under' federal law within the sense of article III whenever it is comprehended in a valid grant of jurisdiction as well as when its disposition must be governed by the national law."\textsuperscript{162} Thus, articles I and III unite to support the judicial use of nonfederal causes of action in areas of national concern.\textsuperscript{163} Federal courts regulate federal interests in this way.

Professor Mishkin offers a narrower view of protective jurisdiction, arguing that it should extend only "where there is an articulated and active federal policy regulating a field."\textsuperscript{164} Within Mishkin's limited scope, however, "the 'arising under' clause of Article III apparently permits the conferring of jurisd-

\textsuperscript{160} Id. at 1030-79. Professor Hill distinguishes international law from foreign relations.

\textsuperscript{161} Wechsler, \textit{supra} note 82, at 224 (emphasis added).

\textsuperscript{162} Id. at 225.

\textsuperscript{163} For a discussion of the amalgam of article I and article III support, see Mishkin, \textit{supra} note 82, at 188-93; Wechsler, \textit{supra} note 82, at 224-25; Note, \textit{The Theory of Protective Jurisdiction}, 57 N.Y.U. L. Rev. 933, 947-59 (1982). The article I support includes the necessary and proper clause, art. I, \textsection 8, cl. 18, by which Congress implicitly may delegate its authority to the judiciary through jurisdictional grants. Article III supports protective jurisdiction because federal jurisdictional statutes are laws of the United States and cases involving those statutes thus arise under federal law for article III purposes. \textit{See} Mishkin, \textit{supra} note 82, at 188-93; Wechsler, \textit{supra} note 82, at 225. Arguably, through the adoption and use of nonfederal rules of decisions, federal judges may "federalize" those rules; that is, transform nonfederal law to federal. Thus, the causes of action that those rules supply arise under federal law for article III purposes.

\textsuperscript{164} Mishkin, \textit{supra} note 82, at 192.
diction on the national courts over all cases in the area—including those governed by state [nonfederal] law.”165 Wechsler’s and Mishkin’s theories contain vestiges of Chief Justice Marshall’s opinions in *Osborn* and *Planters’ Bank*. Based on the existence of a jurisdictional statute and the hypothetical issues stemming from that statute, Justice Marshall upheld federal question jurisdiction, even though Georgia law provided the rule of decision, at least in *Planters’ Bank*.166

Despite some continuing and resourceful scholarly support for the protective jurisdiction theory,167 the judiciary has not fully embraced protective jurisdiction. Although the Supreme Court has not expressly ruled on its validity,168 Justice Burton accepted the doctrine in his concurring opinion in *Textile Workers Union v. Lincoln Mills*.169 Conversely, Justice Frankfurter’s dissent in that case strongly rejected the doctrine.170 *Lincoln Mills* measured the constitutionality of section 301(a) of the Taft-Hartley Act,171 which gave federal district courts original jurisdiction over cases alleging violations of labor-management contracts.172 Because section 301(a) did not refer to the citizenship of the parties to those cases, it was not supported by article III’s diversity clause.173 Moreover, because section 301(a) did not create any rules of decision, the Textile Workers Union argued that labor contract cases arose under nonfederal law. Jurisdiction over those cases thus arguably was unsupported by article III’s arising under clause.174 The Court upheld Taft-Hartley’s jurisdictional grant, however, and con-

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165. *Id.*
166. *See supra* notes 62-75 and accompanying text.
168. For a succinct discussion of Supreme Court opinions implying support for some form of protective jurisdiction, see Brown, *supra* note 167, at 370-75.
170. *Id.* at 460 (Frankfurter, J., dissenting).
173. *See id.*
174. *Id.* at 449.
cluded “that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws.”175 Accordingly, in section 301(a) cases, causes of action arise under federal common law; federal jurisdiction in such cases is thus constitutional.

After initially criticizing the Court’s federal common-law ruling,176 Justice Frankfurter’s dissent rejected the protective jurisdiction theory used in Justice Burton’s brief concurrence and carefully avoided in the majority’s federal common-law ruling.177 Although the Constitution probably requires adoption of nonfederal law in most diversity and alienage cases because jurisdiction stems from the nature of the parties, Justice Frankfurter found adoption of nonfederal law in arising under cases to be unjustified under article III: “‘Protective jurisdiction’ cannot generate an independent source for adjudication outside of the Article III sanctions and what Congress has defined.”178 Actually, Justice Frankfurter’s similar criticisms of both the federal common-law and protective jurisdiction theories179 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 action180 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.

175. Id. at 456.
176. According to Justice Frankfurter, the majority gave “this plainly procedural section,” § 301(a), an “occult content” that “transmuted [it] into a mandate to the federal courts to fashion a whole body of substantive federal law appropriate for the complicated and touchy problems raised by collective bargaining.” Id. at 461 (Frankfurter, J., dissenting).
177. Disagreeing with the majority that federal common law is the applicable substantive law in § 301(a) cases, Justice Burton nevertheless concluded that “some federal rights may necessarily be involved in a § 301 case, and hence... the constitutionality of § 301 can be upheld as a congressional grant to Federal District Courts of what has been called ‘protective jurisdiction.’” Id. at 469 (Burton, J., concurring).
178. Id. at 475 (Frankfurter, J., dissenting).
179. Both criticisms involve the charge that article III is violated. Compare id. at 465 (Frankfurter, J., dissenting) (arguing that Court’s common-law ruling avoided addressing constitutional problems that its interpretation of § 301 actually raises) with id. at 477-78 (Frankfurter, J., dissenting) (stating that because § 301(a) is “wholly jurisdictional,” it “bristles with constitutional problems under Article III” that protective jurisdiction theory does not resolve).
Notwithstanding the limited judicial acceptance of the protective jurisdiction theory, this Article supports its application to human rights claims. Taking the position opposite that of Justice Frankfurter and assuming the constitutionality of protective jurisdiction,181 this Article’s thesis requires two additional and interlocking building blocks: that protective jurisdiction is legitimate in section 1331 cases involving significant federal interests; and accordingly, that protective jurisdiction is particularly appropriate when section 1331 is invoked over human rights claims. The first of these points is discussed in this subsection; the second point is discussed in Part III.

The thesis posits initially that protective jurisdiction is as legitimate in cases involving the general federal question statute, section 1331, as it is in cases involving more specific federal question statutes, such as section 301(a) of the Taft-Hartley Act. As discussed earlier, under the Supreme Court’s current dichotomy, section 1331 cases receive a more narrow arising under interpretation than cases involving other arising under grants of district court jurisdiction.182 If that dichotomy also is used to limit protective jurisdiction over section 1331 cases, this subsection’s initial premise may be fragile. That is, even if protective jurisdiction supports section 301(a) of the Taft-Hartley Act, it may not support section 1331 jurisdiction. It may be contended that Congress delegated less judicial authority to adopt nonfederal law under section 1331 than under the more specific grants of federal question jurisdiction; otherwise, the protective jurisdiction theory would extend section 1331 to every garden-variety tort and contract case involving nonfederal causes of action.183

This subsection maintains, however, that its thesis’s starting point is sound. Protective jurisdiction should extend to section 1331 cases as it does to cases involving other jurisdictional

181. In other words, this Article assumes that the protective jurisdiction theory is generally sound constitutionally, as the works of Mishkin and Wechsler and the sources cited at note 167, supra, fully explain. Readers rejecting this assumption may wish to skip directly to the third genus. Remaining readers will witness the extension of Mishkin’s and Wechsler’s theories within the specific context of this Article.

182. See supra notes 84-95 and accompanying text.

183. Cf. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 474 (Frankfurter, J., dissenting) (rejecting protective jurisdiction generally because it would vastly extend federal jurisdiction, so that “every contract or tort arising out of a contract affecting commerce might be a potential cause of action in the federal courts, even though only state law was involved in the decision of the case”).
grants, at least in areas that involve particularly strong federal interests. Recall that protective jurisdiction relies not only on the judiciary's authority under article III, but also on Congress's authority under article I.\textsuperscript{184} Even if federal courts choose to limit their article III authority in most section 1331 cases, their authority to adjudicate certain section 1331 cases is supplemented by Congress's article I powers. The additional article I support may even mandate that the judiciary assume its full authority over cases entailing important federal concerns. Cases with important foreign relations implications, such as human rights claims, surely involve serious federal interests. The delegation of certain foreign affairs powers to Congress is one of the most significant aspects of article I.\textsuperscript{185} Indeed, the foreign affairs delegation fostered a broader constitutional goal: consolidation of colonial foreign affairs authority within a strong centralized government, so that the power could "be more perfectly and punctually" managed.\textsuperscript{186}

Courts should interpret section 1331 cases involving article I interests of this magnitude broadly under the protective jurisdiction theory, not narrowly under the statutory, nonconstitutional view of arising under jurisdiction. This conclusion is particularly warranted in the human rights area, in which federal interests have been articulated through an active congressional policy.\textsuperscript{187} Under this limited application of the protective jurisdiction theory, section 1331 does not broaden federal jurisdiction excessively. Instead, the articulated federal interests render section 1331 more comparable to the specific grants of federal question jurisdiction, ensuring that section 1331 will not govern mundane tort and contract cases.\textsuperscript{188}

\textsuperscript{184} See supra notes 161-65 and accompanying text.


\textsuperscript{186} THE FEDERALIST No. 3, at 43 (J. Jay) (C. Rossiter ed. 1961).

\textsuperscript{187} The "articulated and active" standard derives from notes 164-65 and accompanying text, supra. This standard is applied to protective jurisdiction over human rights claims in Part III(B)(2)(b), infra notes 343-52 and accompanying text.

\textsuperscript{188} For a different view supporting protective jurisdiction over certain § 1331 cases when nonfederal causes of action borrow or incorporate federal law, see Note, supra note 163, at 988-96.
3. Third Genus: Cases Involving a Substantial Issue of Federal Law

Within the third genus of the case law, there is no pretension that plaintiff's cause of action arises under federal law. This genus, as the Supreme Court indicated in *Franchise Tax Board v. Laborers Vacation Trust*, allows section 1331 jurisdiction "where the vindication of a right under [domestic] state law necessarily turned on some construction of federal law." Although nonfederal law provides the rule of decision, section 1331 jurisdiction serves to facilitate the resolution of "a substantial question of federal law." As with the other genuses, the jurisdiction-triggering criterion—here, the need to resolve a substantial federal issue—must stem from a well-pleaded complaint.

The third genus actually derives from *Osborn* and its companion, even though the Supreme Court has disavowed Osborn's application to section 1331 cases. The third genus differs from Osborn only in that it requires an actual and substantial federal issue; in contrast, Osborn justified jurisdiction based on a hypothetical federal issue. Having formally banished Osborn to a corner of the case law, however, the Court prefers to rest the third genus upon *Smith v. Kansas City Title & Trust Co.*

In *Smith*, a shareholder sued the corporation to enjoin its purchase of bonds issued under the federal Farm Loan Act. The plaintiff's cause of action arose under Missouri law, which prohibited the state-chartered corporation from investing in

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190. Id. at 9. *Laborers Vacation Trust* involved a dispute over whether ERISA permitted California to collect unpaid state income taxes by levying on funds held under a vacation benefit plan that ERISA covered. The defendants asserted that ERISA preempted California's levy power and removed the cause from state court under 28 U.S.C. § 1441. The Supreme Court held that the case was not within the federal district court's removal jurisdiction. "[F]or reasons involving perhaps more history than logic," the Court ruled that because the defense raised the preemption issue and the issue received no mention in the plaintiff's well-pleaded complaint, the district court did not have federal question jurisdiction under § 1331. *Laborers Vacation Trust*, 463 U.S. at 4. For a discussion of this case, see Note, *Federal Jurisdiction over Preemption Claims: A Post-Franchise Tax Board Analysis*, 62 Tex. L. Rev. 893 (1984).
192. See id. at 9-12; see also supra note 98 and accompanying text (discussing well-pleaded complaint rule).
193. See supra notes 83-92 and accompanying text.
194. 255 U.S. 180 (1921).
195. Id. at 195.
bonds that were unconstitutionally issued. Despite the state-created cause of action, the Court upheld federal question jurisdiction under section 1331's statutory predecessor because of the constitutional question concerning the bonds' issuance. When it appears from the plaintiff's complaint, wrote the Smith Court, "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 [the statute]."

Obvious similarities mark Smith's approach and that of the purportedly inapposite Osborn. Moreover, Smith is virtually impossible to reconcile with American Well Works and the first genus, which requires a federal cause of action, not simply a federal issue of law or fact. Indeed, Justice Holmes, the author of American Wells Works, dissented in Smith. So here the species of section 1331 case law seem to contradict more than to converge. Nevertheless, this Article will divorce Smith and its modern counterpart, Laborers Vacation Trust, from the section 1331 quagmire and take them at face value. Therefore, Laborers Vacation Trust's standard, "that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims," must be applied to cases in the final section 1331 genus.

196. Id. at 214 (Holmes, J., dissenting).
197. Id. at 199-202.
198. Id. at 199.
199. Osborn, Planters' Bank, Smith, Laborers Vacation Trust, and Verlinden all agree that arising under jurisdiction may extend to cases involving federal questions, even absent a federal cause of action. See supra notes 62-91, 189-92 and accompanying text. Only Smith and Laborers Vacation Trust involved the general federal question jurisdiction statute in its original or removal form; the other cases involved more specific federal question jurisdictional grants. Because all five cases generally agree about the breadth of arising under, however, they together cast doubt on the Supreme Court's conclusion that § 1331's arising under language is narrower than the article III arising under language employed in the cases not invoking § 1331. See supra notes 93-95 and accompanying text, infra notes 359-61 and accompanying text.
200. See supra Part II(B)(1).
III. FEDERAL QUESTION JURISDICTION OVER HUMAN RIGHTS CLAIMS

While the three genuses of the section 1331 case law sometimes converge and sometimes diverge, it is useful to work within this structural triptych. This Part examines how human rights claims interact with the three genuses of the federal question case law.

International human rights law usually is viewed as a an outgrowth of World War II and the Axis nations' violent aggression and brutalization of human beings. After the Axis's surrender, certain individuals were prosecuted as war criminals. At the major trials, such as the one conducted by the International Military Tribunal ("IMT") at Nuremberg, the defendants were prosecuted for three principal offenses: crimes against peace, war crimes, and crimes against humanity. Those trials helped to define the legal regime outlawing aggressive acts and human rights violations by firmly establishing that individuals, as well as states, may bear liability for international law violations. Recognition of criminal liability for crimes against humanity was particularly significant because it diminished absolute sovereign authority over the treatment of a state's own nationals. The war crimes trials, moreover, coincided with the birth of the United Nations ("U.N."). Entering into force in 1945, the U.N. Charter aimed to end "the scourge of war... to reaffirm faith in fundamental


204. Such prosecutions occurred in various tribunals. See Randall, Universal Jurisdiction, supra note 9, at 801-02.

205. See Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1546, 1547, E.A.S. No. 472, at 4, 82 U.N.T.S. 284, 288; see also Control Council Law No. 10, Dec. 20, 1945, art. II, 3 CONTROL COUNCIL, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY 49,51 (Jan. 31, 1946), reprinted in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 908 (L. Friedman ed. 1972) (Control Council Law No. 10 governs trials administered by one of Allies in occupied zones); see generally Randall, Universal Jurisdiction, supra note 9, at 801-02 (discussing offenses prosecuted at war crimes trials and comparing them to other international crimes).

206. As succinctly put by the IMT: "Crimes against international law are committed by men, not by abstract entities [i.e., states], and only by punishing individuals who commit such crimes can the provisions of international law be enforced." International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT'L L. 172, 221 (1947) (hereinafter IMT Judgment).

207. See RESTATEMENT, supra note 8, pt. VII introductory note.
human rights, ... and to establish ... justice and respect for the obligations arising from treaties and other sources of international law. ..." Paralleling the legal norms underlying the war crimes trials, the U.N.'s ideals prohibited both the use of force and human rights violations committed by either states or individual actors.

During the past forty years, various multinational treaties concerning human rights violations and terrorism have implemented the normative principles of the IMT and the U.N. This Part first will briefly describe those treaties, along with relevant customary international law and other legal sources. This Part later will provide a fuller analysis, examining human rights claims under the section 1331 genuses.

208. U.N. CHARTER preamble.


210. International custom—that is, practices which states accept as legally binding—and "general principles of law recognized by civilized nations" are the primary nontreaty sources of international law, while judicial decisions and legal scholarship are subsidiary sources. Statute of the International Court of Justice, June 26, 1945, art. 38(1),59 Stat. 1055, 1060, T.S. No. 933 [hereinafter ICJ Statute]. The Restatement, supra note 8, § 102(1), identifies international agreements and customary law as primary legal sources and "general principles common to the major legal systems of the world" as a supplementary source. Substantial evidence of international rules also derives from judgments and opinions of international and domestic judicial tribunals, scholarship, and "resolutions of universal international organizations that state the rule as international law, if adopted by consensus or virtual unanimity." Restatement, supra note 8, § 103(2). In addition, treaties and customary law sometimes interact in various ways to create international rules. See infra notes 227-30 and accompanying text.
A. THE MODERN INTERNATIONAL LAW OF HUMAN RIGHTS AND TERRORISM


The International Covenant on Civil and Political Rights ("Covenant"), which entered into force in 1976, is particularly relevant to human rights claims. The Covenant, which is part of the so-called "international bill of rights," elaborates on, and makes legally binding, the human rights provisions of the U.N. Charter and the Universal Declaration of Human Rights. State parties to the Covenant have an obligation to create and protect certain fundamental liberties, including the right to live, to be free from summary execution, to be free from torture, cruel, or inhuman treatment or punishment, to be free from slavery or servitude, and to be treated equally before the law. Article 2(2) requires state parties to adopt domestic legislation "to give effect to the rights recognized in the . . . Covenant." Article 2(3), in part, obliges state parties:

(a) To ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities . . . and to develop the possibilities of judicial remedy.

213. Those rights appear in the Covenant, supra note 211, in articles 6(1), 6(2), 7, 8(1), 8(2), and 26, respectively.
214. Covenant, supra note 211, art. 2(2).
215. Id. art. 2(3) (emphasis added). The Optional Protocol to the Interna-
Other particularly relevant human rights treaties are the four Geneva Conventions of 1949, providing for the protection of military and civilian victims of armed conflict; the Genocide Convention, prohibiting the destruction of a national, ethnic, racial, or religious group; the Apartheid Convention, 


Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. Applying during peace or war, and deriving from the crimes against humanity prosecuted at World War II's conclusion, genocidal acts include:

(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Genocide Convention, supra, art. II, 78 U.N.T.S. at 280.

prohibiting the racial segregation and discrimination practiced in South Africa; and, finally, the Torture Convention.\(^{219}\) Although the Torture Convention and the Covenant explicitly acknowledge that human rights violations merit civil redress,\(^{220}\) the other treaties explicitly recognize only the defendant’s criminal responsibility. Each of the treaties, however, may impose legal obligations on both state and nonstate actors vis-à-vis individual victims.\(^{221}\)


219. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984) [hereinafter Torture Convention]. This reprint of the Torture Convention is the draft form; minor revisions are indicated in 24 I.L.M. 535 (1985). The United States is not yet a party. See infra note 223.

220. Id. art. 13, 23 I.L.M. at 1030 (establishing victim’s right to have case “promptly and impartially examined”); id. art. 14, 23 I.L.M. at 1030 (establishing that victim and dependents have “enforceable right to fair and adequate compensation” in state party’s legal system).

221. This point concerns which defendants (that is, states, individuals, or other nonstate actors) plaintiffs may sue in a § 1331 human rights case. The treaties explicitly recognize the responsibility of individuals and other nonstate actors not to violate the instruments’ substantive norms. Part III(B), infra, analyzes how the civil remedy provisions of the Covenant and Torture Convention and the criminal remedy provisions of the Geneva, Genocide, and Apartheid Conventions as well as the terrorism and hijacking treaties support a private cause of action and § 1331 jurisdiction when individuals and other nonstate defendants violate the treaty norms. When such a cause of action exists, plaintiffs may sue individuals and other nonstate defendants under § 1331.

Assuming that plaintiffs may allege § 1331 jurisdiction, and not just jurisdiction under the FSIA, in cases against states, see supra notes 33-37 and accompanying text, the question arises whether the treaties at hand recognize that a state owes a legal duty to individuals for human rights violations. Although the treaties explicitly recognize the civil and criminal responsibility of individuals and other nonstate actors, the most explicit responsibility of a state party itself is, vis-à-vis other state parties, to implement and enforce the treaties’ norms against individuals and others within its jurisdiction. For example, if a state party did not enforce a treaty’s penal or civil provisions against one of its nationals who committed war crimes or other human rights
The United States is a party to the Geneva Conventions and to the Genocide Convention.\textsuperscript{222} It is not a party, however, to the Covenant or the Apartheid and Torture Conventions, although President Reagan has submitted the Torture Convention to the Senate for advice and consent.\textsuperscript{223} If the norms encompassed by the latter instruments are to raise federal questions, they must enter United States law through alternative sources of international law. Customary law supports such norms. According to the \textit{Restatement (Third) of Foreign Relations Law} ("\textit{Restatement}")\textsuperscript{224}, customary human rights law prohibits states from practicing or condoning the following: genocide; slavery or slave trade; murder; torture, cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and causing the disappearance of individuals.\textsuperscript{225} The United States is subject to these customary norms, based partly on its support for violations, any other state party could pursue remedies against the violating state party. See \textit{Restatement}, supra note 8, at § 703(1).

On several grounds, however, the treaties also may create obligations of state parties directly to individuals. First, at least the Covenant expressly acknowledges that neither state nor nonstate actors may violate its substantive norms. See Covenant, supra note 211, art. 5(1), at 53 (nothing in Covenant may imply "for any State, group or person" the right to derogate from freedoms recognized therein). The rights that the Covenant encompasses overlap with rights that the other instruments cover. See supra notes 213 & 216-19 and accompanying text. If the rights violation occurs as a matter of state policy, victims can seek redress, by inference, against the state itself. In addition, precedents recognize state liability to individual human rights victims under treaty law. See, e.g., infra notes 284-85 and accompanying text. Finally, international criminal law and customary law buttress state responsibility under the treaties. See supra note 209 (international criminal law) and infra notes 224-32 and accompanying text (customary law). Those developments help establish that states bear direct accountability to individual victims for practicing or condoning human rights violations. By implication, in such instances, the individual victims themselves may seek redress against the offending state. This same analysis applies equally to state-sponsored or state-condoned terrorism, in light of the treaties discussed in notes 234-40, infra, and accompanying text. Consequently, when a private cause of action for human rights or terrorist offenses supports § 1331 jurisdiction, see infra Part III(B), international law permits plaintiffs to sue state and nonstate actors alike.


224. \textit{Restatement}, supra note 8, at § 702. Section 702 also prohibits con-
Those customary norms, moreover, overlap with the norms encompassed by the three treaties to which the United States is not a party. In the lexicon of the *North Sea Continental Shelf Cases*, treaties may codify, crystallize, and even create customary law; that law may bind nonparties that do not persistently object to it. The Covenant and the Torture Convention, to some extent, have codified or crystallized the post-war condemnation of crimes against humanity. Through its instrumental involvement in that post-war customary law development, the United States indicated its support for the principles that the treaties now encompass. Of course, the Covenant and the Torture and Apartheid Conventions also expanded the breadth of the human rights norms addressed at the war's conclusion. That expansion may generate human rights norms “which, while only conventional or contractual in ... origin, [have] since passed into the general corpus of international law, ... so as to have become binding even for countries which have never, and do not, become parties to [a] [c]onvention.”

The Vienna Convention on the Law of Treaties similarly recognizes this jurisprudential concept: “Nothing ... precludes a rule set forth in a treaty from becoming binding upon a third state [a nonparty] as a customary rule of international law, recognized as such.” Hence, the rules embodied in the Covenant
and the Torture and Apartheid Conventions still may bind the United States, a nonparty to the agreements, as norms of customary law. Indeed, in some instances, failure to create "an effective remedy under state law for violation of the customary law of human rights might itself be evidence that a violation of rights is state policy."232

2. Terrorism Law: Hijacking, Hostage Taking, and Crimes Against Internationally Protected Persons

Several multinational treaties are especially important when examining terrorist acts that affect individual lives and thus raise human rights claims. For example, hijacking offenses certainly may affect or injure states and corporate aircraft owners, but they also tortiously deprive air passengers of life, liberty, and physical integrity. Notably, two hijacking treaties, the Hague and Montreal Conventions, unite to prohibit the seizure of civil aircraft and "violence against a person on board an aircraft." Other significant terrorism treaties in-

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231. Whether a treaty generates custom that binds nonobjecting nonparties may depend on the length of time that the treaty has been in force and whether the treaty gains widespread representative participation. Continental Shelf Cases, 1969 I.C.J. at 42. The Restatement provides that treaties may lead to the creation of custom when "agreements are intended for adherence by states generally and are in fact widely accepted." See RESTATEMENT, supra note 8, at § 102(3). Of course, applying those standards to determine whether the Covenant and the Torture and Apartheid Conventions generate customary law that binds the United States would involve substantial empirical research and a determination of the United States's position toward each instrument. Without such data, the assumption is that the United States has a commitment to the substantive norms that those instruments contain and is bound by them. See supra notes 224-25 and accompanying text (outlining Restatement's position supporting this idea).

232. RESTATEMENT, supra note 8, § 703 comment c.

233. See supra note 12 and accompanying text (describing why this Article asserts that certain terrorist acts against individuals create human rights claims).


235. Montreal Convention, supra note 234, at art. 1 1(a), 10 I.L.M. at 1152.

These treaties are part of federal law because the United States is a party to each instrument.\footnote{See authorities cited in notes 234, 236, supra.} Individual victims of hijacking and terrorism suing their assailants in federal court may face a major obstacle, however, because the treaties primarily address the criminal liability of hijackers and terrorists.\footnote{See infra note 275.} The treaties do not explicitly address the rights and remedies of individual victims in civil actions. The hijacking and terrorism treaties are, in this sense, like the Geneva, Genocide, and Apartheid Conventions.\footnote{See supra notes 216-18, 222 and accompanying text.}

B. HUMAN RIGHTS CLAIMS UNDER THE THREE GENUSES

1. First Genus: Express or Implied Human Rights Causes of Action under Positive International Law

a. Davis's First Definition

In the first genus, human rights claims must present a cause of action under positive international law to invoke section 1331 jurisdiction. A cause of action, under Davis's initial definition, arises when the plaintiff has a federal right.\footnote{See supra notes 124-26 and accompanying text.} The relevant question thus is: does international law, as accepted by the United States, recognize the human rights of the plaintiff allegedly violated by the defendant?

Deriving partly from the Covenant and the Torture Con-
vention, United States customary law recognizes each individual's right to be free from summary execution, torture, slavery, genocide, and apartheid. One might therefore conclude that violations of these human rights create a cause of action under Davis's first definition, thereby providing section 1331 jurisdiction. Frequently, however, courts reject federal question jurisdiction over claims premised on a denial of these rights, concluding that "[i]nternational human rights law grants no private right of action. . ." Courts have offered two rationales for that conclusion; each is unpersuasive, as this Article will demonstrate.

i. Legal personality—First, some courts that have denied human rights causes of action postulate that claimants lack the legal personality to possess rights under international law. This rationale draws on Lassa Oppenheim's early perspective that "'the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.'" If states are the exclusive subjects of international law, individuals and other nonstate actors are merely the objects of the law. Human rights norms, under this view, directly benefit and regulate only state actors. "[E]ven as international law has become increasingly concerned with individual rights," wrote Judge Bork, concurring in Tel-Oren v. Libyan Arab Republic, there remains a "general relegation of individuals to a derivative role in the vindication of their legal rights." Without the status to possess rights, victims of human rights violations therefore lack a cause of action and courts lack section 1331 jurisdiction over their claims.

This rationale for denying federal question jurisdiction is simplistic and flawed. Legal personality is not an all-or-nothing concept. It is "merely a short-hand symbol which denotes that

242. See supra notes 211-32 and accompanying text.
243. See infra notes 268-14 and accompanying text (considering whether individuals have an implied cause of action for other treaty offenses under Davis's second definition).
245. See infra note 246.
247. Tel-Oren, 726 F.2d at 818.
248. Id. at 817.
an entity is endowed by international law with some legal capacities, but does not tell us what particular capacities it has. Different kinds of 'international persons' have different capacities." To be sure, states are the primary international actors and have full legal personalities. Nonetheless, the states themselves explicitly have recognized certain basic individual rights in the Covenant and the Torture Convention. The United States recognizes these individual rights under customary law. With respect to these rights, individuals surely are the subjects of international law.

Analogizing to the United States Constitution explains further the relative nature of individual legal personality under international law. United States citizens may not lay and collect taxes or regulate domestic or international commerce; such authority vests solely in Congress. Notwithstanding these limitations, because the constitutional amendments create individual rights, individuals are not the mere objects of constitutional law. Similarly, under international law, although individuals may not enter into treaties, declare war, or claim territorial waters, they do possess at least those rights that treaties and customary law have created. Individuals thus alternate between being the subjects and objects of both national and international law, depending on the particular legal authority or right at issue. Indeed, the legal personality argument for rejecting federal jurisdiction is so fundamentally flawed that the counterargument may be reduced to a tautology: individuals are capable of possessing the legal rights that individuals possess.

That international law imposes certain responsibilities on individuals further rebuts the idea that individuals cannot possess rights. The Allies' prosecution of war criminals demonstrates the capacity of individuals to violate international law. In addition, most modern human rights treaties impose criminal and sometimes civil liability on government officials and private citizens who violate their prohibitions. If individ-

250. See supra notes 211-15, 219 and accompanying text.
251. See U.S. CONST. art. I, § 8, cl. 1, 3.
252. See supra notes 204-07 and accompanying text.
253. See generally Bassiouni, Characteristics of International Criminal Law Conventions, in I INTERNATIONAL CRIMINAL LAW 1-9 (M. Bassiouni ed. 1986) [hereinafter Bassiouni] (describing evolution of international criminal
uals may violate certain international norms, it follows that they also may derive benefits from those norms. These liabilities and benefits are the reciprocal halves of legal personality. Just as courts should not reject section 1331 jurisdiction because an individual defendant lacks per se the ability to violate international law,254 courts should not reject jurisdiction because an individual plaintiff intrinsically lacks international rights. When human rights and terrorist offenses are at issue, individual plaintiffs may possess a cause of action under Davis's initial definition.

ii. Nonself-executing international law—A second rationale for rejecting federal jurisdiction is that human rights law is nonself-executing. Each human rights treaty under scrutiny typically is viewed as nonself-executing and “incomplete . . . because it expressly calls for implementing legislation or . . . calls for the performance of a particular affirmative act by the contracting sovereigns.”255 By analogy, the customary law of human rights is also nonself-executing.256 Under this rationale, human rights law, standing alone, cannot be enforced by individuals. As Judge Bork again has concluded: “Absent authorizing legislation, an individual has access to courts for enforcement of a treaty’s provisions only when it is self-executing, . . . when it expressly or impliedly provides a private right of action.”257

Although not incorrect in form, this conclusion lacks substance. According to Judge Bork, the issue of whether a norm is self-executing turns upon whether it provides a private cause

254. See Randall, Further Inquiries, supra note 9, at 493-94.

255. Aerovias Interamericanas de Pan., S.A. v. Board of County Comm’rs, 197 F. Supp. 230, 245 (S.D. Fla. 1961) (footnote omitted), rev’d on other grounds sub nom. Board of County Comm’rs v. Aerolineas Peruanas, S.A., 307 F.2d 802 (5th Cir. 1962), cert. denied, 371 U.S. 961 (1963). In contrast, “where a treaty is full and complete, it is generally considered to be self-executing by the courts.” Id. at 246 (footnote omitted). For background on non-self-executing and self-executing treaties, see INTERNATIONAL LAW, supra note 203, at 198-205.


of action. Judge Bork thus begs the essential question of whether individuals have private causes of action for certain international law violations. The nonself-executing rationale leads back to square one: individuals may enforce only those human rights norms that are self-executing, which in turn depends on whether those norms supply a cause of action to individuals.

Because Davis's first definition focused solely on whether the plaintiff has a federally recognized right, the individual rights to be free from summary execution, torture, slavery, genocide, and apartheid are therefore self-executing and judicially enforceable. The Covenant, for instance, explicitly speaks in terms of individual rights when it states: "No one shall be arbitrarily deprived of his life" and "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Certainly, those provisions are as self-executing as the constitutional provision enforced in the Davis case itself—"[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." Many of the Covenant's provisions "are capable of direct application by the courts, or by other competent national agencies, without any legislative action." The individual rights contained in the Torture Convention are similarly self-executing. Because the Covenant and the Torture Convention have helped to establish customary human rights law in the United States, such custom logically is as self-executing and as enforceable in federal court as the treaty provisions themselves.

Of course, article 2(2) of the Covenant requires signatories to adopt the domestic legislation necessary to give effect to the rights specified in the Covenant and a similar provision exists in the Torture Convention. Those provisions do not, however, broadly render the treaty norms nonself-executing. Instead, they require only domestic implementation if necessary. Thus, if a court can directly apply a human rights norm under customary or treaty law "to give effect to the individual right in

258. Covenant, supra note 211, art. 6.
259. Id. art. 7.
260. U.S. CONST. amend. V.
261. Schachter, The Obligation to Implement the Covenant in Domestic Law, in INTERNATIONAL BILL OF RIGHTS, supra note 212, at 326.
262. See supra notes 226-32 and accompanying text.
263. See supra notes 214-15, 220 and accompanying text.
264. See id.
question, no legislation is required."

Section 1331 provides a vehicle for directly applying those norms and also satisfies the United States's customary law obligation to enforce prohibitions of human rights violations. Stripped of confusion, a cause of action under Davis's initial definition requires only a federal right. Because national customary law recognizes the human rights identified in the Covenant and the Torture Convention, human rights claimants have a valid section 1331 cause of action. Thus, the United States need not adopt additional legislation to give effect to its customary human rights law. As in the case of United States constitutional rights, section 1331 jurisdiction renders human rights protections self-executing.

In this light, the link that Judge Bork and others draw between a cause of action and self-executing norms is "unexceptionable" and "harmless." Human rights, like any other legal rights, must be susceptible to direct judicial enforcement and thus self-executing. Nevertheless, it is precisely because Judge Bork's argument connects cause of action to self-execution that a convincing counterargument emerges. In summary form: human rights norms are self-executing if they create a private cause of action. Under Davis's first definition, the individual rights to be free from summary execution, torture, slavery, genocide, and apartheid create a private cause of action when such rights are violated. Those human rights norms thus are self-executing and a plaintiff properly may invoke federal question jurisdiction to enforce such normative rights.

b. Davis's Second Definition

Focusing less exclusively on whether the plaintiff has a legal right, Davis's second definition of cause of action poses the "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." Applying this question to section 1331 jurisdiction over human rights claims, this Article will follow Davis's organization, analogizing first to federal statutory claims and then to constitutional claims.

i. Analogy to statutory claims—Federal law may explic-
ity or implicitly indicate an individual’s right to invoke judicial power. The Covenant and the Torture Convention explicitly indicate the propriety of a private cause of action. For example, article 2(3) of the Covenant obligates state parties to provide remedies to individuals suffering human rights violations. Similarly, the Torture Convention obligates the state parties to examine torture allegations promptly and impartially, and to “ensure in its legal system that the victim...obtains redress and has an enforceable right to fair and adequate compensation.” By expressly contemplating judicial remedies, both the Covenant and the Torture Convention satisfy Davis’s second cause of action definition. Accordingly, the customary human rights obligations flowing from those instruments, as recognized in the United States, also meet Davis’s second definition.7

Section 1331 jurisdiction provides a means by which the United States may satisfy its obligation to open its courts to victims of the offenses recognized in the Covenant and the Torture Convention.

Neither the remaining humanitarian treaties (the Geneva, Genocide, and Apartheid Conventions) nor the hijacking and terrorism treaties (the Hague, Montreal, Hostages, and Internationally Protected Persons Conventions) provide explicit permission to invoke judicial power. Under Davis’s second definition, courts must determine whether those treaties implicitly permit an individual to invoke federal court jurisdiction. Because the treaties primarily address criminal liability, they may be compared to federal criminal or regulatory statutes and examined under the four Cort criteria. That analysis is particularly apt because it considers the United States criminal statutes passed to implement the treaties to which the nation is a party.

269. See supra notes 127-34 and accompanying text.
270. See supra notes 212-20, 219 and accompanying text.
271. See supra note 215 and accompanying text.
272. Torture Convention, supra note 219, art. 12, 23 I.L.M. at 1030.
273. Id. art. 14, 23 I.L.M. at 1030.
274. See supra notes 226-32 and accompanying text.
275. Primarily penal, those conventions define the offenses at issue as criminal and create an enforcement scheme for those offenses, usually focusing on the domestic legislative, adjudicatory, and enforcement jurisdiction of all states to redress such crimes. The treaties’ overriding goals are to encourage state parties to work independently and collectively to prevent and to punish human rights violations and terrorism. For general discussions of these conventions see Bassiouni, supra note 253, at 1-13; Randall, Universal Jurisdiction, supra note 9, at 816-39.
276. See supra note 132 and accompanying text.
The first criterion considers whether the plaintiff is "‘one of the class for whose especial benefit the statute was enacted,' ... that is, does the statute create a federal right in favor of the plaintiff?" Because war crimes, genocide, and apartheid involve acts committed against individuals, individuals are the exclusive, or at least the most direct, beneficiaries of the prohibition of those acts. Individuals, as well as state and corporate actors, also benefit when international law bans hijacking and terrorism. Although every case deserves individual analysis, most human rights claims will meet Cort's first criterion. Contrary to the myth that individuals are the mere objects of international law, individuals directly and especially benefit from the treaty norms, thereby meeting Cort's initial criterion.

Cort's second and third criteria consider whether a law's legislative history and purpose implicate a private remedy. Remedy, in this context, refers to the idea that individuals may enforce their implied rights in court. Of course, to apply Cort's second and third criteria fully would require examining the complete travaux preparatoires of each of the remaining ten treaties. Determining conclusively whether each treaty's history and purpose supports an implied private remedy might require examining myriad other documents. Without undertaking that herculean task, and lacking an actual case with which to focus the inquiry on one or two relevant treaties, this Article offers several more general observations.

At the outset, two maxims, one of treaty construction, one of international law, color the inquiry into whether the treaties imply a private remedy: Treaties should be liberally construed to meet federalism concerns; and states may meet their in-

278. See supra notes 245-54 and accompanying text.
279. See supra note 134 and accompanying text.
280. Preparatory works.
281. For instance, examining every reservation taken by each state party to each convention might be in order in addition to reviewing every domestic law that any state party has passed pursuant to each convention and even scrutinizing the legislative histories of each such domestic law.
282. Several cases indicate that courts should read the word treaty in § 1331 liberally to include various types of international agreements because such multilateral agreements "could have a significant bearing on this country's international relations and thus should be heard in federal court." Hysung (Am.), Inc. v. Japan Air Lines Co., 624 F. Supp. 727, 730 (S.D.N.Y. 1985); see Weinberger v. Rossi, 456 U.S. 25, 29-30 (1982); B. Altman & Co. v. United States, 224 U.S. 583, 601 (1911). This precedent leads to the logical and more
international obligations as they choose. The first maxim might suggest that courts should interpret private remedies expansively and as flowing from treaties that are primarily criminal in nature, to ensure that federal courts entertain human rights claims. Such claims, after all, involve significant federal issues and concerns and should be heard in federal court rather than in local state courts. Accordingly, human rights plaintiffs might enjoy a lesser burden of proof when demonstrating the existence of a private federal remedy. Because the second maxim recognizes sovereign discretion in norm implementation, the relevant treaties may permit a civil judicial remedy to be granted, just as they impliedly permit various alternative means of implementing the norms at issue. The fact that state parties must provide criminal remedies against international outlaws does not contradict, but rather supports, the idea that states may provide civil remedies to respond to such wrongdoers. Inferring a private civil remedy serves the quintessential purpose of the human rights and terrorism treaties: to prevent and redress certain international offenses.

More particularly, several cases, although only secondary sources of positive international law, indicate that the remaining treaties provide a basis for implying a private remedy for alleged violations. Regarding terrorism, two cases, Von Dardel v. Union of Soviet Socialist Republics and Letelier v. Republic of Chile are relevant. Von Dardel was brought on behalf of Raoul Wallenberg, a Swedish diplomat, whom Soviet officials unlawfully seized, imprisoned, and perhaps murdered outside of the United States. In upholding jurisdiction under section 1331 and other statutory provisions, the District Court for the District of Columbia determined that an implied private remedy was available to redress the violation of Wallenberg's

general suggestion that courts also should liberally interpret the substantive provisions of a treaty when it serves federalism concerns.

See Randall, Further Inquiries, supra note 9, at 488-92.


Von Dardel, 623 F. Supp. at 248.

Although the court focused on the FSIA and Alien Tort Statute, jurisdiction was available under 28 U.S.C. §§ 1330(a), 1331, and 1350. Von Dardel, 623 F. Supp. at 250; see also supra note 37 (discussing Amerada Hess's reliance on Von Dardel concerning relationship between FSIA and other jurisdictional provisions in actions against states).
Referring to the United States criminal statutes passed to implement the Internationally Protected Persons and Hostages Conventions, the court found that "Congress has enacted statutes designed to protect internationally protected persons, including diplomats, as to which a private remedy has been implied." Although those treaties and the laws that implement them are expressly criminal in nature, the court interpreted them as encompassing private remedies. The same court suggested a similar conclusion in Letelier, in which representatives of a former Chilean Ambassador to the United States, who had been assassinated in Washington, D.C., brought an action against Chile and certain terrorists. The court upheld jurisdiction under section 1331 over several causes of action, including the tortious assault of "an internationally protected person pursuant to 18 U.S.C. § 1116." Hence, the Letelier court apparently found that plaintiffs had an implied private cause of action based upon the statutory implementation of the Internationally Protected Persons Convention.

The Sixth Circuit addressed hijacking in Chumney v. Nixon and found an implied cause of action under the criminal statute that implemented the Montreal Convention. Chumney arose out of an alleged assault by one United States citizen against another while they were flying over Brazil. The issue on appeal was whether the federal assault statute, which Congress, pursuant to the Montreal Convention, had extended to apply to offenses committed on aircraft, implied a private cause of action. The Sixth Circuit answered affirma-

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290. Von Dardel, 623 F. Supp. at 254 (emphasis added); see also id. at 259 (when well-being of diplomat was violated, English and American common law recognized private cause of action and this "right to sue has recently been reaffirmed by Congress . . . ").
291. The Court upheld jurisdiction over Chile under the FSIA. Letelier, 488 F. Supp. at 665. The court upheld jurisdiction over the nonstate defendants under §§ 1331 and 1350, as summarily indicated in Letelier, 502 F. Supp. at 266.
293. 615 F.2d 389 (6th Cir. 1980).
294. Id. at 391.
295. Id. at 390.
297. Chumney, 615 F.2d at 390.
tively under Cort's criteria and upheld section 1331 jurisdiction. Although finding no legislative intent either to support or to preclude an implied private cause of action, the court held that Congress's "clear-cut purpose" was to protect the safety of certain air travellers. In light of Cort's second and third criteria, the Chumney court concluded that "[a] civil action for damages would certainly be consistent with the overall congressional purpose and we believe should be inferred therefrom." The court added that "the existence or nonexistence of a civil cause of action in this case may create a legal precedent which will affect other possible fact situations (aircraft kidnapping or terrorism) some of which may well cry out for more than the criminal remedy."

Filartiga v. Pena-Irala supports the view that a private remedy may exist for certain human rights violations. The Filartiga court sustained jurisdiction under the Alien Tort Statute after concluding that extraterritorial torture violates the law of nations. In reaching its conclusion, the court relied heavily on human rights instruments that created no explicit cause of action. In dictum, the Filartiga court "recognize[d] that our reasoning might also sustain jurisdiction under . . . 28 U.S.C. section 1331." Although the recently enacted Torture Convention today creates an explicit cause of action, Filartiga's dictum suggests that section 1331 jurisdiction extends over other human rights violations, such as genocide, apartheid, and war crimes, even absent an explicit private remedy, because only an implied cause of action for torture was available when Filartiga was decided. Judge Edwards's concurring opinion in Tel-Oren bolsters Filartiga's view. Judge Edwards suggested

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298. Id. at 391.
299. Id. at 394 (protecting passengers flying on United States airlines or foreign aircraft either departing from or intending to land at United States airports).
300. Id. But see In re Mexico City Aircrash of October 31, 1979, 708 F.2d 400, 404-08 (9th Cir. 1983) (indicating that Chumney contradicts a majority view).
301. Chumney, 615 F.2d at 395.
302. 630 F.2d 876 (2d Cir. 1980).
303. See supra notes 47-48 and accompanying text.
304. See Filartiga, 630 F.2d at 881-84. The court rejected the contention that only directly self-executing instruments are binding in federal courts. See id. at 883. Even if a treaty does not, standing alone, create a cause of action cognizable in a United States court, it may be "evidence of an emerging norm of customary international law," id. at 880 n.7, and may help create expectations about the protection of individual rights. Id. at 883.
305. Id. at 887 n.22.
that "persons may be susceptible to civil liability if they commit either a [universal crime] or an offense that comparably violates norms of international law." The offenses Judge Edwards envisioned included genocide, slavery, and systematic racial discrimination.

Finally, assuming that a human rights claimant has an implied right and remedy under Cort’s first three criteria, the last criterion likely will support an implied private cause of action. The fourth criterion addresses federalism concerns and considers whether an implied federal cause of action intrudes "in an area basically the concern of the [domestic] States." Because matters of foreign affairs and international law exemplify an area of federal concern, the final Cort criterion supports federal jurisdiction over human rights claims, under Davis’s second definition of cause of action.

ii. Analogy to constitutional claims—The Davis court held that its second definition of cause of action should apply leniently to constitutional claims. The propriety of federal court jurisdiction over constitutional claims should be presumed, especially in the absence of an alternative forum for such claims. The relevant question therefore is whether human rights claims resemble constitutional claims for purposes of federal jurisdiction.

Under the supremacy clause, constitutional law claims may be more important than, and thus distinguishable from, international law claims. Constitutional and international claims,

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306. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (first emphasis added), cert denied, 470 U.S. 1003 (1985). Judge Edwards’s suggestion, made in the Alien Tort Statute context, however, provides less support for § 1331 jurisdiction over human rights claims than the Filartiga dictum. Although the Filartiga court viewed §§ 1331 and 1350 as coterminous, Judge Edwards distinguished the two provisions, indicating that only § 1331 requires a private cause of action under international law. See id. at 779 n.4.

307. Tel-Oren, 726 F.2d at 781 (referring to list of offenses in RESTATEMENT, supra note 8, § 702).


310. See supra note 127 and accompanying text.


312. See supra notes 135-36 and accompanying text.

313. Constitutional norms are superior to international norms under the supremacy clause. See U.S. CONST. art. VI, cl.2.
however, compare more closely if the latter category is narrowed to the subset of human rights claims. Human rights claims parallel individual constitutional claims because of the primacy of the rights at issue. There is an obvious overlapping of the first principles involved in both types of claims; the international claims may involve even more basic, and thus more compelling, fundamental rights than the constitutional claims. Indeed, constitutional rights may subsume every human right. The rights to be free from terror and from human rights violations emanate from international documents as basic to the world legal order as the Constitution is to the United States legal system.

Assuming that constitutional claims and human rights claims are analogous, then Davis's more liberal interpretation of cause of action applies to both. This argument supports the presumption that human rights claimants may invoke the federal court's power; rebutting that presumption should become the defendant's responsibility. Presuming the existence of a cause of action and section 1331 jurisdiction is especially appropriate in light of the dearth of alternative forums in which to commence human rights actions.314

2. Second Genus: Human Rights Causes of Action that Federal Judges Create or Adopt

When a court uses the more demanding of Davis's definitions of cause of action, and when it is unclear whether the positive law of a specific human rights norm, standing alone, creates a private cause of action, the second genus becomes relevant. Under the second genus, section 1331 jurisdiction exists over human rights claims if the district court creates a federal

314. See infra notes 388, 402 and accompanying text. Granted, Davis indicated that the presumption of a private judicial remedy is proper when a particular issue is not committed explicitly to the executive or congressional branches, see supra note 135 and accompanying text, and it is possible to argue that human rights and terrorism issues are committed to those political branches. However, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. 186, 211 (1962). Both Baker, 369 U.S. at 211, and Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964), actually support the federal judiciary's involvement in human rights claims. Consequently, they support the presumption of private judicial remedies for such claims, because the relatively clear and well-codified executive and congressional policy in the human rights and terrorism areas permits the judiciary to speak in unison with its coordinate branches when it recognizes private causes of action for human rights claims. See also supra note 20 (distinguishing questions of whether court has jurisdiction from whether court should exercise it).
common-law cause of action or if it adopts a nonfederal cause of action under the protective jurisdiction theory.\textsuperscript{315}

a. \textit{Federal Common Law of Human Rights}

Establishing a human rights cause of action under federal common law requires both that human rights claims merit federal decisional law and that the federal judiciary reasonably can craft a human rights cause of action.\textsuperscript{316}

i. \textit{The need for federal common law}—“Specialized” federal common law usually should regulate issues involving international law and foreign relations because they affect uniquely national interests. The Supreme Court’s opinion in \textit{Banco Nacional de Cuba v. Sabbatino}\textsuperscript{317} supports this conclusion. In \textit{Sabbatino}, the Court considered whether the act of state doctrine, a judicial abstention device, precluded a United States court from examining the legality of the Castro government’s expropriation of sugar in Cuba.\textsuperscript{318} According to the Court, certain international issues occupy one of the post-\textit{Erie} “enclaves of federal judge-made law.”\textsuperscript{319} The act of state doctrine fell within the post-\textit{Erie} enclaves because it ordered and affected the United States’s “relationships with other members of the international community” and, as such, “must be treated exclusively as an aspect of federal law.”\textsuperscript{320}

The \textit{Sabbatino} Court based its holding on the express constitutional delegation of foreign affairs and international law powers to federal control.\textsuperscript{321} Going beyond the act of state doctrine, however, the Court generally “found in the Constitution a mandate to fashion a federal law of foreign relations.”\textsuperscript{322} Indeed, \textit{Sabbatino} exemplifies Professor Hill’s “constitutional

\textsuperscript{315} See supra notes 137-88 and accompanying text. For the purpose of considering human rights claims under this genus, the analysis assumes the second of Davis’s cause of action definitions.

\textsuperscript{316} See generally supra notes 138-60 and accompanying text.

\textsuperscript{317} 376 U.S. 398 (1964).

\textsuperscript{318} \textit{id.} That doctrine, which may counsel a court not to exercise jurisdiction, see supra note 20, is discussed in Randall, \textit{Civil Jurisdiction}, supra note 9, at 104-06 and Bazyler, \textit{Abolishing the Act of State Doctrine}, 134 U. Pa. L. Rev. 325 (1986). Although \textit{Sabbatino}'s approach to the act of state doctrine remains controlling, the “Second Hickenlooper Amendment,” 22 U.S.C. § 2370(e)(2) (1982), reversed the conclusion in \textit{Sabbatino}—that the act of state doctrine applies to issues involving a foreign state’s expropriation of private property.

\textsuperscript{319} \textit{Sabbatino}, 376 U.S. at 426.

\textsuperscript{320} \textit{id.} at 425.

\textsuperscript{321} See Hill, supra note 158, at 1061-67.

\textsuperscript{322} \textit{Friendly}, supra note 143, at 408 n.119.
preemption” theory, mentioned earlier. 323 United States’ relations “with foreign states constitute an area of exclusive federal competence; . . . insofar as such relations become involved in judicial controversy, the controlling law is that proclaimed by the federal judiciary.” 324 Hence, federal courts have “controlling competence, vis-à-vis the [domestic] state courts, to decide questions of international law.” 325

In light of Sabbatino, federal decisional law should certainly regulate human rights claims. Human rights violations and terrorism figure prominently on the federal government’s international agenda. The executive and congressional devotion to those subjects is evidenced by myriad laws, treaties, orders, speeches, and political messages; even the United States’s foreign-assistance and arms dealings depend partly upon the other state’s human rights record and approach to terrorism. 326 Such prescriptions illustrate that the human rights and terrorism areas embody primary national interests, which, in turn, support the federal judiciary’s lawmaking authority over human rights claims. The executive branch’s occasional expressions of its views on human rights cases to the judiciary 327 also indicate the need for a body of federal decisional law; the executive branch is more accustomed to communicating with its coordinate judicial branch than with local state courts and can thus better affect the common-lawmaking process. In sum, if Sabbatino “imposes a ‘federal common law’ upon cases in which the court finds a national interest so strong that a judge-made federal rule of decision preempts the [local] state law,” 328 then human rights cases categorically demand federal decisional law.

ii. The content of federal common law—Assuming that federal common law governs human rights claims, the content of that law still requires examination. How, specifically, do judges create federal common law to produce a human rights cause of action? Depending on the character and status of the

323. See supra notes 158-60 and accompanying text (discussing Professor Hill’s theory of constitutional preemption).
324. Hill, supra note 158, at 1056.
325. Id. at 1025.
326. See RESTATEMENT, supra note 8, § 702 reporters’ note 10; Schachter, supra note 309, at 79-87; see also Roberts, Reagan Aides Call Human Rights ‘Agenda Item No. 1’ at the Summit, N.Y. Times, May 29, 1988, at A1, col. 4 (discussing Reagan-Gorbachev summit).
327. See Randall, Further Inquiries, supra note 9, at 530 (discussing the executive branch’s involvement in Filartiga and Tel-Oren through amicus briefs).
treaty at issue, a cause of action arises either from the customary law affiliated with a treaty or from the interstices of a treaty. The fact that the judicial invention of human rights causes of action varies from case to case is consistent with *Lincoln Mills*'s conception of federal common law: "The range of judicial inventiveness will be determined by the nature of the problem."

The analysis begins with the Covenant and the Torture Convention. Because both instruments explicitly recognize a cause of action, a judge need not create individual rights and private judicial remedies. Instead, because neither instrument is in force in the United States, a court should determine whether the Covenant and the Torture Convention support a customary law cause of action cognizable in the United States. As analyzed above, through the Covenant's and the Torture Convention's codification and crystallization of certain customary norms and their generation of others, the federal government arguably has an obligation to recognize private causes of action under the customary law affiliated with those instruments. That customary-law obligation is met by the judiciary's recognition of common-law causes of action in human rights cases. Such common-law causes of action may support section 1331 jurisdiction, as *Filartiga v. Pena-Irala* suggests in the case of torture. A California district court made a similar suggestion concerning a former Argentine general's commission of prolonged arbitrary detention and summary execution.

Conversely, the Geneva, Genocide, Hague, Montreal, Hostages, and Internationally Protected Persons Conventions, though currently in force in the United States, do not explicitly create a private cause of action. Hence, under these treaties, courts perform a more traditional lawmaking function; the absence of an express cause of action requires federal judges to find or create a private right and remedy for section 1331 jurisdiction to exist. With minimal strain, however, a judge may

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331. 630 F.2d at 876, 885-87 (2d Cir. 1980).
333. *See supra* text accompanying notes 238-40.
find individual rights within the interstices of these treaties. The design of the Geneva and Genocide Conventions and, to some extent, the hijacking and terrorism treaties is to protect individuals from heinous and depraved acts. Indeed, the treaties arguably *entitle* individuals to freedom from such offenses; the intent of, and sentiments behind, these instruments dictates judicial recognition of individual rights. In *Illinois v. City of Milwaukee*, the Supreme Court upheld the creation, under federal common law, of private rights for interstate water pollution because such rights were consistent with the goals of federal environmental legislation. Similarly, creating private rights, under federal common law, for war crimes, genocide, hijacking, and terrorism is consistent with the first principles of United States treaties.

Assuming the creation of such private rights, it follows directly that federal judges also should create private remedies for violations of those rights; it is, afterall, "not uncommon for federal courts to fashion federal law where federal rights are concerned." As well-phrased by an early maxim, the "very essence of civil liberty" is to provide a "remedy for the violation of a vested legal right." To give full remedial effect to the rights at issue, human rights plaintiffs should have access to federal courts. Judicial creation of human rights remedies is logical, given the discretion that international law affords to states in satisfying their commitments. Although the aforementioned treaties *oblige* state parties to create criminal remedies for war crimes, genocide, hijacking, and terrorism, they also may *permit* state parties to create private judicial remedies for those offenses. Providing private common-law remedies for human rights violations and terrorism furthers the treaties' commitment to prevent and redress such offenses. Customary law also supports creating such remedies. Moreover, because *creating* private rights and remedies actually may overlap with *inferring* a private cause of action, section 1331 jurisdiction in the present genus may draw support from some of the arguments made under the first genus.

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335. See supra text accompanying notes 149-56.
339. See *Restatement*, supra note 8, § 703 comment C.
340. See supra notes 277-310 and accompanying text; see also supra notes 156-57 and accompanying text.
The Apartheid Convention, as a prospective source of federal common law, presents both sets of problems that the other treaties raise. It is not in force in the United States and it does not explicitly create a private cause of action. To create a common law cause of action for apartheid, the federal judge therefore first must find that the Apartheid Convention generates customary law in the United States, and, second, must derive a private cause of action from that customary law. Given the distance between those judicial tasks and the positive law, federal judges may be reluctant to create private rights and remedies emanating from the Apartheid Convention. Because the Covenant explicitly creates a private cause of action for at least certain types of racial discrimination, the Covenant may provide victims of apartheid with a more useful basis of section 1331 jurisdiction.

b. Human Rights under Protective Jurisdiction

As previously argued, the protective jurisdiction theory supports section 1331 jurisdiction over nonfederal causes of action, at least in cases involving the strong article I interests that arise in the area of foreign policy. This subsection argues further that such protective jurisdiction is especially appropriate over human rights claims.

Courts may invoke protective jurisdiction legitimately over human rights claims because the cases implicate clear and unique foreign policy interests. With the possible exception of certain international law disputes to which the federal government is a party, no cases implicate foreign policy concerns as significantly as those involving human rights violations or terrorism. The topics of human rights and terrorism entail issues central to the nation's foreign policy, and the judiciary's handling of those issues directly indicates the federal government's responsiveness and commitment to such issues. Given the similarity between the federal common-law and protective jurisdiction theories, the rationale behind employing federal common law to govern human rights claims also supports protective jurisdiction over those claims.

341. See supra notes 218, 275 and accompanying text.
342. See Covenant, supra note 211, arts. 8, 24-27, at 54-56. The provisions prohibiting racial discrimination give rise to a private cause of action when they are violated. See id. art. 2(3)(b), at 53.
343. See supra notes 181-88 and accompanying text.
344. See supra notes 179-80 and accompanying text.
Protective jurisdiction is appropriate over human rights claims even under Professor Mishkin's restrictive theory.³⁴⁵ Mishkin's formulation, which extends protective jurisdiction only to areas involving "an articulated and active federal policy," is easily satisfied in the human rights and terrorism contexts.³⁴⁶ Although the United States could be more consistent in its condemnation of human rights violations and terrorism, the federal policy against such acts is generally well articulated and promoted. For instance, the federal legislation implementing the hijacking and terrorism treaties commits the United States to prosecute or extradite individuals in its custody who commit those crimes, even when a particular offense bears no direct connection to the United States.³⁴⁷ Other recent examples of legislative efforts aimed at mitigating human rights violations and terrorism include the Omnibus Diplomatic Security and Antiterrorism Act of 1986³⁴⁸ and the Torture Victim Protection Act.³⁴⁹ One title of the former act addresses the criminal punishment of terrorists, while another dictates federal compensation for victims employed by the United States civil or military services.³⁵⁰ The torture statute, currently pending, would provide a new basis of district court jurisdiction over civil cases involving torture or extrajudicial killings.³⁵¹

Even if such positive law alone does not yet create a private cause of action, it illustrates the federal government's express and expansive policy of meting out justice in the antiterrorism and human rights contexts. In concert with that articulated foreign policy, and thus supported by article I powers and concerns, the federal judiciary should use the protective jurisdiction theory in section 1331 cases involving human rights claims. Assuming that Congress does not provide rules of decision sufficient to govern human rights claims, federal courts

³⁴⁵. See supra notes 164-65 and accompanying text.
³⁴⁶. Mishkin, supra note 82, at 192. For discussions of protective jurisdiction in the context of the Alien Tort Statute, see Casto, supra note 44, at 512-25; Note, supra note 163, at 1018-24.
³⁴⁷. See generally Randall, Universal Jurisdiction, supra note 9, at 816-34 (discussing hijacking and terrorism treaties' prosecute-or-extradite language and noting federal legislation implementing those treaties).
might rely upon choice-of-law considerations in adopting a nonfederal cause of action. Civil disputes involving human rights violations and terrorist acts resemble tort cases. Therefore, under the *lex loci* approach, for example, the situs's law should be adopted to regulate plaintiff's cause of action and resolve the substantive issues.\footnote{352}

### 3. Third Genus: Human Rights Cases as Involving Substantial Issues of Federal Law

The third genus requires no federal cause of action, but, under *Laborers Vacation Trust*, only that "some substantial, disputed question of federal law is a necessary element" of the nonfederal claim.\footnote{353} A recent Second Circuit opinion, *Republic of Philippines v. Marcos*,\footnote{354} illustrates the third genus’s applicability in cases with international implications. In *Marcos*, the Philippines attempted to enjoin transfer of certain New York properties, allegedly purchased with funds illegally appropriated by its deposed President.\footnote{355}

The *Marcos* court upheld section 1331 jurisdiction, even though it found that “on the face of the complaint” the case was brought “under a theory more nearly akin to a state cause of action for conversion.”\footnote{356} After noting a probable federal common-law basis for the action, the court particularly held that “the presence of a federal issue in a state-created cause of action”\footnote{357} supported jurisdiction. More specifically, the conversion claim raised, “as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government’s directives to freeze property in the United States subject to future process in the foreign state.”\footnote{358} Although *Marcos* was a section 1331 case, the Second Circuit implicitly adopted the approach used in *Verlinden*, an FSIA case.\footnote{359} Recall, however, that *Verlinden*, in

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\footnote{352}{See generally Randall, *Further Inquiries*, supra note 9, at 534-38 (analyzing how choice-of-law principles might regulate human rights tort cases).}

\footnote{353}{Franchise Tax Bd. v. Laborers Vacation Trust, 463 U.S. 1, 13 (1983). See *supra* notes 189-202 and accompanying text.}

\footnote{354}{806 F.2d 344 (2d Cir. 1986), cert. denied, 107 S. Ct. 2178 (1987).}

\footnote{355}{Id. at 346-47.}

\footnote{356}{Id. at 354.}

\footnote{357}{Id. at 354 (quoting Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 810 (1986)).}

\footnote{358}{Id.}

\footnote{359}{See *supra* notes 84-95 and accompanying text; see also *supra* notes 199-201 and accompanying text. The comparison to *Verlinden* is this Author’s; the *Marcos* court did not make it expressly.}
the heritage of Osborn, required only a federal issue, not a federal cause of action, because the case involved a statute other than section 1331. Hence, under Marcos, mere federal question ingredients, rather than a federal cause of action, may satisfy section 1331 after all. Marcos thus brings the section 1331 case law full circle back to Osborn, rendering section 1331 indistinguishable from other grants of arising under jurisdiction.

Apparently, article III supports section 1331 jurisdiction in all conversion cases involving a foreign sovereign, just as it supports FSIA jurisdiction in all contract cases involving a foreign sovereign. As Verlinden noted, such actions "raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident." Issues of that ilk, the Marcos court echoed, must "be decided with uniformity as a matter of federal law, . . . regardless of whether the overall claim is viewed as one of federal or state common law." Marcos certainly suggests a liberal approach to the third genus in cases with significant foreign relations implications. Even if Marcos, like Verlinden, extends only to cases involving foreign sovereigns, its jurisdictional ruling at least applies to human rights cases against states. If federal courts follow Amerada Hess, and if the FSIA is not the exclusive jurisdictional vehicle against state defendants, a liberal interpretation of section 1331 could provide a useful alternative to the FSIA in human rights cases. Marcos's view of section 1331 should not, however, extend only to cases in which a state is a party. Because the court predicated its holding on foreign relations implications, any dispute satisfying that predicate should support section 1331 jurisdiction over state and nonstate actors alike.

Most human rights cases meet Laborers Vacation Trust's "necessary" and "substantial" federal issue requirement, particularly if Marcos colors that standard. Indeed, although resting upon federal common law grounds, a recent decision involving human rights violations in Argentina referred to the generous section 1331 standard operable in cases that implicate international law issues. Even when human rights causes of action

361. Marcos, 806 F.2d at 354 (citation omitted).
362. See supra notes 33-37 and accompanying text. The Supreme Court, however, has granted certiorari in Amerada Hess Shipping Corp. v. Argentine Republic. See 108 S. Ct. 1466 (1988).
arise under nonfederal law, numerous and significant federal issues require resolution in section 1331 cases. These federal issues include, for example, whether diplomatic, consular, or head-of-state status entitles a defendant to jurisdictional immunity; whether judicial authority is legitimate under international law's jurisdictional principles; whether the act of state doctrine precludes judicial review of acts committed under color of state authority within the sovereign's territory; whether procedural aspects of a case violate an individual defendant's rights under international law; and whether, and to what extent, international law influences and informs nonfederal tort standards. Human rights cases presenting those and other substantial issues may well implicate foreign relations and thus merit federal jurisdiction. Therefore, even when nonfederal law, such as the situs's tort law, governs a human rights cause of action, section 1331 jurisdiction should prevail under the third genus.

IV. DOMESTIC JURISDICTION AND THE HUMAN RIGHTS PARADIGM

Every inquiry about jurisdiction essentially concerns the division of authority among different legal and political institutions. Accordingly, as argued above, in the section 1331 human rights context, the federal judiciary has legitimate authority in relation both to its coordinate branches and to local state courts. Within the domestic legal system, separation of powers and federalism concerns justify such adjudicatory jurisdiction. Human rights claims, however, also obviously implicate concerns of the international legal system. Human rights claims often involve foreign state and nonstate actors, extraterritorial acts, and substantive international law. This Article's jurisdictional inquiry, therefore, should consider whether the federal judiciary legitimately has authority over human rights claims not just vis-à-vis the United States's legal system, but also vis-à-vis the world legal order.

Drawing on the universality principle and other doctrines that give priority to human rights and terrorism norms, this Part demonstrates the propriety of domestic jurisdiction over

364. R. Falk, The Role of Domestic Courts in the International Legal Order 21 (1964). This Article's emphasis is, of course, on judicial or adjudicatory jurisdiction, although other types of functional authority, such as legislative and executive authority, also exist. See Restatement, supra note 8, § 401.
those norms under international law. This Part argues, moreover, that post-World War II developments have altered the very structure of the world legal order, so that it now encompasses the human rights paradigm. Domestic courts appropriately function as the double agents of that paradigm by enforcing individual rights central to the world legal order.

A. THE UNIVERSALITY PRINCIPLE

International law provides principles that determine when a state legitimately has jurisdiction over offenses affecting more than one state. A domestic court may have jurisdiction under the territoriality or objective territoriality principle, the nationality principle, the passive personality principle, and the protective principle. These principles, all premised on direct connections between the forum and the offense, do not support human rights jurisdiction in cases involving exclusively foreign actors and entirely extraterritorial acts. As a result, only a final jurisdictional basis, the universality principle, legitimizes judicial authority in such human rights cases. Because the universality principle does not require a nexus between the forum and the offense, it provides every state with jurisdiction over certain egregious acts, regardless of the offense's situs and the parties' nationalities. Universal jurisdiction extends over a limited array of offenses that strike at the foundations and first principles of the world legal order. Commission of a uni-

365. The territoriality and objective territoriality principles apply to offenses that occur within the state or intentionally have effects within that state. See INTERNATIONAL LAW, supra note 203, at 828-29.
366. The nationality principle applies to offenses committed by one who is a national of the state. See RESTATEMENT, supra note 8, § 402 comment b.
367. The passive personality principle applies to offenses involving a victim who is a national of the state. See, e.g., United States v. Wright-Basker, 784 F.2d 161, 167 n.5 (3d Cir. 1986).
368. The protective principle applies when an offense threatens the state's security or a basic governmental function. See INTERNATIONAL LAW, supra note 203, at 855-56. The protective principle of jurisdiction under international law is distinct from Mishkin and Wechsler's theory of protective jurisdiction under federal law, discussed in Parts II and III. See supra notes 343-52 and accompanying text.
369. Those principles, dealing "with the propriety of exercises of jurisdiction by a state, and the resolution of conflicts of jurisdiction between states," RESTATEMENT, supra note 8, § 401 comment b, are further addressed in INTERNATIONAL LAW, supra note 203, ch. 10, M. McDougal & W.M. Reisman, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE, ch. XI-XII (1981), and O. Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE, ch. XII (1982).
370. Randall, Universal Jurisdiction, supra note 9, at 788. That Article focused on the universality principle in the criminal setting.
universal offense renders a defendant *hostis humani generis*, that is, an enemy of all humanity, whose act concerns every state. Consequently, each nation has authority to respond to those offenses.\textsuperscript{371}

Universal jurisdiction recently has expanded to include the acts that this Article discusses. Although piracy and slave trading represent archetypal universal offenses, the Allied tribunals also used the universality principle, in part, to justify prosecuting crimes against peace, war crimes, and genocidal acts.\textsuperscript{372} In addition, universal jurisdiction applies to offenses addressed by the Geneva, Apartheid, Torture, Hague, Montreal, Hostages, and Internationally Protected Persons Conventions. Those treaties obligate state parties to prosecute or extradite individuals who commit the offenses at issue, regardless of any forum-offense nexus.\textsuperscript{373} Such obligations draw on the universality principle by committing state parties to extradite or prosecute offenders with whom they have no connection. Such universal jurisdiction may extend even to nonparties to the conventions. According to the *Restatement*, under customary law, every state has universal jurisdiction over at least the following: piracy; slave trade; attacks on, or hijacking of, aircraft; genocide; and certain terrorist acts.\textsuperscript{374}

Although traditional dogma held that international jurisdictional principles regulated only domestic criminal authority, it is now recognized that those principles also extend to civil...
Both the Restatement and recent case law recognize the extension of universal jurisdiction to the civil context. The Second Circuit's conclusion in Filartiga, a civil action, illustrates this recognition: "the torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind." The normative expansion and extension of the universality principle to civil cases permits section 1331 jurisdiction over human rights claims under international law. The federal judiciary's authority in this context is thus legitimate in relation to the world legal order. Indeed, because modern universal jurisdiction largely derives from treaties obligating states to prosecute or extradite...
offenders, the federal courts arguably are required to assume authority over human rights claims where section 1331 jurisdiction exists.

B. OTHER DOCTRINAL DEVELOPMENTS

Other doctrinal developments have matched the universality principle's categorical expansion. Based on the world community's ardent condemnation of human rights violations and terrorism, those prohibitions have become obligations *erga omnes* and *jus cogens* norms. The International Court of Justice illuminated the concept of obligations *erga omnes*, literally obligations "flowing to all," in its renowned dictum in *Barcelona Traction*.379 As the court explained, in contrast to a state's obligations "arising vis-à-vis another state," obligations *erga omnes* "are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection . . ."380 Those obligations stem from both "general international law" and "international instruments of a universal or quasi-universal character."381 For example, they "derive from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."382 Somewhat similarly, *jus cogens* literally means "compelling law." The *jus cogens* doctrine refers to certain peremptory norms "accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted."383 Treaties conflicting with such norms are void.384 *Jus cogens* norms overlap with the examples of *erga omnes* obligations mentioned in *Barcelona Traction*.385

380. *Id.* at 33 (dictum). The court's overall opinion, however, contains some ambiguity regarding the *erga omnes* doctrine, as discussed in O. SCHACHTER, supra note 369, at 195-99.
382. *Id.*
384. *Id.*, 8 I.L.M. at 698.
385. An authoritative list of *jus cogens* norms is nonexistent. Nonetheless, the general overlapping of *Barcelona Traction*’s examples of obligations *erga omnes*, see supra note 382 and accompanying text, with examples of *jus cogens* is illustrated in Schwelb, Some Aspects of International Jus Cogens As Formulated by the International Law Commission, 61 AM. J. INT’L L. 946 (1967), and Whiteman, Jus Cogens in International Law, with a Projected List, 7 GA. J.
Apart from their specific functional applications, the universality principle and the *erga omnes* and *jus cogens* doctrines together have helped to give hierarchical order to international norms. Just as some constitutional rights are deemed more fundamental than others,\(^{386}\) some international rights are more fundamentally significant to the world legal order.\(^{387}\) The individual rights discussed in this Article commonly appear on the lists of universal offenses, obligations *erga omnes*, and *jus cogens* norms. As such, these rights inhabit the apex of international law's normative hierarchy, and all global actors need to be vigilant in guarding and enforcing them.

The lofty status of those norms legitimizes federal court jurisdiction over human rights claims. Especially because the International Court of Justice lacks jurisdiction over individual claims,\(^{388}\) juridical credence is paid to fundamental international norms when section 1331 authority is assumed over human rights cases. Prolific codification and sustained consensus condemning both human rights violations and terrorism within the world legal order dictate domestic court adjudication in these critical areas.\(^{389}\) The compulsory nature of the *erga omnes* and *jus cogens* doctrines may suggest that domestic jurisdiction over human rights claims is not only legitimate, but also obligatory. Because each state has an obligation to all other

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\(^{386}\) Just one example is the equal protection area, in which certain fundamental rights trigger a stricter scrutiny of governmental behavior than other rights. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-7 to 16-12 (2d ed. 1988) (analyzing impact of fundamental rights on equal protection model).


\(^{388}\) See I.C.J. Statute, *supra* note 210, art. 34, at 1059 (allowing, with limited exceptions for international organizations, only states to be parties before I.C.J.).

\(^{389}\) See R. FALK, *supra* note 364, at 9-10 (arguing that greater international community support for particular concern should lead courts to greater willingness to adjudicate in that area); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it").
states to follow human rights norms, the federal courts should meet and further these obligations by adjudicating human rights claims. Indeed, commentators have suggested that the Barcelona Traction dictum may sanction a type of actio popularis, a universal judicial vindication of universal rights.390

C. RECOGNIZING AND JUDICIALLY ACCOMMODATING THE HUMAN RIGHTS PARADIGM

The quantity and quality of attention paid to international individual rights since World War II is staggering. Through the aforementioned doctrines, and through diverse legal agreements and developments, the protection of individual liberty and physical integrity now dominates international law. Rather than simply revising the substance of international law, it is likely that the human rights and terrorism laws actually have fundamentally altered the world legal order.

As commonly conceived, the state system derives from the Peace of Westphalia in 1648, formally ending the Thirty Years War and medieval feudalism.391 Underlying that European war was conflict over the centralized sovereignty of the Emperor and Pope. This secular and spiritual dominance ceased after the Peace of Westphalia, which, through treaty, recognized the separation of church and state and the territorial sovereignty of European states.392 Under the Westphalian perspective, sovereign states exclusively constitute the world legal order.393 In a decentralized legal order, "governments are sovereign and equal by juridical fiat, rather than by virtue of some higher authority."394 International law thus has been created and enforced horizontally, rather than vertically, with each state acceding to certain sovereign rules otherwise unenforceable.395

392. Such attributes of the Treaty of Westphalia (1648), reprinted in I MAJOR PEACE TREATIES OF MODERN HISTORY 7 (F. Israel ed. 1967), are described more fully in the sources cited in note 391, supra. See also Falk, A New Paradigm for International Legal Studies: Prospects and Proposals, 84 YALE L.J. 969, 978-91 (1975) (stating that Peace of Westphalia helped shape primary elements of modern state system).
394. Id. (emphasis in original).
395. A vertical legal order may be shaped pyramidally, with a governing
Just as the Peace of Westphalia marked "the end of [one] epoch and the opening of another," however, the international status and protection afforded to individuals following World War II arguably signify another structural or paradigmatic revision of the world legal order. A "paradigm," according to scientist Thomas Kuhn, "stands for the entire constellation of beliefs, values, techniques, ... shared by members of a given community"; it alternatively denotes just "one sort of element in that constellation, which, employed as models or examples, can replace explicit rules as a basis for the solution . . . ." of remaining scientific puzzles. Drawing loosely from Kuhn's concept, Richard Falk wrote that the time is ripe "to give juridical shape to a new paradigm of global relations, one that corresponds more closely than statist thinking to the needs, trends, and values of the present state of global politics." Falk counseled future recognition of "the pull and push of forces in the international legal system without losing sight of the cumulative drift toward central guidance" and he envisioned a return to pre-Westphalian world governance.

Although state sovereignty remains the touchstone of the world legal order, its primacy has been diminished in the context of fundamental rights. Beginning with the prosecution of Axis leaders for domestic crimes committed under state authority, international treaties diminished the authority of states, individual rulers, and other nonstate actors to commit individual human rights violations or acts of aggression. The "pull and push" of such legal forces revised the Westphalian apparatus. In Kuhn's terms, the world community has reconceived the Westphalian constellation to include the shared human rights values. Alternatively, human rights claims may be one constellatory element in the Westphalian system, employed as a model

See R. Falk, supra note 364, at 21-52.
396. T. Kuhn, The Structure of Scientific Revolutions 175 (2d ed. 1970). Such alternative definitions attempted to refine Kuhn's earlier definition of a paradigm, which referred to "universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners." Id. at viii.
398. Falk, supra note 392, at 992.
399. Id. (emphasis in original). The transition toward, and eventual fulfillment of, central guidance, Falk argues, partly derives from the Westphalian order's unsuitability to protect minimum standards of human rights: "Statist interests take precedence over the pretensions of international solidarity and concern for human rights." Falk, supra note 393, at 68.
to reorder and solve current international disputes over fundamental rights. An entire paradigm shift 400 has not occurred, and true centralized governance does not exist. It is plausible to conclude, nevertheless, that the human rights paradigm now overlays, or is encompassed by, the Westphalian structure. Legal and doctrinal developments discussed in this Article have revised the status, rights, and integrity of individuals as well as the world legal order itself.

If the individual rights movement is now recognizable in an international paradigm, how should domestic courts function in relation to that paradigm? Assuming that human rights and terrorism laws have effected a revision of world legal order, domestic court jurisdiction over violations of those laws is fully legitimate. In light of certain doctrinal developments, this Article has recommended that domestic court jurisdiction is legitimate over international law violations that are condemned by substantial codification and consensus. 401 A fortiori, this recommendation compels domestic jurisdiction over violations of those specific human rights norms acknowledged to have structurally altered the global legal system.

In the absence of appropriate centralized international judicial tribunals, domestic courts, including the federal judiciary, may bridge the waning Westphalian model and the evolving human rights paradigm. Decentralized domestic courts may facilitate this transition by enforcing the fundamental norms of the modern legal order. Although the courts are horizontally arranged, they may properly enforce norms emitted by centralized institutions, such as the U.N. and, in the case of hijacking, the International Civil Aviation Organization. The fact that no global civil tribunal now exists does not foreclose domestic court jurisdiction over human rights claims; it suggests only that, institutionally, the world has not yet fully provided human rights enforcement machinery. In the meantime, domestic courts legitimately act as double agents (dedoublement fonctionnel) of both national and international legal orders. 402

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400. A "paradigm shift" refers to an entire structural and agenda revision, "a mutation rather than a series of increments." Falk, supra note 392, at 977-78.

401. See supra note 389 and accompanying text.

402. See generally Scelle, Regles Generales de la Paix, 46 RECUEIL DE COURS 1 358-59, 421-27 (IV 1933) (describing dual and multiple functions played by single institutions in particular domestic and international contexts). Of course, this Author's use of dedoublement fonctionnel refers to a domestic
CONCLUSION

Faced with the recent reluctance of federal courts to vindicate international human rights claims, this Article has demonstrated the existence of federal question jurisdiction over such claims. The Article identified section 1331's potential import in human rights litigation and created a three-genus framework of section 1331 jurisdiction. The Article then demonstrated that various human rights claims may satisfy the requisites of those genuses. After concluding that section 1331 jurisdiction over human rights cases is legitimate within the United States legal order, this Article explained why doctrinal and paradigmatic developments within the world legal order also legitimize the extension of federal jurisdiction over human rights cases. This Article aims to persuade federal judges to assume jurisdiction to vindicate federal rights in one of the most significant and compelling legal areas of our time.

institution acting as an agent of two legal orders, rather than to an institution playing dual functions in a single system.