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| Case Name | Description |
| *Marbury v. Madison*(1803) | Marbury, a justice of the peace in Washington, was denied his commission after it had been signed. The question was whether, under §13 of the Judiciary Act, the court could grant relief. It was found that the Act itself was unconstitutional. *Propositions—*1. Judicial review (*Heyburn’s case*) and the theory of **inherent powers**—it is the duty of a court to say what the law is
2. The court can issue *mandamus* to the executive. Where there is a **right, there is a remedy**.
3. *Political questions*: “the President is invested with certain important political powers, in the exercise of which he is to use his own discretion.”
4. Article III provides a ***ceiling*** to congressional power to create jurisdiction, and Article III is *not self-executing*.
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| ADVISORY OPINIONS |  |
| *Heyburn’s Case* (1792) | Scheme involved disability payments to war veterans. Congress created a process by which the federal courts would make preliminary findings about eligibility, and then *recommend* an outcome to the Secretary of War. The Secretary of War could *disregard* the courts’ findings or *revise* them. *Held—*1. **Finality:** Revision and control is radically inconsistent with the independence of the judiciary. This line of thought intersects the *principle of institutional settlement* with the *separation of powers*.
2. **Non-judicial activity:** The process described here is not by nature judicial.
3. **Constitutional avoidance:** The willingness of the N.Y. judges to step back and do this as commissioners, as a fair reading of the statute, prefaces the interpretative principle of avoidance.
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| *Correspondence of the Justices*  | Letters between Jefferson and the Court: Jefferson asked questions of the Court related to wars in Europe and the land issues that occur thereof; The Court refuses to issue advice, stating the questions are “purposely” and “expressly united to the executive department.” *Principles—*1. **Constitutionalization of the Case-or-Controversy clause:** Jay links the problem with advisory opinions to C&C. The clause implements the separation of powers by ensuring that courts will address policy problems in only a discrete, limited context.
2. **Court of last resort**
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| *Muskrat v. U.S.* (1911) | In 1902, an Act granted land to some Indians. Subsequent Acts in 1904 and 1906 increased the number of Indians with rights to those lands. Congress then passed an Act in 1907 authorizing suits against the interim Acts, to test their constitutionality – that 1907 Act actually names the Petitioners of the initial suits, and says when the suits should be instituted, and would be paid out of the Treasury. The statute was held unconstitutional for lack of adversity. *Modern ban on advisory opinions.* |
| STANDING |  |
| *Allen v. Wright* (1984)*Primary standing case* | *Class litigation*—parents of children in public schools in several states. They allege that the IRS has not adopted sufficient standards/procedures to fulfill its obligation to deny tax-exempt status to discriminatory private schools. *Injuries alleged—*1. *Failure to comply with the law*—that the government’s failure to comply itself injures black families (O’Connor’s reading)
2. *Stigmatic injury*—the resulting stigma from the IRS’s failure to comply is its own injury (her more charitable reading)
3. *Segregation—*the diminished ability to receive education in a racially integrated school.

*HOLDING*—The court first clearly expresses the idea that the six limits on standing are integral to the *separation of powers*—they are about the “constitutional and prudential limits to the powers of an unrepresentative, unelected judiciary.” (*Vander Jagt v. O’Neill*). Three prudential aspects: third-party standing, generalized grievances, zone of interests. Then three constitutional requirements: **injury in fact** (*must be distinct and palpable, not abstract, conjectural, or hypothetical*); **fair traceability**, and **redress**. All these amount to one single idea: “the article III notion that federal courts may exercise power only in the **last resort**.” As a result of all of this, there is *no injury in fact* for injuries (a) and (b), and no causation or redressability for (c).1. *Failure to comply*—an asserted right to have the government act in accordance with the law is not sufficient (40).
2. *Stigma*—a basis for standing only **“to those persons who are personally denied equal treatment”**(40).
3. *Segregation*—“one of the most serious injuries.” But the injury would be traceable “only if there were enough [bad] schools receiving tax exemptions *in respondents’ communities* for the withdrawal … to make an appreciable difference.” Redressability is undermined by the actions of **third parties** and the principle that government should enjoy discretion/latitude.

Dissent (Brennan): Argues that O’Connor is essentially making findings of fact, and that these should be pleading rules that open the door to fact-finding. But maybe her point is more doctrinal about third parties.Dissent (Stevens): Disputes the causation logic—common sense and economics. |
| *Lujan v. Defenders of Wildlife* (1992)*Generalized grievances vs. individualized injury; citizen-suit provisions; vague status of GGs* | The Endangered Species Act provides a statutory entitlement for “any person” to enjoin violations. Respondents sued to establish that ESA applies to agency activities abroad. The court found *no standing*. 1. *Injury in fact?* The court first held that “it goes beyond the limit … into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere … is appreciably harmed by a single project.” (*See also Summers*)
2. *General grievance*: To convert compliance with the law into an **individual right** is bad. *Constitutionalizing* generalized grief?
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| *Federal Election Comm’n v. Akins* (1998)*Voter standing; “logical nexus” standard; general grievances* | Federal Election Campaign Act requires record-keeping and disclosure requirements for certain campaign groups. Plaintiffs challenged the FEC determination that AIPAC was not such a group. Standing is found.1. **Logical nexus:** Unlike *Richardson* and most of the taxpayer standing cases, there is a nexus between litigant’s injury and the government wrongdoing. The FECA information would play a role in the upcoming election, and is “*directly related to voting*”
2. **Generalized Grievance:** Its constitutional status remains unclear. The court distinguished *Richardson* by finding a logical nexus, so it arguably clears the grievance hurdle regardless.
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| *U.S. v. Richardson* (1974) | No *taxpayer standing* to challenge CIA accounting methods. |
| *Frothingham v. Mellon* (1923)*Taxpayer standing* | No standing for a taxpayer challenging the constitutionality of a federal expenditure. The interest is “comparatively minute and indeterminable” and the effect on taxation “so remote, fluctuating, and uncertain.” |
| *Flast v. Cohen* (1968)*Taxpayer standing; two-part nexus test* | A taxpayer has standing to challenge action that *violated the taxing power* itself, by way of the Establishment Clause. The challenge was to federal expenditures that supported religious schools. ***Two-part nexus test—***1. Logical link between *status* as taxpayer and the *type of enactment*
2. Nexus between status and the precise nature of the right infringed. Must show that it *exceeds specific limitations*.
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| *Hein v Freedom of Religion Foundation, Inc.* (2007)*Taxpayer standing; distinguishing Flast* | Executive branch funds were allocated to the White House Office of Faith-Based and Community Initiatives. The plurality distinguished *Flast* on the ground that it *specifically endorsed* spending federal money. Here this was a general allocation to the executive.Scalia (concurring in judgment): Overrule *Flast*. Only *wallet injury* can create a cause within Article III, not *psychic injury*. |
| *ASARCO Inc. v. Kadish* (1989)*State law and standing* | Defendants lost in state court, rendering their mineral leases invalid. The Court found standing, even though the action would not have acquired standing if it had been commenced in federal court. ***The state court decision can create an injury***. |
| *Sprint Communications v. APCC Svcs Inc.* (2008)*Assignment of claims; policies and theories of standing doctrine; standing in private law* | Payphone operators assign their claims to “aggregators,” who promise to remit any recovery. The aggregators then negotiate or sue to recover the claim. One wrinkle is that aggregators are paid a flat fee, and do not receive a portion of the judgment. *Court finds standing*—1. The holding is highly *functionalist*: assignments are routinely allowed, and there are proper incentives to develop the record.
2. **Orbit of federal regulation:** Perhaps the court deals with standing here because this system of claims is taking place in the orbit of a federal regulatory scheme, and there is actually a separation of powers question here.
3. Dissent relies on a formalist view that the plaintiffs have nothing
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| *Summers v. Earth Island Institute* (2009)*Injury in fact; speculative; imminence; procedural injury; aesthetic; orgs.* | Environmental orgs sue to prevent the Forest Service from enforcing regs that exempt small timber salvage projects from the procedural process for usual management decisions. *No standing*—1. **Injury in fact:** The probabilistic calculus of the plaintiffs and the dissent (Breyer) does not satisfy the constitution. Aesthetic injury is possible, but not where the possibility that any plaintiff would observe the site is “no more than conjecture.” (*cf. Lyons*).
2. **Procedural injury:** This may provide a basis for injury in fact, but it must be to protect the ***immediate interests*** of a plaintiff, and that requires redressability and imminence.
3. **Constitutionalizing:** The plaintiffs’ injury is too general, and, while Congress may tinker with traceability and redressability, it cannot create new injuries in fact. (*What does this mean?!?*).
4. Organizational standing
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| *Perry v. Schwarzenegger* (9th Cir. 2009) | Plaintiffs below won a constitutional challenge against Prop. 8. The state refuses to appeal. The question is whether the original proponents of the ballot measure have standing to appeal. *Certified two questions*—1. Do the proponents have a personal injury?
2. Are the proponents essentially the officials charged with representing the state’s interest?

There is a redressability problem here. What can the proponents get from the plaintiffs? But maybe we should ask, what can the plaintiffs get from the proponents? |
| CONGRESS AND THE SUPREME COURT |  |
| *U.S. v. Klein* (1872)*Rules of decision vs. new circumstances; interference with exclusive powers; pardons* | Wilson, having fought for the Confederacy, had received a presidential pardon. He sued under *Padelford* to recover for property seized by the U.S. Congress passed a law that said no pardon shall be used as evidence against the U.S., and that it shall be incontrovertible evidence of rebellion, and the Court, finding a pardon, shall dismiss the case. *The law is struck down as unconstitutional*—1. **Rules of Decision:** The line the court seems to draw is that Congress may change the applicable law or circumstances, but it cannot prescribe a rule that says, when a certain situation exists, the court must dismiss. *Compare* *Wheeling Bridge* (holding that it was acceptable for a court to redefine a bridge as a “postroad” to avoid a nuisance suit).
2. **Separation of Powers:** The congressional law also interfered with the effect of a presidential pardon, a power exclusive to another branch.
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| Abortion debate*Exceptions*; *external limitations* | Can Congress prohibit the appellate court from exercising appellate jurisdiction over all cases involving abortion? Laurence Tribe argues that it cannot, as this would burden constitutional rights and not survive strict scrutiny. (*Cf. Maricopa County* (holding that a one-year residency rule for abortions is an **invidious classification** that burdens the right to travel)).Gerald Gunther and Paul Bator disagree, arguing that congressional power to create ***exceptions*** authorizes Congress to do this exactly—remove categories of cases from appellate jurisdiction. Determining the proper way to adjudicate rights is not a burden, but merely a power to apportion jurisdiction. |
| LOWER COURT JURISDICTION |  |
| *Sheldon v. Sill* (1850)*Internal limitations on withholding jx* | Congress had limited diversity jurisdiction by stating that claimants had to be *originally* diverse. Thus an assignment could not create diversity. Designed to prevent forum-shopping. Plaintiff challenged this as an impermissible limitation on Article III. Court disagreed—1. **Discretion:** “Congress may withhold from any court its creation of jurisdiction for any of the enumerated controversies.”
2. *Sheldon* clearly stands for the proposition that there are **no internal limits** on the court’s power to withhold jurisdiction.

*Limiting Sheldon*: The case does not deal with **external limitations**, such as the due process clause of the fifth amendment. Also, the state courts were open to Sheldon, and they may not be in another case. Finally, the chose in action here was a common-law private right, not a public right or the constitution. |
| *Lauf v. E.G. Shinner & Co.* (1938)*Limits on remedies* | An Act prohibited federal courts from ***issuing injunctions in absence of specific findings***. *HELD*—Congress had the authority to limit the relief in this way. *Possible limitations on Lauf—*1. **Inherent power:** Generally, it is the inherent power of a court to craft remedies. Why is that not available here? Could read the article III vesting clause as requiring some of this power.
2. **Rules of decision:** This creeps up on *Klein*
3. External limitations, such as due process.
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| *Oestereich v. Selective Svc System Local Board No. 11* (1968)*Avoidance* | A statute seemed to bar all judicial review of a decision by the draft board to draft somebody. Plaintiff had been deprived of his exemption for conduct unrelated. The Court decided to **read the statute as permitting jurisdiction**, against the clear legislative history. |
| *Battaglia v. General Motors*(2d Cir. 1948)*External limitations; due process; deprivation of state court jurisdiction* | Federal law prohibited the exercise of jurisdiction by ***any court***, state or federal. The Court indicated that, although Congress had the power to deprive lower courts of jurisdiction, “it must not exercise that power as to deprive any person of life, liberty, or property without ***due proce***ss of law or to take private property without just compensation.” |
| *Plaut v. Spendthrift Farm*(1995)*Final judgments*; *inherent judicial power* | While in pretrial hearings, the Supreme Court decided *Lampf*, creating a short limitation on suit, and applied it to pending suits just for fun. In response, Congress changed the statute of limitations for cases filed before 1991, to let this case in. *Held the new law was unconstitutional—*1. **History:** *Klien* prohibits redefining the rule of decision, and *Heyburn’s case* stands for the principle of non-revision. This case is like a third category.
2. ***Marbury*:** This law offends the idea that it is the “province and duty of the judicial department to say what the law is.”
3. Congress cannot compel the court to **reopen final judgments**. The judgment is the final word of the judicial department. A vigorous dissent thinks this is an overly rigid version of SoP.
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| LEGISLATIVE COURTS |  |
| *Northern Pipeline Constr. v. Marathon Pipe Line* (1982)*Limits on legislative courts; categorical approach; state law claims; adjunct theory* | A case challenges the scheme put in place by the Bankruptcy Act of 1978. *Before the act*: District Courts served as bankruptcy courts and appointed referees, who conducted proceedings. The referees’ final order was appealable to the District Court. The courts had “summary jurisdiction” over property actually before the court. With consent, they could have jurisdiction over “plenary” matters.The Act established a *new system*. It establishes new Bankruptcy Courts as adjunct to the District Courts. Judges are appointed by the president to 14-year terms. They are subject to removal by a judicial council, and the salaries are set by statute and subject to adjustment. They have jurisdiction over *all civil proceedings arising under Title 11*; this includes suits to recover accounts, exempt property, preference actions, fraudulent conveyances, and causes of action owned by the debtor. The courts can here state law claims, as well as federal. They are vested with the full powers of equity, law, and admiralty, with some small exceptions. They can hold jury trials, issue declaratory judgments, issue writs of habeas, and anything else necessary. The Act provides a special procedure for appeals. The circuit council will direct the chief judge to create panels of three bankruptcy judges to hear appeals, or the District Court may be asked to do it. The Court of Appeals may hear appeals from the panel, or, if parties agree, directly from the Bankruptcy Court.*HELD (plurality)—The scheme violates Article III*:1. **Separation of Powers:** “A judiciary free from control by the Executive and Legislature is essential.” (*Federalist*). Thus, the judicial power must be exercised by courts having the **attributes of Article III**—“good behavior” and “compensation” clauses.
2. **Categorical approach:** *Three historical exceptions*—territorial courts, courts-martial, adjudication of certain public rights.
3. **Adjuncts:** Congress may have broader power to create adjuncts, provided “essential attributes” of the judicial power remain in the federal courts, so long as it is doing so to enforce statutory public rights. But there is a difference when Congress encroaches on the means for adjudicating non-congressional common-law rights

Concurrence (Rehnquist): Concur on the basis that the Act allowed adjudication of state law matters only tangentially related to the federal law of bankruptcy.Dissent (White) presages *Schor*. |
| *American Ins. v. Canter* (1828)*Territorial courts* | Article IV bestows power of government over territories, and provides an independent basis for Congress’s power to create territorial courts.  |
| *Dynes v. Hoover* *Courts-martial* | Historically, the political branches have **extraordinary control** over the precise subject matter at issue. See especially, Art. I §8, cls. 13, 14. |
| *Murray’s Lessee v. Hoboken Land* (1856)*Public rights doctrine* | “There are matters involving public rights, which may be presented in such a form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States.” |
| *Thomas v. Union Carbide* (1985)*Public rights; binding arbitration as a legislative court; private law claims as public rights* | Where an applicant to the EPA requests a new registration, permit, or use, FIFRA allows the EPA to consider data produced by other manufacturers, provided the applicant offers compensation to the mfr. If parties couldn’t agree on compensation, Congress in 1978 provided for binding arbitration. The arbitration was subject to judicial review only for fraud, misrepresentation, or other misconduct. This scheme was challenged as unconstiutitonal.*HELD*—*The scheme is constitutional*. *The* ***public rights doctrine is not limited to cases where the U.S. is a party***. Congress may create a seemingly private right, pursuant to Article I, that is integrated into a public regulatory scheme so as to be appropriate for agency resolution.  |
| *Commodity Futures Trading Comm’n v. Schor* (1986)*Modern balancing test; limited common-law counterclaims; consent; agency capture* | The Commodity Exchange Act empowers the CFTC to administer claims of customers of commodity brokers, who allege violations of the CFA or CFTC regulations. It was intended to be “inexpensive and expeditious.” The forum was an **alternative to existing fora**. A regulation allowed the CFTC to adjudicate counterclaims arising out of the transaction.In this case, Schor commenced actions in the CFTC against broker Conti. Conti had filed a diversity action in District Court to recover what Schor owed. Schor had counterclaimed in this action, and moved to dismiss because the reparations proceedings were a better forum. The court declined. Then Conti voluntarily dismissed its claims, and brought them by way of counterclaim in the CFTC. An ALJ ruled in Conti’s favor on all claims. Schor then challenged the authority of the CFTC.*HELD—The scheme is constitutional*. **The modern balancing test:**1. Extent to which the “essential attributes of judicial power” are reserved to Article III courts
2. The exercise of Article III powers by the non-Article III court
3. Origins and importance of the rights to be adjudicated
4. Concerns that drove Congress to depart from Article III

The agency here deals only with particularized areas of law. Its orders are enforceable only by a District Court. Orders are reviewed under the “weight of the evidence” standard, as in *Crowell*. Legal rulings are subject to de novo review. The CFTC does not exercise “all ordinary powers of District Courts,” unlike *Northern Pipeline*. |
| *Granfinanciera S.A. v. Nordberg* (1989)*Jury trial; public rights doctrine; claims at law* | Trustee in bankruptcy sought to recover money that petitioners allegedly received as a fraudulent transfer. Petitioner-defendants demanded a jury trial. The court determined that the right to recover a fraudulent conveyance was private, like a state-law contract claim, and thus was a claim “at law” requiring jury trial under the Seventh Amendment. The Court then suggested that ***whether a claim requires a jury trial requires the same answer as whether it can be adjudicated by a non-Article III court*.**  |
| *Crowell v. Benson* (1932)*Adjunct theory; fact-finding; review* | Employees Compensation Commission can make ***initial factual determinations*** in employer-employee disputes under a workers’ compensation scheme. The District Courts can review the Commission’s orders. This the Court found that this served *as an* ***adjunct***. |
| *U.S. v. Raddatz* (1980)*Adjuncts; magistrates* | A suppression motion was referred to a magistrate for an evidentiary hearing, over the defendant’s objection. The magistrate conducted the hearing, made *proposed* findings of fact, recommended denial. The District Court reviewed the report, transcript, and objections, and heard oral argument before accepting the recommendation. *This was upheld because at all times the process was* ***under the District Court’s control*.***Contemporary powers of magistrates are in my other outline.* |
| ARISING UNDER JX:CONSTITUTIONAL |  |
| *Osborn v. Bank of the U.S.* (1824)*Clear statement rule; ancillary and pendent jurisdiction; three tests for constitutionality* | The Second Bank of the United States had, like many banks, issued loans on credit they did not have. This led to a major economic downturn. In response Ohio decided to tax the bank $50,000/year. An agent of Osborn, the state auditor, broke into the bank to recover the money owed by the bank. The bank sued in federal court to get its money back. The Bank is arguing that it’s immune from taxation, and Osborn argues that this is a matter of state tax law, on which federal courts cannot interfere.The Court first finds that ***Congress intended to confer jurisdiction***. The Bank statute grants capacity “to sue and be sued … in all State Courts having competent jurisdiction, *and in any Circuit Court of the U.S.*”Then, the Court holds that *jurisdiction is constitutional—*1. **Any question test:** The Court can receive jurisdiction of “any question respecting” the laws, treaties, or constitution of the U.S. Some commentators think this is operationalizing the *theory of co-extensive powers*.
2. **Construction of Federal Law test:** If the question may be defeated by one construction of federal law, and upheld by another. (*See Verlinden*).
3. **Ingredient test:** When a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause.

*Osborn* also establishes the proposition that “case and controversy” in the Constitution refers to the *entire* case, not the particular claim. Some say Marshall invents the **constitutional case** here.Dissent (Johnson) expresses trepidation with respect to *hypothetical* federal issues. |
| *Am. Nat’l Red Cross v. Solicitor General* (1992)*Clear statement rule* | The Red Cross’s federal charter authorizes it to “sue and be sued in courts of law and equity, State or Federal.” The Court holds that this confers jurisdiction, only because it *specifically mentions federal courts*. (*Contra Deveaux*). |
| *Textile Workers Union v. Lincoln Mills* (1957)*Protective jurisdiction; “pure” jurisdictional grants; inherent authority; federal common law* | The Labor-Management Relations Act (Taft-Hartley) §301 granted jx over actions concerning violations over labor-employer contracts. But Congress did not enact substantive law regarding such contracts, which continued to be governed by state law.The majority *construes the Act as a command to create Federal Common Law*, and thus does not reach the constitutional question. Harlan concurs to suggest that the court may craft remedies pursuant to its **inherent equitable authority**.Frankfurter’s dissent constitutes the broadest statement on protective jx. He first says that Congress did not intend to create FCL. *Then—*1. **Ingredient:** His version of the “ingredient” test is that “some aspect” of federal law must be essential to the plaintiff’s success. But he wants to severely restrict *Osborn* and the *Pacific Railroad Cases* (federally chartered RR companies).
2. **Wyzanski:** Judge Wyzanski suggests that §301 can be viewed as a direction to incorporate state law by reference, and that such controversies would then arise under a valid federal law. Frankfurter rejects this, arguing that “we cannot argumentatively legislate for Congress …. To do so disrespects legislative responsibility and disregards judicial limitations.”
3. **Protective Jurisdiction:** Following the *Tidewater* plurality, some have argued that, where Congress has Article I power to make rules of decision, it can also provide for jurisdiction. This seems to undermine the independence of Article III.
4. **Limited protective jurisdiction:** Mishkin argues that the purpose of such a broad theory would only be to ensure impartiality to some litigant, which is the purpose of the diversity jurisdiction grant, and should be thus limited. However, Mishkin argues that, where Congress has an ***articulated and active federal policy*** in the area, *Tidewater* and other cases indicate that protective jx is permissible. Frankfurter is willing to entertain this to the extent that there are “federal rights existing in the interstices of actions under §301.” But there aren’t.
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| *National Mutual Ins. Co. v. Tidewater Transfer* (1949)*Article I as a separate grant of jurisdiction; protective jurisdiction* | Congress conferred jurisdiction on the district courts for non-federal suits between citizens of D.C. and citizens of a state. D.C. is not a state for the purpose of diversity jurisdiction, so this would seem unconstitutional. Jackson, writing for three justices, upholds the grant. “*Where Congress finds it necessary to provide those on whom its power is exerted with access to some kind of court or tribunal … it may open the regular federal courts to them.*” Jackson finds this power in Article I, which is “plenary in every respect” over the District of Columbia. |
| *Verlinden v. Central Bank of Nigeria* (1983)*Construction of federal law test; foreign sovereign immunity; foreign affairs* | The Foreign Sovereign Immunity Act (1976) provides legal standards by which a foreign government’s amenability to suit is determined. The court below had held that the jurisdictional grant in the FSIA unconstitutionally allowed suits between foreign states and foreigners.By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide under what circumstances foreign sovereigns will be amenable to suit in U.S. courts. Furthermore, a suit under FSIA *necessarily raises federal questions* ***at the very outset***. |
| ARISING UNDER JX:STATUTORY TEST |  |
| 28 USC § 1331 | “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” |
| 28 USC § 1441 | Removal jurisdiction available if and only if there was original jurisdiction available in the district court; without regard to actual exercise of jurisdiction. |
| *Louisville R.R. v. Mottley* (1908)*Well-pleaded complaint; placement of the federal issue* | Plaintiffs were injured by the railroad, which gave them free passes for life. The Congress passed a law prohibiting free passes. The Mottleys filed a lawsuit in federal court for breach of contract. The federal law would have been an affirmative defense.Court finds *no jurisdiction—*1. **Well-pleaded complaint rule:** A suit that “arises under” must appear on the face of a well-pleaded complaint, alleging all claims and elements. Anticipations of defenses do not count.
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| *Metropolitan Life Ins. v. Taylor* (1987)*Complete preemption* | ERISA had ***so completely preempted*** state law that the plaintiff’s state claims were construed as federal for the purpose of removal. For this purpose, plaintiff is not master of the complaint. |
| *Avco v. Machinists* (1968)*Complete preemption* | Contract dispute between a union and employer under the LMRA. *State law does not exist as an independent source of private rights to enforce collective bargaining contracts*. |
| *Caterpillar Inc. v. Williams* (1987)*Complete preemption* | Limiting *Avco*. The LMRA preempted state law only with respect to contracts between employers and unions, not with respect to individual contracts between employers and employees. |
| *Beneficial National Bank v. Anderson* (2003)*Complete preemption* | Anderson sued the bank to recover damages, alleging that the bank charged excessive interest under Alabama common law and usury law. But the National Bank Act set a maximum interest rate, and provided a private right of action for debtors subject to usury.The court found that the National Bank Act *completely preempts* the area, so that plaintiff could not bring a state claim—1. **Clear statement for removal:** When Congress creates a private right of action like this, the question is whether there is anything in the legislative record to suggest other than that the normal law on removal applies.
2. **Intent:** It is important to find that Congress intended to preempt state remedies.

Scalia and Thomas dissented on the ground that preemption is a defense, not a jurisdictional grant, and that this federalize-and-remove business is all nonsense anyway. |
| *Franchise Tax Board of California v. Construction Laborers Vacation Trust* (1983) | Four unions establish a trust within the meaning of a “welfare benefit plan” in ERISA. The Tax Board claims that the trust had failed to pay, and it sought declaratory relief. The trust claimed that the levies were preempted by ERISA, and removed. *No jurisdiction—*1. [Several points on declaratory judgments]
2. **Preemption:** ERISA preemption is “not enough” to displace a state cause of action. Here, the underlying statute refers to those entitled to bring suit for particular kinds of relief, and FTB is not among the named sorts of parties. This is different from *Taylor*, because that case involved a party named by ERISA.
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| *Am. Well Works v. Layne & Bowler* (1916)*Bright-line rule* | L&B accused AWW of stealing its patented pump design, and threatened lawsuits against anyone using AWW’s pump. This is a state libel claim. But AWW wants to argue that the merits will be determined by patent law, which is federal. *The Court finds that it’s a state claim—*1. **Bright-line rule** (Holmes test): A suit arises under the law that creates the cause of action.
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| *Shoshone Mining v. Rutter* (1900)*Federal cause of action with no federal dispute* | Congress created a comprehensive scheme for resolving disputes over miners’ claims to tracts of western land. The scheme included a cause of action, but it also provided that local law *should* govern most claims involving land. Congress had not even incorporated local law into the statute; it had just made its use permissible. *In most cases, the case would be resolved on issues of fact or local law, with no provision of federal law in dispute*. Therefore, the court found that Congress did not intend to expand federal jurisdiction. |
| *Smith v. Kansas City Title & Trust Co.* (1921)*Substantiality; flexible test* | A shareholder of the trust company seeks to enjoin the company from investing in bonds issued by Federal Land Banks, because he thinks the bonds are unconstitutional. *The court finds jurisdiction*—1. **Dependency test:** “Where it appears from the bill … that the right to relief depends on the construction or application of the Constitution or laws of the United States, and that such a federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction.
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| *Moore v. Chesapeake & Ohio Ry.* (1934)*Substantiality; incorporation of federal standards* | Moore sought damages for injuries suffered while working on the railroad. He stated two counts, one under FELA, and the other under a parallel Kentucky provision and other law. Kentucky law incorporated federal law, stating that an employer’s negligence could not be negated by contributory negligence or assumption of risk if the employer had violated any state or federal employee-safety statute. Moore argued that the case was not federal, and thus not subject to the ICC’s special venue provisions. *The second cause of action was held to be state law, despite wholesale incorporation of federal standards.*Hershkoff thinks one way to explain *Moore* was that the federal issue implicated only **state concerns**. Also *Moore* doesn’t satisfy *Mottley*. |
| *Gully v. First National Bank* (1936)*Substantiality* | The Bank purchased the assets of a predecessor. One of the liabilities was a state tax obligation, which was possible only under a federal statute permitting such taxes. Gully sued to collect, and the Bank removed, arguing that the enabling statute was essential to Gully’s claim. *No jurisdiction—The federal right “must be an essential one. The right or immunity must be such that* ***it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another***.” *We need common sense of judgment.* |
| *Merrell Dow v. Thompson* (1986)*Substantiality; bright-line rule* | State tort action. Ohio law provides that violating a federal safety statute (FDCA) is *per se* negligence (rebuttable). There is no private right of action for violations of the FDCA in federal law. *No jurisdiction—*1. **Cause of action:** *A complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim “arising under.”*
2. ***Gully* lives** (FN 12): *Importance of the federal issue*.

Brennan provides three critiques: (1) incorporation implicates federal interests/uniformity; (2) expertise; (3) FDA is overseen by fed courts, so why would Congress not want these cases to be adjudicated here?  |
| *Grable & Sons Metal Products v. Darue Engineering & Mfg* (2005)*Substantiality; multi-factor test; integrating the strands of cases* | IRS seized property from Grable to satisfy a tax delinquency, and sold it to Darue. Grable brought a quiet title action in state court, claiming that Darue’s title was invalid because the IRS had failed to give proper notice, because it had been given by certified mail, not leaving at the place of business. Darue removed. *Court affirms jurisdiction—*1. **Preserving Merrill-Dow:** *Grable* identifies *two* classes of FQJ: (1) that “invoked by … plaintiffs pleading a cause of action created by federal law”; and (2) cases that “implicate significant federal issues.” Citing FN 26, *Merrill Dow* should be read as finding that the absence of a federal cause of action is probative but not dispositive of the judgments about congressional intent required by §1331.
2. **Multi-factored test:** *Does a state law claim necessarily raise a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing the balance of federal-state responsibilities?*

The case here would be quite rare, and thus would have little impact on the balance of judicial responsibilities. It also necessarily turns on the adequacy of notice. |
| *Empire Healthchoice Assurance v. McVeigh* (2006)*Substantiality; preemption* | The government has contracted with private health insurance carriers to administer a variety of health plans funded by government and employee contributions into a special fund under the FEHBA. Explicitly preempts state law on issues concerning “coverage or benefits.” It does not create a right of action. The *contracts* provide that employees enrolling agree to either reimburse the carrier for benefit payments if the employee recovers in a tort action with respect to the condition, or to subrogate the carrier to their claims.A beneficiary’s estate settled a tort action for a large sum. The carrier knew of the action, but did not participate, then filed a federal action seeking reimbursement for the benefits it paid. If the claim were viewed as a *contract* dispute between the employee and the carrier, it would be a state law claim. But if the contract is a creature of federal law, then the matter is governed by FCL. *Five justices find no jurisdiction—*1. **State law applies:** Congress preempted state law as to coverage and benefits, not jurisdiction.
2. **Substantiality:** *Compare with Grable*. Disputes between employee and carrier do not implicate the federal treasury in ways that IRS claims do. There is no overt government action here. A contrary ruling could inundate the federal courts with state-law claims. And a ruling on law in this case could preclude further litigation (finding on law as opposed to facts).
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| *Vaden v. Discover Bank* (2009)*Arbitration; preemption; “look-through” rule* | Discover sued Vaden in state court to recover past due payments. Vaden counterclaimed that Discover’s fees violated state law. These claims were subject to an arbitration clause. Discover sued in federal court to compel arbitration under the FAA, which incorporates a version of the *Skelly Oil* rule. Discover argued Vaden’s counterclaims were completely preempted. All agreed that FAA was a “look-through” statute—1. **Majority:** Look to the entire suit viewed as a unit. Discover filed first, and its claim would not satisfy *Mottley*.
2. **Dissent:** View only the arbitrable claims. Uncomfortable with the “race to the courthouse” that was set up by the *Skelly Oil* rule and *Franchise Tax Board*.
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| FEDERAL COMMON LAW |  |
| Henry J. Friendly, *In Praise of Erie—And the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964) | *Four types of federal common law—*1. Spontaneous generation (*Clearfield Trust; Kimbell Foods; Boyle*)
2. Implication of a private federal cause of action (*Bivens*)
3. Construing a jurisdictional grant as a command to fashion federal law (*Lincoln Mills*)
4. Filling in statutory interstices
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| *Clearfield Trust v. U.S.* (1943)*Spontaneous generation; commercial paper* | The U.S. paid a WPA employee for work, but the check is intercepted by some asshole, who cashes it at J.C. Penney. Penney endorsed the check over to Clearfield Trust Co., which collected from the Federal Reserve. Barner informs the WPA/federal government that he was not paid in a timely manner, but the government delays in telling Clearfield and Penney until the following year. The U.S. then sued to recover the funds, and defendants responded that “undue delay” barred recovery. Penn. law places the burden on the party showing undue delay. *Court creates a federal common law rule placing the burden on Clearfield—*1. **Constitutional competence:** *Erie* doesn’t apply because the federal government has authority under Article I to create commercial paper. Where Congress hasn’t acted, federal courts may fashion the rule.
2. **Uniformity:** The court finds that the government should not be held to various rules of burden of proof
3. **Content:** The court resorts to “background principles,” the federal law merchant, much like pre-*Erie* general law.
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| *Bank of America v. Parnell* (1956)*Spontaneous generation; private parties; US bonds* | Like *Clearfield* with private parties. The U.S. recalled early some bonds. The Bank’s bonds disappeared a day later, and four years later Parnell tried to cash them. The Bank sued Parnell for conversion. The question was whether federal or state law applied to determine who had the burden of proof regarding Parnell’s good faith. *Court said state law applies—*1. **Distinguish *Clearfield*:** That case was about commercial paper, with operations on a vast scale. This case, not about the nature of the bonds at all, does not affect the rights and duties of the U.S.
2. **Private parties:** Frankfurter says that private party suits may sometimes be governed by FCL, but doesn’t say when.
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| *United States v. Yazell* (1966)*Spontaneous generation; private parties; no need for uniformity; federalism* | U.S. tried to recoup a small-business loan made to the Yazells. Texas had a coverture law shielding a married woman’s separate property from contractual alienation in the absence of a court order removing her disability to contract. The U.S. argued for a federal common law rule to govern the contract that would ignore coverture. *Court says no—*1. **Uniformity:** No need for a uniform rule in light of the fact that the U.S. negotiates contracts individually and regularly associates with local counsel.
2. **Solicitude of state interests:** Notes that matters of the *family are especially sensitive*. The court should only override state law where there is a **clear and substantial interest of the national government**. *State interests are not being balanced here—*it’s just that federalism is a federal interest.
3. **Ambiguity:** The court is openly unclear about whether it was adopting the state common law rule, or allowing state law to govern. *This choice has major jurisdictional consequences*.
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| *Banco Nacional de Cuba v. Sabbatino* (1964)*Spontaneous generation; foreign affairs; uniformity* | Seller conveys sugar to buyer, who loads it on a ship docked in Cuba. The Cuban government expropriated the sugar, but allowed the ship to sale when the seller agreed to remit the purchase price to the National Bank’s predecessor in interest. When the sugar arrived, the buyer, rather than giving the price to the bank, gave it to Sabbatino, a receiver of the seller’s assets in New York. Banco Nacional brought a diversity action to recover in New York District Court.The issue here was the act of state doctrine, which generally prohibits the courts of a country from questioning acts done by a state within its own territory. Under the doctrine, the Cuban bank wins; under New York’s view of international law, the seller was entitled to the proceeds.1. **Basic rule:** Federal common law governs the law of foreign relations in the absence of federal statute.
2. **Uniformity:** The court found that uniform federal law was necessary to govern foreign relations cases. (This is not entirely historical, according to *Bergman v. De Sieyes* (2d Cir. 1948)).
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| *U.S. v. Kimbell Foods Inc.* (1979)*Spontaneous generation; content of the rule; modern test; state law applies* | Two cases are being decided, but each have similar issues involving loans guaranteed by two federal agencies—the Small Business Administration, and the Farmers Home Administration. Kimbell Foods loaned money to O.K Supermarkets, with OK’s interests as collateral. OK later borrowed an SBA-backed loan from a Texas bank, with the same collateral. When OK defaulted, the bank assigned the loan to the SBA. Competing claims to the funds arose, and Kimbell brought an action to foreclose on its lein, arguing that its interest was superior. The District Court provided a federal common law rule to govern the action, which held that a lein, to be “first in time,” must be fully choate—Kimbell didn’t reduce the lein to judgment until after the bank assigned its lein to the SBA. The Court of Appeals reversed, holding that the District’s rule should not apply where the SBA is acting as a commercial lender. It fashioned a new rule that the first to reach “perfection” under the UCC would be prioritized.In the other case, the FHA had provided several loans to a farmer, securing an interest in his equipment. The farmer eventually also incurred debt at a repair shop, which retained the tractor and acquired a lien on it under Georgia law. The farmer then filed for bankruptcy, and the US initiated proceedings against the repair shop for possession of the tractor. There’s the usual battle over perfection and priority.*HELD*: Federal common law applies, but the court will ***adopt the relevant state laws***. 1. **Competence:** Federal law governs the questions involving the rights of the United States under nationwide federal programs (*Clearfield Trust*)
2. Federal interests are “sufficiently implicated”
3. **Content:** Consider (1) the need for uniformity given the nature of the federal program; (2) whether applications of state law would frustrate the purpose of the program; (3) the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.

State commercial codes in this case furnish “convenient solutions” to the problems at issue. The FHA even often incorporates state law, and issues “state supplements.” The Court also looks to the Federal Tax Lien Act, not directly applicable, to note “Congress’ disapproval of unrestricted federal priority” in an area where uniformity might even be more important. (This little analogic trick is used by Scalia in *Boyle.*) |
| *Butner v. U.S.* (1979)*Lawmaking in absence of Congress*; *spontaneous generation; bankruptcy* | A trustee in bankruptcy and a second mortgagee each claimed rents owed the mortgagor during its bankruptcy before a foreclosure sale of the mortgaged property. The issue was whether state or federal law should govern. *Court ruled that state law should govern, thus requiring a mortgagee (lender) to take affirmative steps after default to obtain a security interest*.“*The constitutional authority of Congress to establish ‘uniform laws on the subject of Bankruptcies…’ would clearly encompass a federal statute defining the [lender’s] interest in the rents and profits earned by property in a bankrupt estate. But Congress has not chosen to exercise its power to fashion any such rule.”* |
| *Boyle v. United Technologies* (1988)*Spontaneous generation; new test; conflict; military contractor defense* | Boyle was killed in the crash of a Marine helicopter. His father argued that Sikorsky (UT) had defectively designed the emergency escape system. The claim was under Virginia tort law. The question was whether the “military contractor defense” could apply to this case.1. **Federal concern:** There is a government interest in procurement of equipment.
2. **Significant conflict:** *Displacement of state law (or of federal incorporation of state law) will only occur where there is significant conflict between the federal policy/interest and the operation of state law*.
3. **New test?** Some commentators think there is a new test in *Boyle*. First, ask whether there is competence (e.g. procurement). Second, assume state law applies unless there is significant conflict between the state and federal.

In this case, the exceptions in the FTCA (for claims based on the performance of a discretionary duty) state a federal policy that is in conflict with application of the state tort rule. |
| *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971)*Implying a right of action; inherent authority* | Federal agents broke into Bivens’ home, manacled him in front of his family, and threatened to arrest the entire family. They searched the apartment, and too Bivens to the courthouse. The arrest was effected without a warrant or probable cause.Bivens brought suit in federal court for violations of the Fourth Amendment. Respondents argued that Bivens’ action was at state law for breach of privacy, and the Fourth Amendment served as a limit on the agents’ ability to assert a valid exercise of official power. *Court finds that Bivens has an independent remedy in the Fourth Amendment—*1. ***Marbury*:** The background principle goes back to this—where there is a right, there is a remedy.
2. **Brennan:** The remedy derives directly from the constitution, though Congress may possibly prescribe another remedy.
3. **Harlan:** The cause of action derives from the federal common law and the court’s equitable authority to fashion remedies.
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| *Carlson v. Green* (1980)*Implied rights of action* | Federal prison officials failed to provide medical attention. Created remedy out of the Eighth Amendment. This emphasized the concept of **special factors counseling hesitation**, which were first hypothesized in *Bivens*. It still retained the aspect of analyzing the remedy. |
| *Bush v. Lucas* (1983)*Bivens; alternative remedies* | An engineer working for a federal agency sued, claiming demotion for dissident speech. The Civil Service Board restored him to his previous position and awarded back pay. The court assessed this remedy, and found that, while not “complete,” the **elaborate remedial scheme** argued against creation of a new remedy. |
| *Chappel v. Wallace* (1983)*Bivens; special factors* | Chappel, a soldier, alleged discrimination in duty assignments. Military service and the command relationship is a **special factor**.  |
| *U.S. v. Stanley* (1987)*Bivens; special factors* | While in the military, plaintiff was subjected to experimentation with psychotropic drugs. It ruined his life. The court found again that military service was a **special factor**. O’Connor, the author of *Stanley*, vigorously dissented, arguing that clandestine experimentation was so far beyond the military mission. |
| *Schweiker v. Chilicky* (1988)*Special factors; assessing remedies* | This was one of the “churning” cases from the rollback of the welfare state. Congress created a “continuing special disability review” (CDR) program that kicked massive numbers of people off the welfare rolls. Three years later, Congress created a “remedy” that provided for continuation of benefits, pending review by an ALJ, after a state agency determined that an individual was no longer disabled.Respondents’ disability benefits were terminated pursuant to the CDR. Two had appealed these and had them restored through the administrative process, with retroactive benefits. Chilicky filed a new application and was awarded some retroactive benefits. *No dice—*1. **Special factors:** Now includes “deference to indicators that congressional inaction has not been inadvertent.” Seems to indicate that regular Article I programs can be special factors.
2. **Intended to substitute:** In *Bivens*, alternative remedies were expected to be stated clearly as *the* remedy for this violation. Now, clear statement sees to cut the other way. “Congressional unwillingness to provide consequential damages … [is] clear.”
3. **Assessing remedies:** Very deferential. When the design of a government program suggests Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional remedies.”
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| *Correctional Services v. Malesko* (2001) | A resident of a halfway house run on behalf of the Federal Bureau of Prisons sued after being denied his heart medication and forced to walk up five flights of stairs, causing a heart attack. *No Bivens remedy—*1. **Private actors:** The *Bivens* remedy does not lie against private actors or against state agencies.
2. **State remedies:** Conditioned the *Bivens* remedy on the non-existence of a state remedy, exactly the opposite of *Bivens* itself.
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| *Alexander v. Sandoval* (2001) | The Alabama drivers’ test is only given in English. Plaintiff claims violation of Title VI, and wants a private right of action. The Court refuses to imply one.1. Absence of rights-creating language in §602
2. That section addressed itself to federal agencies rather than to individuals
3. It provided an enforcement mechanism that agencies, not individuals can invoke.
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| *Willkie v. Robbins* (2007) | Government failed to file paperwork for an easement, so property owner said get off my land; but Bureau of Land Management began a campaign of harrashment, shooting out windows, malicious prosecution, trespass, to compel landowner to grant easement. *Court—* Just a retaliation case. If we give a claim here, opens a pandoras box whenever you see a retaliation on property rights – every tax case, every denial of license. |