

**SOLVING “THE BURKLOW PROBLEM”: FEDERAL QUESTION
JURISDICTION OF TUCKER ACT AND LABOR-
MANAGEMENT RELATIONS ACT CASES AFTER *TEXTRON
LYCOMING v. UAW***

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Table of Contents

I. INTRODUCTION	942
II. FEDERAL QUESTION JURISDICTION AND SECTION 301	952
A. <i>The Well-Pleaded Complaint Rule and Steel Co. v. Citizens for a Better Environment</i>	952
B. <i>The Labor-Management Relations Act and the Role of the District Courts</i>	957
C. <i>Jurisprudence Gone Wrong: The Well-Pleaded Section 301 Complaint</i>	959
1. <i>Category One: Courts Have Jurisdiction to Decide Validity as an Element of a Cause of Action or to Determine Their Own Jurisdiction</i>	960
2. <i>Category Two: Courts Have Jurisdiction to Decide Cases Where Validity is the Ultimate Issue</i>	960
3. <i>Category Three: Courts Had No Jurisdiction to Determine the Validity of a Contract for Any Purpose</i>	963
D. <i>Passing the Laugh Test: The Frivolous Section 301 Complaint</i>	967
III. <i>TEXTRON AND THE “BURKLOW PROBLEM”</i>	970
A. <i>Textron v. UAW</i>	970
B. <i>The “Burklow Problem”</i>	973

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1. <i>The Burklow Story</i>	973
2. <i>Burklow's \$64,000 Question: Could a Superseding Contract Claim Ever Pass the "Laugh Test?"</i>	
<i>Answer: Yes</i>	977
C. <i>Interlude</i>	983
D. <i>The Arbaugh-Winnett "Non-Solution"</i>	987
IV. THE TUCKER ACT	994
A. <i>The Tucker Act and Section 301: Analogous Statutes</i>	994
B. <i>Jurisdiction Analysis Under the Tucker Act</i>	997
C. <i>Another Solution to the "Burklow Problem"</i>	1002
V. CONCLUSION	1006

I. INTRODUCTION

Much jurisprudential ink has been spilt on the distinction between a federal district court's subject matter jurisdiction and whether a plaintiff has stated a claim. The Supreme Court has said: "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case."¹ The analysis bogs down, however, where "the asserted basis for subject matter jurisdiction is also an element of the plaintiff's allegedly federal cause of action."²

Jurisdiction and merits are not completely separable. The Supreme Court recently held that district courts must apply a more rigorous analysis of Congressional intent before concluding that an element of a federal cause of action is also a requirement for district court jurisdiction of a case.³ Procedurally, however, if "the complaint is drawn so as to seek recovery under federal law or the Constitution" in light of the facts Congress intends to be jurisdictional, district courts have exercised subject matter jurisdiction.⁴

This practice honors the longstanding principle that a plaintiff's purported federal claim must be non-frivolous and made for reasons other than to pry open the door to the federal courthouse.⁵ Non-frivolousness, however, is a test for jurisdiction with roots in the merits

1. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

2. *Id.* at 89.

3. *Arbaugh v. Y&H Corporation*, 546 U.S. 500, 514-15 (2006).

4. *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1189 (2d Cir. 1996).

5. *See, e.g., Bell v. Hood*, 327 U.S. 678, 682-83 (1946).

of the case.⁶ To the extent that substance therefore drives the outer boundaries of federal jurisdiction, what a plaintiff must plead and prove to stay in federal court will never be far removed from the substantive right at issue.

In *Textron Lycoming Reciprocating Engine Division, AVCO Corp. v. United Automobile, Aerospace and Agricultural Implement Workers of America, International Union*,⁷ the Supreme Court held that Section 301 of the Labor-Management Relations Act means what it says: that the "provision confers federal subject-matter jurisdiction only over '[s]uits for violation of contracts.'"⁸ Justice Scalia's majority opinion did try to separate two groups of feuding circuits, one holding that a district court had never had jurisdiction to determine the validity of a labor contract⁹ and another holding that they virtually always did.¹⁰

This does not mean that a federal court can never adjudicate the validity of a contract under Section 301(a). That provision simply erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse. Thus if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with Section 301(a), adjudicate that defense. Similarly, a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a court to declare the agreement invalid. But in these cases, the federal court's power to adjudicate the contract's validity is ancillary to, and not independent of, its power to adjudicate "[s]uits for violation of contracts."¹¹ The paragraph was dicta,¹² but it is hardly a "lone ambiguous statement."¹³

6. *Id.* at 683 (noting that the Supreme Court has questioned even calling such dismissals jurisdictional).

7. 523 U.S. 653 (1998).

8. *Id.* at 656. The provision states:

[S]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

9. *See, e.g., Heussner v. Nat'l Gypsum, Co.*, 887 F.2d 672, 676-77 (6th Cir. 1989), *overruled by* *Winnett v. Caterpillar, Inc.* 553 F.3d 1000 (6th Cir. 2009).

10. *See, e.g., Mack Trucks, Inc. v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., UAW*, 856 F.2d 579, 587-90 (3d Cir. 1988).

11. *Textron*, 523 U.S. at 657-58 (internal citations omitted).

Earlier that term, the Supreme Court issued a more comprehensive jurisdiction decision, *Steel Co. v. Citizens for a Better Environment*.¹⁴ *Steel Co.* was an Article III standing case, but in a section of his opinion for the court endorsed by a plurality, Justice Scalia described a comprehensive analytical framework for assessing a court's federal question jurisdiction and refined the "frivolity/bad-faith exception":

[T]he district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another . . . [and] [d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy."¹⁵

This portion of *Steel Co.* does make the frivolity/bad-faith exception more tangible, but still defines a "federal controversy" in terms of being "a federal controversy."

More helpful was Justice Scalia's explanation that when a statement in one provision that jurisdiction exists over a suit "brought under" another provision—Congress means to confer jurisdiction over "suits *contending* that" the underlying circumstances of the case satisfy the elements of the cause of action.¹⁶ *Steel Co.* therefore reinforces in the specialized jurisdiction context the applicability of the general principle that where the "jurisdictional facts" and elements of a cause of action are intertwined, federal question jurisdiction exists if the complaint is drawn on its face to seek recovery under federal law.¹⁷ If the plaintiff ultimately

12. The paragraph was dicta, because both parties agreed neither had violated a contract. *Textron*, 523 U.S. at 658.

13. This is what the Sixth Circuit called it in *Bauer v. RBX Indus., Inc.*, 368 F.3d 569, 579 n.5 (6th Cir. 2004) *overruled by Winnett*, 553 F.3d 1000.

14. *Steel Co.*, 523 U.S. 83.

15. *Id.* at 89 (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946); *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)).

16. *Id.* at 93.

17. *See id.* at 90-93; *see also, e.g., Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 80 (3d Cir. 2003); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1940 (9th Cir. 2004) (reasoning that the jurisdictional provision of RCRA provides the basis for both subject matter jurisdiction and the substantive cause of action and that jurisdiction and merits are intertwined and dismissal for failure to establish jurisdictional facts is one for failure to state a claim); *Nowak*, 81 F.3d at 1189 (ERISA jurisdiction claim) ("in cases where the asserted basis for subject matter jurisdiction is also an element of the plaintiff's allegedly

fails to prove a federal cause of action, the court should dismiss on the merits, not for lack of jurisdiction.¹⁸

Consistent with *Steel Co.*, *Textron* implies that Section 301 jurisdiction exists over a broad range of labor contract matters as long as a plaintiff formally pleads a "suit for violation of a contract." Nevertheless, *Textron's* failure to acknowledge that the functional substance of a claim can determine a court's jurisdiction at the outer boundaries of its power leaves the full meaning of its dictum obscure.¹⁹ Crucially for "the *Burklow* problem," *Textron* does not decide when a formal allegation of breach is so functionally meritless that courts should conclude that it was "made solely for the purpose of obtaining jurisdiction" or is frivolous.²⁰

As a result, the *Textron* dictum invites artful pleading to secure district court jurisdiction that other evidence suggests Congress did not intend. First, it permits a clever drafter to demand the very relief in district court the Court insists it cannot give: a determination of the existence or validity of a contract. There is a perhaps too-fine of a distinction between a complaint that alleges violation of a contract that all parties will stipulate governs the case, and complaints that allege violations of contracts the plaintiff hopes the court will dismiss on the merits in order to establish that the contract is invalid, or that the plaintiff hopes will provoke a ruling that what might have been the governing contract is invalid.²¹

federal cause of action, we ask only whether – on its face – the complaint is drawn so as to seek recovery under federal law or the Constitution. If so, then we assume or find a sufficient basis for jurisdiction, and reserve further scrutiny for an inquiry on the merits"); *see also* *Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997) (stating that under the Tucker Act, just because there was no enforceable contract did not mean district court lacked jurisdiction); *Davoll v. Webb*, 194 F.3d 1116, 1129-30 (10th Cir. 1999) (stating that in an ADA claim, "as [plaintiffs] wrote their complaint to allege a federal cause of action, we have subject matter jurisdiction unless their allegations are immaterial or insubstantial").

18. *Steel Co.*, 523 U.S. at 99.

19. *See generally* 28 U.S.C. § 1367(a) (1990) (defining the state claims over which federal courts have supplemental jurisdiction as those that "form part of the same case or controversy" as the federal claim that is the basis for the court's original jurisdiction), and § 1367(c) (1990) (noting that a federal court with supplemental jurisdiction of a state claim may decline to exercise that jurisdiction if "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction"); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (defining the concept that federal courts having federal question jurisdiction of the original claim have supplemental jurisdiction of state claims that "arise out of a common nucleus of operative fact").

20. *Cf. Bell*, 327 U.S. at 682-83.

21. *Gibbs*, 383 U.S. at 726-27 (stating that the federal courts have discretion not to exercise pendent jurisdiction if the state claims substantially predominate over federal

This strategy would make an end run around Congress' intention that the National Labor Relations Board provide the exclusive forum for contract validity suits.²² In fact, Section 301 carves out only a narrow role for district courts in labor disputes²³ and does not itself interfere with the Board's concurrent jurisdiction where a plaintiff also has access to a federal court.²⁴ Section 301's circumscribed role in labor disputes does admit of the possibility that Congress intended Section 301 plaintiffs to satisfy different pleading and proof requirements before proceeding to merits issues in federal court.²⁵

The second clever pleading strategy *Textron's* dictum undermines *Textron's* actual holding by reading the "affirmative defense" concept broadly. A well-pleaded complaint under Section 301 and *Textron* does not appear to require mention of that the contract sued upon has been facially superseded by another contract. The defendant would respond that the contract forming the basis of the complaint was invalid, in some cases adding that the superseding contract had settled all claims arising from the invalid prior contract.²⁶ The plaintiff would then defend on the basis that the superseding contract had been procured by fraud, thereby squeezing into federal court what is really a claim for fraudulent inducement, the one cause of action *Textron* seemed to be holding specifically was *not* cognizable under Section 301.²⁷ This superficially

claims); *cf.* *Gonzales v. Raich*, 545 U.S. 1, 46 (2005) (O'Connor, J.) (interpreting the majority opinion to reduce the decision in *United States v. Lopez* to "nothing more than a drafting guide").

22. See 5 N. PETER LAREAU, NATIONAL LABOR RELATIONS ACT: LAW AND PRACTICE § 36.01[1] (2d ed. 2007); *cf.* *UFCW Local 1564 v. Albertson's, Inc.*, 207 F.3d 1193 (10th Cir. 2000).

23. *Vaca v. Sipes*, 386 U.S. 171, 179 (1966).

24. LAREAU, *supra* note 22, § 41.02[4].

25. Section 301 does not arise from the same Congressional intent to provide a federal forum for federal statutory rights of action; Section 301's purpose is to make a judicial forum available for what are essentially common law causes of action. *Cf.* *Arbaugh*, 546 U.S. at 505-06.

26. Federal Rule of Civil Procedure 8(c)(1) is not exclusive, but "release" is actually mentioned.

27. See *Textron*, 523 U.S. at 654. This was also well established law in the circuit courts when the Court decided *Textron*. See, e.g., *Parker v. Connor's Steel, Co.*, 855 F.2d 1510, 1518 (11th Cir. 1988); *Kolentus v. Avco Corp.*, 798 F.2d 949, 960 (7th Cir. 1986); *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1287, 1287 (6th Cir. 1986). The difference between *Textron* and a superseding contract case is that plaintiffs did not allege a superseded contract was being breached. *Id.* But almost all effective collective bargaining agreements supersede another. So if a superseded and superseding contract would create inconsistent obligations, the argument arises that the superseded contract is being breached if the superseding contract does not exist. See *supra* notes 8-11 and accompanying text.

unsatisfactory result implies that *Textron* is little more than a complaint drafting guide.²⁸

Despite *Textron*'s apparently unintended consequences for Section 301 jurisdiction, courts do usually measure the extent of federal subject matter jurisdiction with a formalistic stick. For example, an action may arise *from* what is functionally a dispute over the interpretation or application of federal law,²⁹ but if the dispute's federal character is apparent only from a defendant's answer³⁰ or serves merely to decide the fate of a state law cause of action,³¹ the doors of the federal district court

28. The analogy to seminal Commerce Clause cases is apt because they measure the propriety of an exercise of Congressional regulatory power in part on the existence and sufficiency of a "jurisdictional element" that defines and limits Congress' permissible exercise of that while Section 301 defines and limits the federal courts' permissible exercise of federal judicial power. Cf. *United States v. Lopez*, 514 U.S. 549, 561 (1995). A jurisdictional element recognizing the extent of Congressional power is "a fact included in a statute that must be pled and proven by the plaintiff in each case, serving as a nexus between a particular piece of legislation and Congress' constitutional power to enact that legislation and regulate the conduct at issue." Howard M. Wasserman, *Jurisdiction and Merits*, WASH. L. REV. 643, 679 (2005). The federal criminal statute at issue in *Lopez* lacked a requirement that a prosecutor plead and prove that the conduct alleged was within Congress' power to render that conduct a crime that Congress had the power to define pursuant to the Commerce Clause. *Lopez*, 514 U.S. at 562. "Jurisdictional element" means something slightly different in the context of federal statutes allocating the federal judicial power, but the analogy remains apt. Article III grants Congress the power to define how much of the judicial power of the United States federal courts may exercise. U.S. CONST. art. III, sec. 1 ("[T]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as Congress may from time to time establish."); U.S. CONST. art. III, sec. 2, cl. 2 ("In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."). See also *Webster v. Doe*, 486 U.S. 592, 611 (1988). Congress defines the extent of federal jurisdiction via its general statutory grants in 28 U.S.C. §§ 1331 and 1332 and more specialized provisions, such as Section 301. Those provisions necessarily include factual and legal "elements" that a plaintiff must plead and establish by some standard of proof to gain access to a federal forum. See, e.g., *A.F.A. Tours, Inc. v. Whitchurch*, 937 F.2d 82 (1991) (stating that for purposes of diversity jurisdiction, the plaintiff must be able to show if questioned that the amount in controversy allegation is in "good faith" and dismissal is only appropriate when "it appears to a legal certainty that the claim is really for less than the jurisdictional amount") (quoting *St. Paul Mercury Indemnity Co v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938)); but see note 19 and accompanying text. Just as Congress may also only act within the limits of the regulatory power the Constitution defines, federal courts may only act within the limits of the portion of the federal judicial power Congress grants.

29. Cf. 28 U.S.C. § 1331 (1980) (granting district courts jurisdiction of "all civil actions arising under" federal law) (emphasis added).

30. See generally *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908).

31. See generally *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986).

will remain closed. Those same doors may open if a federal proposition deemed sufficiently important lurks in the landscape of the case, whether likely to take on a starring role or not.³² Even more relevant to the appropriate analysis of a purely statutory definition of federal question jurisdiction is the purely statutory test to establish the amount in controversy requirement for diversity jurisdiction:³³ that the plaintiff has alleged in "good faith" that more than \$75,000 is at stake and provide a sufficient evidentiary basis if challenged to forestall a conclusion "to a legal certainty" that the opposite is true.³⁴

Into this dense jurisprudential thicket grew *Burklow v. Baskin-Robbins*,³⁵ where the plaintiffs relied on the *Textron*'s affirmative defensive pleading strategy to establish Section 301 jurisdiction.³⁶ Plaintiffs, former union employees of a Baskin-Robbins plant in Owensboro, Kentucky, sued Baskin-Robbins for breach of a collective bargaining agreement. Baskin-Robbins claimed a plant closing agreement had superseded the collective bargaining agreement, and the plaintiffs responded that Baskin-Robbins had procured the plant closing agreement by fraud.³⁷ Following established Sixth Circuit precedent, the Western District of Kentucky held that it lacked subject-matter jurisdiction to decide the validity of either agreement.³⁸

The "*Burklow* problem"³⁹ is whether *Textron*'s dictum permits a district court to exercise jurisdiction over a suit for breach of a facially

32. This is the concept of protective jurisdiction relevant to labor cases. See generally *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 471 (Frankfurter, J., dissenting).

33. Compare 28 U.S.C. § 1332(a) (2005) (including amount in controversy requirement for diversity jurisdiction), with U.S. CONST. art III, § 1, cl. 1 ("The judicial Power shall extend to all Cases . . . between Citizens of different States."), and therefore analogous to Section 301, which may be interpreted as a limitation on the district courts' federal question jurisdiction in favor of the National Labor Relations Board.

34. See, e.g., *A.F.A. Tours, Inc. v. Whitchurch*, 937 F.2d 82 (1991) (stating that for purposes of diversity jurisdiction, the plaintiff must be able to show if questioned that the amount in controversy allegation is in "good faith" and dismissal is only appropriate when "it appears to a legal certainty that the claim is really for less than the jurisdictional amount") (quoting *St. Paul Mercury Indemnity, Co. v. Red Cab, Co.*, 303 U.S. 283, 288-89 (1938))).

35. 274 F. Supp. 2d 899 (W.D. Ky. 2003).

36. *Id.* at 905 n.1.

37. *Id.* at 902.

38. *Id.* at 904-05. The Sixth Circuit affirmed in *Burklow v. Baskin-Robbins USA, Co.*, 2005 U.S. App. LEXIS 29493, at *5 (6th Cir. 2005), based on precedent handed down only a few months prior to oral argument in *Burklow* (citing *Bauer v. RBX Industries, Inc.*, 368 F.3d 569 (6th Cir. 2004)).

39. We have coined the phrase, "the *Burklow* problem" to refer to whether Section 301 extends federal question jurisdiction to cases alleging breach of a contract superseding on the face of a subsequent contract.

superseded contract alleged to have been procured by fraud.⁴⁰ This article will conclude that it does.⁴¹ Admittedly, *Textron* is susceptible to the criticism that it is little more than a complaint "drafting guide."⁴² Section 301's narrow position in the broader landscape of labor dispute resolution also counsels against a mechanistic analysis of whether Congress intended to make the actual existence of a breachable contract a jurisdictional fact.⁴³ Nevertheless, courts construe "contract" liberally to effectuate Congressional intent to emphasize the importance of collective bargaining agreements by allowing federal courts to enforce them, but this implies that Section 301 should not be read to require a higher standard of pleading and proof to establish jurisdiction.⁴⁴ A claim for breach of a contract of disputed validity also remains a breach of contract claim:⁴⁵ federal courts take jurisdiction of claims for breach under analogous statutes even where the relevant contract is unenforceable on its face, making the allegation of breach and not the existence of the contract the crucial jurisdictional hook.⁴⁶ Moreover, such a claim is not necessarily frivolous or asserted for the sole purpose of obtaining access to a federal forum.⁴⁷ The plaintiff may be very happy to avoid National Labor Relations Board jurisdiction, but the Supreme Court has not ruled on the merits of a superseding contract case, and recent superficially reasoned lower court cases have cast doubt on what

40. *Burklow*, 274 F. Supp. 2d at 902.

41. *See infra* Part V.

42. *See, e.g., Gonzales*, 545 U.S. at 46 (opinion of O'Connor, J.) (interpreting the majority opinion to reduce the decision in *United States v. Lopez* to "nothing more than a drafting guide").

43. *E.g., Winnett*, 553 F.3d at 1007 (holding that "the existence of a union contract is an element of Plaintiffs' merits claim, not a limit on federal subject-matter jurisdiction," relying on a superficial application of *Arbaugh*, 546 U.S. at 515-16 (2006)).

44. *See* LAREAU, *supra* note 22, at §§ 41.01-.02.

45. *Kozera v. Westchester-Fairfield Chapter of Nat'l Elec. Contractors Assoc., Inc.*, 909 F.2d 48, 52 (2d Cir. 1990) (stating that "[i]t is axiomatic, however, that to determine whether a breach of agreement has occurred, a court must necessarily determine whether a valid agreement exists in the first place"). *Id.* *Steel Co.* explains that, "the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Steel Co.*, 523 U.S. at 89 (quoting *Bell*, 327 U.S. at 685)).

46. *See, e.g., Total Medical Mgmt., Inc. v. United States*, 104 F.3d 1314, 1319-21 (Fed. Cir. 1997) (Tucker Act).

47. *Cf. Avco v. Aero Lodge No. 735, Int'l Assoc. of Machinists and Aerospace Workers*, 390 U.S. 557, 561 (1983) (distinguishing remedies available from jurisdictional inquiry); *Bell*, 327 U.S. at 683 (stating that "[t]he accuracy of calling [dismissals for frivolity] jurisdictional has been questioned"); *see also infra* notes 77-84 and accompanying text.

had been almost uniform appellate court condemnation of their viability.⁴⁸ The key question is whether “the plaintiff was not really relying upon [§ 301] for his alleged rights.”⁴⁹ Section 301 superseding contract cases do rely on federal law.⁵⁰

The federal circuit court of appeals analysis of the Tucker Act’s breadth confirms both that Section 301 extends district court jurisdiction to superseding contract cases and that a plaintiff establishes jurisdiction with a complaint making formalistic allegations that seek recovery under federal law. In fact, at approximately the same time that federal courts started grappling with *Textron* and *Steel Co.*, the federal circuit court of appeals was clarifying the proper application of the Tucker Act,⁵¹ which grants to the court of federal claims jurisdiction over breach of contract actions against the federal government.⁵² As in Section 301 cases, existence and validity of a contract have a dual character as “jurisdictional facts” and threshold elements of the cause of action.⁵³ Unlike Section 301 cases, the federal circuit’s rule is that it has jurisdiction over cases pleading a valid contract; if a valid contract ultimately does not exist, the court of federal claims dismisses on the merits.⁵⁴ The court of federal claims does not disavow jurisdiction in superseding contract cases,⁵⁵ and it takes jurisdiction to decide existence

48. See generally *supra* note 27 and accompanying text.

49. *Nowak*, 81 F.3d at 1188 (quoting *Fair v. Kohler Die and Specialty Co.*, 228 U.S. 22, 25 (1913)). Section 301 cases raising “the *Burklow* problem” certainly are relying on federal law, even if the law on which they rely is of doubtful validity.

50. E.g., *Bauer*, 368 F.3d at 569; *Taylor v. Siemens VDO Auto. Corp.*, 157 Fed. Appx. 557 (4th Cir. 2005).

51. E.g., *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 686-88 (Fed. Cir. 1992). One might be forgiven for indicting *Spruill* for plagiarizing *Steel Co.*, except that *Spruill* came down five years earlier.

52. 28 U.S.C. § 1491(a)(1) (2008). Relevant portions of the Act state:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id.

53. Compare *Rabine*, 161 F.3d 430 (showing that in LMRA case “the absence of a ‘statutory employer’ does not deprive this court of jurisdiction to hear a claim to enforce an arbitral award”), with *Total Medical Mgmt.*, 104 F.3d at 1318 (quoting, in Tucker Act case, with approval court of claims opinion in the case that “defendant, while implicitly acknowledging that plaintiff has alleged a contract, challenges the contract’s existence. This is a challenge to the truth of the allegations, not to their sufficiency . . . [S]uch a challenge is a merits question.”). *Id.*

54. *Id.* at 1319.

55. *Asset 42302, LLC v. United States*, 77 Fed. Cl. 552 (2007) (taking jurisdiction summarily in case where obligation of parties under lease agreement and later settlement

and validity of contracts that on their face show they were procured in violation of other law.⁵⁶ The Federal Circuit's application of the Tucker Act's grant of jurisdiction in disputed contract cases is a model for the application of *Textron* and *Steel Co.* to Section 301 cases.⁵⁷

The proper analysis for determining jurisdiction in superseding contract cases under Section 301 matters not only for labor litigation, but also because it helps define the outer boundaries of federal question jurisdiction. Absent discernable boundaries, judicial federalism and separation of powers—structural guarantors of liberty⁵⁸—are dead letters.⁵⁹ Part II of this Article will describe the vagaries of Section 301 jurisdiction prior to *Textron*.⁶⁰ Part III will describe “the *Burklow* problem” with the backdrop of *Textron* and subsequent cases.⁶¹ Part IV will show how the Tucker Act should guide jurisdictional analysis in a “*Burklow* problem” case.⁶² The Article will conclude that the district courts should consult the reasoning from the federal circuit's jurisdiction decisions in Tucker Act cases to confirm the proper application of the well-pleaded complaint rule in Section 301 cases.⁶³

agreement disputed unclear in light of subsequent settlement agreement); *Zoubi v. United States*, 25 Ct. Cl. 581, 585-88 (1992) (determining that subsequent agreements existed but did not supersede prior agreements).

56. *E.g.*, *Total Medical Mgmt.*, 104 F.3d at 1320.

57. *See infra* Part IV. The Tucker Act waives sovereign immunity and provides Court of Claims jurisdiction for lawsuits against the federal government based on breach of contract theories. *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005). Therefore, validity issues are also relevant in Tucker Act cases. *Total Medical Mgmt.*, 104 F.3d at 1319-20 (Fed. Cir. 1997) (reasoning that a valid contract must only be pleaded and not proved, court determines whether pleaded contract is void). Though NLRB jurisdiction over unfair labor practices can cloud jurisdictional analysis in Section 301 cases in ways no equivalent concern does so in Tucker Act cases, in true section 301 breach of contract cases, the district court will at least have concurrent jurisdiction with the NLRB. *See infra* notes 117-121 and accompanying text.

58. *See Lopez*, 514 U.S. at 575-76 (Kennedy, J., concurring).

59. *See, e.g.*, *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-74 (1950).

60. *See infra* Part II.

61. *See infra* Part III.

62. *See infra* Part IV.

63. *See infra* Part V.

II. FEDERAL QUESTION JURISDICTION AND SECTION 301

A. *The Well-Pleaded Complaint Rule and Steel Co. v. Citizens for a Better Environment*

Federal subject matter jurisdiction implicates both an individual's right to be heard in federal court,⁶⁴ and the federal courts' power to declare the law.⁶⁵ Federal courts have limited jurisdiction: only "the authority endowed by the Constitution and that conferred by Congress."⁶⁶ District courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States" pursuant to the catch-all statute 28 U.S.C. § 1331.⁶⁷ Congress has enacted other statutory grants of jurisdiction, such as Labor Management Relations Act (LMRA) Section 301.⁶⁸ Courts have generally held that subject matter jurisdiction is a threshold matter district courts must establish without exception.⁶⁹ Therefore, courts are obligated to raise the issue sua sponte, even if neither party does.⁷⁰

A district court has federal question jurisdiction based on either § 1331 or another statutory grant, unless "the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution."⁷¹ The plaintiff cannot satisfy this requirement, known as the "the well pleaded complaint rule," by anticipating another party's defense or via a defendant asserting a defense based on federal law.⁷² As Justice Holmes famously said, a claim arises under the law that creates

64. *Cohens v. Virginia*, 19 U.S. 264 (1821).

65. *Steel Co.*, 523 U.S. at 94.

66. *Save Bay, Inc. v. U.S. Army*, 639 F.2d 1100, 1102 (5th Cir. 1981); *see also* FED R. CIV. P. 12(h)(3).

67. 28 U.S.C. § 1331 (1980).

68. *E.g.*, 29 U.S.C. § 185(a) (1947). Though § 1331 makes many of statutes superfluous from a purely jurisdictional perspective, this was not so when Congress passed them. For example, when Congress enacted Title VII, § 1331 still contained an amount-in-controversy threshold. *See Arbaugh*, 546 U.S. at 500. Therefore, Title VII's jurisdictional statute, for example, served to confer federal question jurisdiction over citizens of the same state and without regard for the amount in controversy. *Id.* The Supreme Court has since explained that Title VII's provision has no independent jurisdictional significance from that of § 1331. *Id.*

69. *Steel Co.*, 523 U.S. 83 at 95 (citing *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

70. *Mansfield, C. & L. M. Ry. Co.*, 111 U.S. at 382.

71. *Mottley*, 211 U.S. at 152.

72. *Id.*

the cause of action,⁷³ and since the plaintiff is "master to decide what law he will rely upon," he has power to determine the forum.⁷⁴

Subject matter jurisdiction is a jurisprudential minefield. If a district court *does* have jurisdiction, a court upsets the separation and equilibrium of powers within the federal system by abrogating its "unflagging" duty to hear the case.⁷⁵ After all, Congress, not the courts, defines the scope of federal jurisdiction within constitutionally permissible grounds.⁷⁶ On the other hand, a court upsets the federal system no less if it hears a case when it *does not* have jurisdiction.⁷⁷ Nevertheless, there is a middle ground: the principle that courts have, at minimum "the power to make the coverage decision."⁷⁸

Complications determining jurisdiction arise when the elements of a cause of action and "jurisdictional facts" are not clearly differentiated in the relevant statute.⁷⁹ Courts certainly may have power to hear a case even if the plaintiff has not pled a valid cause of action.⁸⁰ In fact, the Supreme Court recently held in *Arbaugh v. Y & H. Corp.*, that courts should treat "a threshold limitation on a statute's scope" as non-jurisdictional unless Congress has "clearly stated" otherwise.⁸¹ Principled standards for distinguishing between jurisdictional facts and elements of the cause of action are elusive.⁸² Congress made the *Arbaugh* Court's

73. *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916); *see also* *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 12 (2003). Federal question jurisdiction also may exist when the plaintiff has pled a state law claim that involves a significant federal issue. *See Grable & Sons*, 545 U.S. at 312 (stating that "[t]his court having recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues"); *Franchise Tax Bd. v. Const. Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, at 27-28 (1983) (stating that "Congress has given the lower federal courts jurisdiction to hear . . . only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law").

74. *Fair*, 228 U.S. at 25.

75. *New Orleans Pub. Serv.*, 491 U.S. at 359.

76. U.S. CONST. art III, § 2; *see also* *Kline v. Burke Const. Co.*, 260 U.S. 226 (1922).

77. "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens*, 19 U.S. at 264.

78. *Rabine*, 161 F.3d at 431. This is the concept of a court's "jurisdiction to determine its own jurisdiction." *See* *United States v. United Mine Workers*, 330 U.S. 258, 282-84 (1947).

79. *See generally* Wasserman, *supra* note 28, at 662-78.

80. *Steel Co.* 523 U.S. at 89; *see also* *Bell*, 327 U.S. at 682.

81. *Arbaugh*, 546 U.S. at 515-16.

82. *See Nesbit*, 347 F.3d at 80 n.6 (quoting RESTATEMENT (SECOND) OF JUDGMENTS: SUBJECT MATTER JURISDICTION § 11 (1982)).

analysis much simpler by not even including the relevant limitation in the statute's provision conferring jurisdiction on the district courts.⁸³

Steel Co. anticipated *Arbaugh*'s reasoning for identifying some facts as jurisdictional versus merits-based, but it also grappled with a related but different statutory jurisdiction problem:⁸⁴ how to avoid confusing failure to state a claim and failure of jurisdiction when the allegations of the complaint are sufficiently weak as to call into question whether the plaintiff has actually pled a claim arising under federal law.⁸⁵ Citizens for a Better Environment sued Steel Co., a small manufacturer, for violating the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA).⁸⁶ Citizens claimed that Steel Co. failed to file certain environmental reports as required by federal law⁸⁷ and informed the Administrator of the EPA, Steel Co. and the State of Illinois sixty days prior to filing suit pursuant to statutory notice rules.⁸⁸ During the sixty-day window between Citizens' giving notice and filing suit, Steel Co. promptly filed the delinquent reports with the proper agencies.⁸⁹

When Citizens brought suit, Steel Co. filed a motion to dismiss both for lack of subject matter jurisdiction and failure to state a claim, because 42 USC § 11046(e) prohibits a citizen suit if "the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this Act with respect to the violation of the requirement."⁹⁰ Steel Co. argued that this language does not allow a citizen group to sue for historical violations, and because Steel Co. was compliant at the time the suit commenced, Citizens could no longer maintain their suit.⁹¹ The Supreme Court decided that Citizens lacked standing, because based on its alleged historic violations of EPCRA, "injunctive relief will not redress its injury."⁹²

83. *Arbaugh*, 546 U.S. at 515.

84. *Arbaugh* explicitly distinguishes between the two. *Id.* at 513 n.10.

85. *Steel Co.*, 523 U.S. at 89.

86. *Id.* at 96.

87. *Id.* at 87.

88. *Id.*

89. *Id.* at 88.

90. *Id.* at 132.

91. *Steel Co.*, 523 U.S. at 88.

92. *Id.* at 109-10. Reading *Steel Co.* presents analytical challenges, because Justice Scalia's majority opinion flits about among different types of "jurisdiction": pure federal question jurisdiction, statutory jurisdiction, Article III jurisdiction, hypothetical jurisdiction (itself hypothetical)—almost every flavor. See generally Jack H. Friedenthal, *The Crack in the Steel Case*, 68 GEO. WASH. L. REV. 258, 260-66 (2000).

Steel Co. holds that lower courts must establish their jurisdiction, in this case Article III jurisdiction, before dismissing based on the merits.⁹³ "One would have thought that that would have been the end of the matter," Professor Friedenthal grimly commented.⁹⁴ Instead, in a mutual demonstration of "shock and awe," a war of words broke out between Justice Scalia and Justice Stevens over whether the Court was required to decide the case based on a complicated jurisdictional issue that "created new constitutional law," or whether it could ignore that sticky problem and proceed to an easy merits issue.⁹⁵

Justice Stevens argued that to do the latter would honor the prudential principle that federal courts should avoid deciding unnecessary constitutional questions.⁹⁶ Whether the court decided the case on jurisdictional grounds or substantive grounds was of little moment to him:

[T]here is only a standing problem if the statute confers jurisdiction over suits for wholly past violations. The Court's opinion reflects this fact, as its analysis of the standing issue is predicated on the hypothesis that § 326 may be read to confer jurisdiction over citizen suits for wholly past violations. If, as I think it should, the Court were to reject that hypothesis and construe § 326, the standing discussion would be entirely unnecessary.⁹⁷

Jurisdictional versus substantive grounds were of tremendous moment to Justice Scalia. "Jurisdiction is the power to declare the law,"⁹⁸ he intoned; courts could not simply leap frog over jurisdictional issues and dismiss cases based on the merits before answering difficult jurisdictional questions. Without confirming their jurisdiction, courts could not even know if they had power to decide merits-based questions.⁹⁹

93. *Steel Co.* 523 U.S. at 101-02. A year later, the Supreme Court held in a unanimous decision that lower courts may dismiss a case for lack of personal jurisdiction before answering difficult subject matter jurisdiction questions. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999).

94. Friedenthal, *supra* note 92, at 260.

95. *See Steel Co.*, 523 U.S. at 112 (Stevens, J., concurring).

96. *Id.*

97. *Id.* at 123-24.

98. *Id.* at 94 (quoting *Ex parte McCordle*, 74 U.S. 506, 514 (1869)).

99. The Ninth Circuit referred to this practice as taking "hypothetical jurisdiction." *Steel Co.*, 523 U.S. at 93-94.

Justice Scalia laid down the law that has survived from the case. A district court has subject matter jurisdiction of a case based on the plaintiff's well-pleaded complaint, and "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, that is, the courts' statutory or constitutional *power* to adjudicate the case."¹⁰⁰ He then amalgamated prior case law into a clear, two-prong test. First, "district court[s] [have] jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,'"¹⁰¹ and second, plaintiff would fail to satisfy the rule with a claim that is "immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."¹⁰²

Justice Scalia's broad, clear synthesis of a substantial portion of weight of authority provided a foundation to separate intertwined statutory jurisdictional facts and elements of the cause of action. The standard of proof as to jurisdiction would not be high. The district court would look to the complaint to determine if the plaintiff intended to claim a right to recover under federal law.¹⁰³ If so, and the claim was not otherwise frivolous on its face, the district court had jurisdiction.¹⁰⁴ The emphasis was on the first test. Though *Steel Co.* itself did not say so, a prior case *Steel Co.* repeatedly cited with approval had noted sternly that "[t]he accuracy of calling [frivolous] these dismissals jurisdictional has been questioned."¹⁰⁵

Once a plaintiff gets her ticket into federal court, her responsibility to prove her substantive case would not change. Showing you *intended* to plead a federal case for purposes of Rule 12(b)(1) is easier than the burden of showing you *actually did* plead one as required under Rule 12(b)(6).¹⁰⁶ What lawyers and judges normally call "meritless cases"

100. *Id.* at 89.

101. *Id.* (quoting *Bell*, 327 U.S. at 682-83).

102. *Id.* (quoting *Bell*, 327 U.S. at 682-83); see also *Nowak*, 81 F.3d at 1188; *Fair*, 228 U.S. at 25; *AVC Nederland B.V. v. Atrium Inv. P'ship.*, 740 F.2d 148, 152-53 (2d Cir. 1984).

103. See *Bell*, 327 U.S. at 681. In referring to actions brought under a particular statute, Justice Scalia argued that plaintiffs would satisfy the standard with "suits *contending*" that certain facts necessary to state a claim are true. *Steel Co.*, 523 U.S. at 93.

104. See *Nowak*, 81 F.3d at 1190.

105. *Bell*, 327 U.S. at 683 (citing *Fair*, 228 U.S. at 25). Most are merit-based; the claim is simply so poor, it is "frivolous."

106. "[A]llegations far less specific than the ones in the complaint before us have been held adequate to show that the matter in controversy arose under the Constitution of the United States . . . The reason for this is that the court must assume jurisdiction to decide

would be dismissed as they always had, but for failure to state a claim and not for lack of jurisdiction.

Rigorous application of the *Steel Co.* framework eliminates evils inherent in a blurred division between jurisdiction and merits. First, because dismissal based on failure of jurisdiction has no preclusive effect,¹⁰⁷ it provides both plaintiffs and future courts a clear decision as to plaintiffs' rights to pursue both their alleged federal claims¹⁰⁸ and any supplemental state claims in a different forum.¹⁰⁹ Second, clear differentiation between dismissal for lack of jurisdiction versus failure to state a claim minimizes the chance of stretching what may already be a questionable basis for original jurisdiction into a vehicle for gathering supplemental state claims into federal court.¹¹⁰ This is the underlying purpose of the "frivolity" exception.¹¹¹ Moreover, a higher burden on plaintiffs risks turning every element of the claim into a jurisdictional question, with the unappetizing prospect that courts would be required to raise them *sua sponte*!¹¹² "Congress of course did not create such a strange scheme,"¹¹³ Justice Scalia concluded.

B. The Labor-Management Relations Act and the Role of the District Courts

The LMRA¹¹⁴ amended the National Labor Relations Act (NLRA)¹¹⁵ in the mid-twentieth century. The former created statutory rights to organize unions, bargain collectively, and engage in strikes, and it also created the National Labor Relations Board (NLRB) and vested it with exclusive jurisdiction to protect employees from unfair labor practices.¹¹⁶

whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy." *Bell*, 327 U.S. at 682.

107. See FED. R. CIV. P. 41(b).

108. *Nowak*, 81 F.3d at 1188.

109. If a federal court lacks subject matter jurisdiction over the claim ostensibly within its original jurisdiction, all of the court's actions are void, including its adjudication of supplemental state claims. See *Arbaugh*, 546 U.S. at 514; *Da Silva v. Kinsho Intern. Corp.*, 229 F.3d 358, 365 (2d Cir. 2000).

110. Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1012-13 (2006).

111. *Id.*

112. *Steel Co.*, 523 U.S. at 92-93; see also *Arbaugh*, 546 U.S. at 514.

113. *Steel Co.*, 523 U.S. at 93.

114. Now codified at 29 U.S.C. §§ 141-144, 167, 172-187. The LMRA is also known as the "Taft-Hartley Act."

115. 29 U.S.C. § 151 (1947).

116. 2 AMERICAN BAR ASSOCIATION, SECTION OF LABOR & EMPLOYMENT LAW, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 28-29 (5th ed. 2006) [hereinafter DEVELOPING LABOR LAW].

Under the LMRA, the NLRB retained its primary jurisdiction as the day-to-day administrator of "matters of national labor policy,"¹¹⁷ but Congress "carved out" an exception to the NLRB's exclusive jurisdiction,¹¹⁸ Section 301, giving jurisdiction over breach of labor contracts to district courts:

Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.¹¹⁹

The provision reflected "[t]he strong policy favoring judicial enforcement of collective-bargaining contracts," even if "the conduct involved was arguably or would amount to an unfair labor practice within the jurisdiction of the National Labor Relations Board."¹²⁰ In such cases, the NLRB and the district courts enjoy concurrent jurisdiction.¹²¹ Therefore, Section 301 is more an exception to the NLRB's jurisdiction as it is an affirmative grant of jurisdiction to district courts.

Soon afterwards, the Supreme Court held that federal courts should create federal common law to govern breach of labor contract cases, based primarily on policies revealed in labor statutes and their

117. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1958). Disputes arising from these activities, such as representation, a party's status as an employee, or union governance are those most appropriately entrusted to the NLRB as the day-to-day administrator of the Act. *Mack Trucks*, 856 F.2d at 584. Therefore, though *Garmon* holds that the NLRA preempts both state substantive regulation and state court action where they conflict with federal law within the central aim of federal regulation, *Garmon* is a doctrine less about law than it is about protecting the NLRB's exclusive jurisdiction. *Vaca v. Sipes*, 386 U.S. 171, 179 (1966); *Mack Trucks*, 856 F.2d at 585.

118. *Vaca*, 386 U.S. at 179.

119. 29 U.S.C. § 185(a) (1947).

120. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976); accord *Smith v. Evening News Ass'n.*, 371 U.S. 195, 197 (1962).

121. *Smith*, 371 U.S. at 197; *Textile Workers of Am. v. Lincoln Mills*, 353 U.S. 448, 452 n.3 (1957). "Indeed, the NLRB has declined to exercise its concurrent jurisdiction over unfair labor practice questions when federal labor policy would best be served by judicial treatment." *Mack Trucks*, 856 F.2d at 586 (citing *Smith*, 371 U.S. at 198 n.6); see also *William E. Arnold Co. v. Carpenters Local 25*, 417 U.S. 12, 18 (1974) (referring to the Board's "practice and policy" of declining jurisdiction when an unfair labor practice was also a contract violation in order to vindicate Congress' intention that courts should protect contractual rights).

"penumbra of express statutory mandates"¹²² to facilitate Congress' intent to create a uniform, national labor law.¹²³ As an independent source of law, Section 301 has independent substantive significance that many "statutory jurisdiction" provisions lack.¹²⁴ Absorbing state contract law into federal substantive law pursuant to Section 301 also means that if deciding a plaintiff's state claim would require interpreting a collective bargaining agreement, Section 301 "completely preempts" the state claim and federal law applies to the dispute.¹²⁵

C. Jurisprudence Gone Wrong: The Well-Pleaded Section 301 Complaint

Three theories of Section 301's breadth emerged pre-*Textron*. The first concluded that courts had jurisdiction to determine the validity of a contract ancillary to determining if breach had occurred.¹²⁶ The second held that courts had jurisdiction to decide the validity of a contract even where it was the ultimate issue in the case.¹²⁷ The third denied that courts had jurisdiction to determine validity of a contract for any purpose.¹²⁸ Virtually all superseding contract cases fell into this third category.

122. *Lincoln Mills*, 353 U.S. at 456-57. In this sense, the Supreme Court has held that Section 301 has "substantive content." *Smith*, 371 U.S. at 199. State law, also, could inform federal labor law "if compatible with the purpose of § 301," but "[a]ny state law applied . . . will be absorbed as federal law and will not be an independent source of private rights." *Lincoln Mills*, 353 U.S. at 457.

123. *See Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

124. Section 301 is not the same, however. While it does include language indicating that jurisdiction exists without regard to the amount in controversy, its status as a carve out from the NLRB's exclusive jurisdiction does provide it with independent significance. A plaintiff may not simply bring a labor related claim in federal court under § 1331. *See, e.g., United Food & Com. Workers Union v. Albertson's*, 207 F.3d 1193, 1196 (10th Cir. 2000) (referring to the "dubious 'federal common law of contract'").

125. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). Complete preemption is an "'independent corollary' to the well-pleaded complaint rule," creating federal question jurisdiction under Section 301. *See Avco Corporation*, 390 U.S. at 560; *Cisneros*, 217 F.3d at 1304. In complete preemption cases, federal law governs and federal courts have jurisdiction of even a state claim for injunctive relief in a labor dispute if it "comes within the scope of" Section 301. *See Franchise Tax Bd.*, 463 U.S. at 23-24 (1983) (discussing *Avco Corp.*, 390 U.S. 557).

126. *E.g., Kozera*, 909 F.2d at 52.

127. *E.g., Mack Trucks*, 856 F.2d at 587-88.

128. *E.g., Adcox v. Teledyne*, 21 F.3d 1381, 1385-86 (6th Cir. 1994) *overruled in part by Winnett*, 553 F.3d 1000.

1. Category One: Courts Have Jurisdiction to Decide Validity as an Element of a Cause of Action or to Determine Their Own Jurisdiction

Many pre-*Textron* cases held that district courts had jurisdiction under Section 301 to determine the existence or validity of labor contracts ancillary to their power to hear actions for breach of contract. The Second Circuit's was the typical view:

It is axiomatic . . . that to determine whether a breach of agreement has occurred, a court must necessarily determine whether a valid agreement exists in the first place. Ancillary to determining the merits of an action for breach of a collective bargaining agreement, therefore, is the power to declare a purported agreement either invalid or binding.¹²⁹

Therefore, plaintiffs faced no risk that a district court would have Section 301 jurisdiction over their claim only if the defendant agreed a contract existed.¹³⁰

2. Category Two: Courts Have Jurisdiction to Decide Cases Where Validity is the Ultimate Issue

During the pre-*Textron* era, several circuits interpreted Congress' intent to underscore the heightened responsibilities that formal collective bargaining agreements create in order to "promot[e] industrial peace"

129. *Kozera*, 909 F.2d at 52; see also *McNally Pittsburg, Inc. v. Int'l. Assoc. of Bridge, Structural & Ornamental Iron Workers, AFL-CIO*, 812 F.2d 615, 620 (10th Cir. 1987) (stating that "[a]n obvious prerequisite to finding that a litigant has breached a promise to arbitrate is ascertaining whether a promise was given or a contract was made").

130. *Mack Trucks*, 856 F.2d at 588. The same analysis applied in more specialized fact sets. *Mogge v. District No. 8*, 387 F.2d 880, 882 (7th Cir. 1967) (stating that "[i]f the plaintiff alleges a violation of a collective bargaining agreement and the defendant's defense is that the agreement is not valid," Section 301 conferred jurisdiction); *Sheet Metal Workers Int'l. Assoc., Local Union No. 150 v. Air Sys. Eng'g, Inc.*, 948 F.2d 1089, 1091-92 (9th Cir. 1991) (holding that there was no subject matter jurisdiction to compel arbitration after finding no agreement to arbitrate ever existed); *Bd. of Trustees, Container Mechanics Welfare/Pension Fund v. Universal Enter., Inc.*, 751 F.2d 1177, 1184 (11th Cir. 1985) (citing *United Steelworkers of Am. v. Rome Indus. Inc.*, 437 F.2d 881, 882 (5th Cir. 1970)) (stating that "where a question of [bargaining] unit determination is not presented, a court may properly ascertain who is bound by a particular collective bargaining agreement . . .").

and "develop uniform law,"¹³¹ to allow jurisdiction under Section 301 to determine contract validity questions even where validity is the ultimate issue in the case.¹³² A leading "validity case," *Mack Trucks, Inc.*,¹³³ concerned the validity of a plant closing agreement never memorialized in writing, because before the parties could agree on specifics, the UAW concluded that Mack Trucks was implementing modifications to the agreement.¹³⁴ Mack Trucks filed suit asking the district court to declare a new collective bargaining agreement valid and enforceable.¹³⁵

Mack Trucks stretched Section 301's plain language to find jurisdiction over the existence of a labor contract. The Third Circuit substituted "enforcement action" and "cases involving breach" for "suits for violations of contracts"; and "disputes" for "violation."¹³⁶ A "dispute over an agreement's existence"¹³⁷ could mean anything. All of a sudden Section 301 was dramatically broader.

Mack Trucks did not need to hold that district courts had jurisdiction to hear all validity claims, however, because the Third Circuit found that both *Mack Trucks* litigants made allegations of breach.¹³⁸ Instead, it held: "[T]he district court had jurisdiction to consider this action, *together with the underlying issue of the existence of a collective bargaining agreement*."¹³⁹

Equally inconvenient subtleties marred the Seventh Circuit's *International Brotherhood of Electrical Workers, Local 481 v. Sign-*

131. *McNally*, 812 F.2d at 618; *Painting & Decorating Contractors Assoc. v. Painters & Decorators Joint Committee, Inc.*, 717 F.2d 1293, 1295 (9th Cir. 1983).

132. *E.g.*, *Rozay's Transfer v. Local Freight Drivers, Local 208, Int'l. Bhd. of Teamsters*, 850 F.2d 1321, 1326 (9th Cir. 1988) (determining as the ultimate issue); *McNally Pittsburg, Inc.* 812 F.2d at 617-19 (holding that action for declaration that unions have no enforceable rights from employer inadvertently signing agreement where employer does not intend to honor the agreement and unions have not acted in reliance confers jurisdiction on federal court).

133. *Mack Trucks, Inc.*, 856 F.2d 579.

134. *Id.* at 582-83.

135. *Id.* at 583.

136. *Id.* at 589. *Cf.* 29 U.S.C. § 185(a) (substituting "suits for violations") (emphasis added).

137. *Mack Trucks*, 856 F.2d at 589.

138. *Mack Trucks*, declaratory judgment plaintiff, pled that the UAW had attempted to repudiate the new agreement, and the district court had found a breach by repudiation. *Id.* The Union, as declaratory judgment defendant, took the position only a few days before *Mack Trucks* filed suit that "[t]here is not now, nor has there ever been, any agreement with the UAW-Mack Trucks Department to allow you to deviate from the terms and conditions of the October, 1984 to October 20, 1987 [Agreements]," the equivalent of alleging the unexecuted agreement had never taken effect and therefore, *Mack Trucks* was acting in breach of a prior agreement. *Mack Trucks*, 856 F.2d at 583-84.

139. *Id.* at 581(emphasis added).

*Craft, Inc.*¹⁴⁰ *Sign-Craft* overturned *NDK Corp. v. Local 1550 of the United Food and Commercial Workers International Union*,¹⁴¹ a case applying a vintage *Textron* plain language analysis to decide that a district court did not have Section 301 jurisdiction over a case seeking only a determination of a contract's validity.¹⁴² Like *Mack Trucks*, *Sign-Craft* interpreted Section 301 more broadly than necessary. Employer, *Sign-Craft*, had announced it was ceasing operations in the Indianapolis area and repudiating a multi-employer collective bargaining agreement with Local 481.¹⁴³ The Union pled breach of contract—"the Union alleges in its complaint that *Sign-Craft* has consistently ignored the terms of the agreement"—but its complaint focused on claims for declaratory and injunctive relief related to the validity of the contract.¹⁴⁴ The district court characterized the complaint as one where "the request for damages was incidental to the question of validity."¹⁴⁵

The *Sign-Craft* court recognized that characterization was one of *NDK*'s weaknesses:

It rests too heavily on the mere labeling of complaint as asserting either a violation of the contract or questioning its validity. In many cases, such as the one before us, either label could easily apply. These fine-line distinctions fail to give adequate guidance to the district courts on an issue as important as subject matter jurisdiction.¹⁴⁶

But like *Mack Trucks*, *Sign-Craft* swung radically in the other direction; it held that "any disputes about the meaning or validity of collective bargaining agreements come within the jurisdiction of the federal courts."¹⁴⁷

Sign-Craft's concern about characterization was apt, but its solution was not. According to the *Sign-Craft* court, *NDK* got bogged down in the difference between validity as a "threshold matter" and validity as the

140. 864 F.2d 499 (7th Cir. 1988).

141. 709 F.2d 491 (7th Cir. 1983), *overruled by* Int'l. Bhd. of Elec. Workers, Local 481 v. *Sign-Craft, Inc.*, 864 F.2d 499 (7th Cir. 1988). *Textron* would ultimately make the same holding.

142. *Sign-Craft*, 864 F.2d at 493.

143. *Id.* at 500.

144. *Id.* at 501. The Seventh Circuit's opinion does not state the precise content of the allegations in the complaint.

145. *Id.* Therefore, the Union must have pled breach of contract.

146. *Id.* at 502.

147. *Id.* (emphasis added). Again "any" and "disputes" are notably distinct from "suits for violation of contracts."

"ultimate issue." To the *Sign-Craft* court, validity as a "threshold matter" meant validity as an element of the cause of action for breach.¹⁴⁸ Validity as the ultimate issue meant a suit "to determine whether a particular document is a valid contract."¹⁴⁹ The Seventh Circuit worried that labeling put courts at risk of mangling application of the well-pleaded complaint rule by considering a defendants' defenses of invalidity in deciding whether they have jurisdiction under Section 301(a).¹⁵⁰ Therefore, *Sign-Craft* urged use of the rule, but only in the context of doubting district courts could properly apply it.¹⁵¹

3. Category Three: Courts Had No Jurisdiction to Determine the Validity of a Contract for Any Purpose.

The First,¹⁵² Fourth,¹⁵³ and Sixth¹⁵⁴ Circuits swung to the other extreme. With varying degrees of fervor, all three took the position that a court lacked jurisdiction to determine the validity of a contract. As a result, they sometimes could not even decide whether a party had breached a contract unless both parties agreed a contract existed.¹⁵⁵ Sometimes they also lacked jurisdiction even to determine their own

148. *NDK*, 709 F.2d at 493; see also *Rome Indus.*, 437 F.2d at 882.

149. *NDK*, 709 F.2d at 492; cf. *Sheet Metal Workers Local Union No. 20 v. Baylor Heating and Air Conditioning, Inc.*, 877 F.2d 547, 552 n.4 (7th Cir. 1989) (district court has jurisdiction to enforce an arbitration clause even though the clause's validity is the "ultimate question in this litigation," because *Sign-Craft* holds that "federal courts have § 301 jurisdiction even if the ultimate question is the validity of the agreement").

150. *Sign-Craft*, 864 F.2d at 502 n.2.

151. *Id.*

152. See, e.g., *Hernandez v. National Packing Co.*, 455 F.2d 1252, 1253 (1st Cir. 1972) (suggesting "a district court might be obliged to consider the validity of a collective bargaining agreement when asked to enforce one of its provisions" but where claim is simply to challenge the agreement's validity, district court lacks jurisdiction).

153. E.g., *A. T. Massey Coal Co. v. Int'l. Union, United Mine Workers of Am.*, 799 F.2d 142 (4th Cir. 1986) (no jurisdiction exists to decide a dispute where the complaint alleges an agreement is not valid, or that the complaining party is not bound, because by definition, no valid contract can exist; a district court does have jurisdiction in the opposite situation—where plaintiff admits to being bound, and to the agreement's existence).

154. E.g., *Adcox* 21 F.3d at 1386 (where Plant Closing Agreement "on its face purports to be a valid, existing contract" and plaintiff sues on a superseded contract, district court lacks jurisdiction).

155. See, e.g., *Holland v. Cline Bros. Mining Co., Inc.*, 877 F. Supp. 308, 315 (S.D.W. Va. 1995). *Mack Trucks* recognized this potential trap and explicitly avoided it. *Mack Trucks*, 856 F.2d at 587-88.

jurisdiction.¹⁵⁶ This well-entrenched Section 301 jurisprudence simply could not be the law.¹⁵⁷

The Sixth Circuit is the story of jurisprudence gone wrong. In 1985, the court indicated that a claim for breach of a union's "duty of fair representation during negotiations with an employer at a time when there was no collective bargaining agreement" probably undermined the district court's jurisdiction under Section 301(a).¹⁵⁸ A year later, the court ruled that district court jurisdiction existed under Section 301 for negligent performance of a labor contract.¹⁵⁹ Soon afterwards, the court upheld a district court's ruling in a declaratory judgment action requesting that the court find that a binding labor contract existed between the parties without mentioning the source of the lower court's jurisdiction.¹⁶⁰ None of these three cases followed the established lines of authority from other jurisdictions, though their results were not inconsistent.

International Brotherhood of Boilermakers v. Transue & Williams Corp.,¹⁶¹ suggested even greater acceptance of district court jurisdiction to make validity decisions under Section 301. In *Transue*, the union and employer believed they had reached a consensus on a new collective bargaining agreement, but when they began memorializing it, a dispute emerged.¹⁶² Both parties complied with other terms and conditions of the negotiations, but the dispute continued.¹⁶³ Transue later announced it would terminate operations and effects bargaining began between the parties.¹⁶⁴ The Union filed suit, claiming Transue had breached the original agreement between the parties, while Transue responded that no labor contract existed.¹⁶⁵ The district court held that the Union had

156. Cf. *United Mine Workers of Am.*, 330 U.S. 258.

157. The Sixth Circuit has since held that it was not, though its recent decision in *Winnett* does less than it appears to clarify what the law actually is. See *supra* notes 9-13 and accompanying text.

158. *Storey v. Local 327, Int'l Bhd. of Teamsters*, 759 F.2d 517, 518, 523 (6th Cir. 1985).

159. *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1287, 1288 (6th Cir. 1986).

160. *Bobbie Brooks, Inc. v. Int'l Ladies' Garment Workers Union*, 835 F.2d 1164, 1165 (6th Cir. 1987) (stating "[t]he sole issue before this Court is whether the district court erred in finding that a collective bargaining agreement existed between the Company and the Union"). *Bobbie Brooks* makes no reference to subject matter jurisdiction, however, nor does it reveal if defendant, the Union, was alleging a breach of contract.

161. 879 F.2d 1388 (6th Cir. 1989).

162. *Id.* at 1389-90.

163. *Id.* at 1390.

164. *Id.*

165. *Id.* at 1390-91.

alleged a claim for breach of contract, and a contract existed "sufficient to vest the court with jurisdiction under Section 301."¹⁶⁶

The Sixth Circuit upheld the district court's finding that a contract existed and approved the exercise of Section 301(a) jurisdiction.¹⁶⁷ It even announced a standard of review of district court findings "that a labor contract existed sufficient to invoke Section 301 jurisdiction."¹⁶⁸ The court denied rehearing and rehearing en banc on August 24, 1989.¹⁶⁹

Nine days before the Sixth Circuit finalized *Transue*, a panel including two of the three *Transue* judges heard arguments in *Heussner v. National Gypsum Co.*,¹⁷⁰ in which several individual plaintiffs sued their former employer based on the negotiation of a plant closing agreement they claimed was procured by fraud.¹⁷¹ Before the parties' collective bargaining agreement had expired, the employer announced it would shut down or sell the mill where plaintiffs worked.¹⁷² Union leaders worried about their severance benefits under the terms of the agreement, and they quickly negotiated a new one, albeit with a much less favorable severance package.¹⁷³ The new agreement "expressly superseded" the prior one.¹⁷⁴ Plaintiffs filed suit, alleging breach of the first agreement.¹⁷⁵

Heussner held that district courts do not have jurisdiction over "questions of the *validity* of collective bargaining contracts,"¹⁷⁶ and plaintiffs had no claim based on the "apparently superseded" first agreement until the second agreement [was] invalidated."¹⁷⁷ The panel never mentioned its recent decision in *Transue*, which upheld findings of fact that a contract both existed and was valid for the purposes of Section 301 jurisdiction.¹⁷⁸ Instead, *Heussner* not only held that Section 301 did not sweep in claims where validity was the ultimate issue, but it stated repeatedly that district courts lacked power to decide "questions of the

166. *Id.*

167. *Transue*, 879 F.2d at 1391-93.

168. *Id.* at 1391.

169. *Id.* at 1388.

170. 887 F.2d 672.

171. *Id.* at 674.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 674-76. This alleged reason that the plant closing agreement was invalid might have supported the *Heussner* holding. Whether district courts had jurisdiction to decide questions of invalidity arising from fraudulent inducement was deeply controversial. See *infra* notes 198-208 and accompanying text.

176. *Heussner*, 887 F.2d at 676.

177. *Id.*

178. *Transue*, 879 F.2d at 1393.

validity of collective bargaining contracts”¹⁷⁹ or to “determine the existence or validity of contracts.”¹⁸⁰ These statements abrogated *Transue*¹⁸¹ and expanded the *Heussner* holding’s breadth beyond any principle conceivably necessary to decide the case.

Heussner also relied on the difference between breach “‘of a collective bargaining agreement’ and suits for ‘an alleged violation by a labor contract’ of rights that employees already possessed under a pre-agreement”¹⁸² In *Leskiw*, plaintiffs alleged that as a result of union representatives’ failure to negotiate in good faith, a new collective bargaining agreement robbed them of rights under the prior agreement.¹⁸³ But the *Leskiw* plaintiffs did not allege a breach of contract; the *Heussner* plaintiffs did.¹⁸⁴

Heussner also latched onto *Mack Trucks*’ distinction between “existence” and “validity” of a contract,¹⁸⁵ but even *Mack Trucks* often used “existence,”¹⁸⁶ “existence of a valid agreement,”¹⁸⁷ and “validity”¹⁸⁸ interchangeably. The Third Circuit had held that Section 301(a) permitted a district court to determine the existence of a collective bargaining agreement,¹⁸⁹ but on the theory that if a court had jurisdiction to decide what was arguably a pre-formation dispute, an unfair labor practice often committed to the exclusive jurisdiction of the NLRB,¹⁹⁰ it

179. *Heussner*, 887 F.2d at 676.

180. *Id.* at 676 n.2.

181. *Transue* was an “expired” contract case, while *Heussner*, *Adcox*, *Bauer* and *Burklow* are all “superseding” contract cases. This is a significant difference under Section 301 law, but not sufficiently different to justify not mentioning *Transue* when holding that a district court has no jurisdiction to determine “questions” of validity of contracts. *Transue* actually did determine the validity/existence of a contract. See *Transue*, 879 F.2d at 1391-95.

182. *Mack Trucks*, 856 F.2d at 589 (quoting *Leskiw v. Local 1470, Int’l. Bhd. of Elec. Workers*, 464 F.2d 721 (3d Cir. 1972)).

183. *Id.* at 722.

184. The *Mack Trucks* court confirms this interpretation: “in *Leskiw*, we did not address the issue whether section 301 grants jurisdiction for courts to decide whether a contract exists.” *Mack Trucks*, 856 F.2d at 589.

185. *Heussner*, 887 F.2d at 676 n.2.

186. *Mack Trucks*, 856 F.2d at 590.

187. *Id.* at 587.

188. *Id.* at 586.

189. *Id.* at 589 (emphasis added).

190. *Garmon*, 359 U.S. at 245 (1959); see also *William E. Arnold, Co. v. Carpenters*, 417 U.S. 12, 14 (1974).

would have concurrent jurisdiction to decide validity, a post-formation issue.¹⁹¹

Efforts to wriggle away from *Heussner* failed. Judge Duggan of the Eastern District of Michigan latched onto *Heussner*'s apparent differentiation between existence of a contract and whether a challenged contract violated rights allegedly established from a prior contract.¹⁹² Yet, when later litigants relied on *Central Transport* in *Adcox*,¹⁹³ the Sixth Circuit's response was: "Whatever the merits of the *Central Transport* decision, *Heussner* is the law in the Sixth Circuit and so governs the outcome of this case."¹⁹⁴

So on the eve of the *Textron* decision, most circuits agreed that at minimum, they could determine the existence and validity of a Section 301 contract for the threshold purpose of determining whether breach had occurred, or whether a district court had jurisdiction of the case. In these circuits, the *Textron* dictum would incite no controversy. Three circuits, however, read Section 301 to deny district courts power to determine any existence or validity questions. Many of these cases concerned superseding contracts.

D. Passing the Laugh Test: The Frivolous Section 301 Complaint

There is no ticket to federal court unless a claim passes the jurisdictional "laugh test".¹⁹⁵ it must not be "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy"¹⁹⁶ or "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction."¹⁹⁷ In the pre-*Textron* era, courts took a dim view of certain categories of "contracts," among them contracts procured by fraud in the inducement¹⁹⁸ and superseded contracts.¹⁹⁹ Most circuits

191. *Mack Trucks*, 856 F.2d at 586, 588 (quoting *United Ass'n of Journeymen and Apprentices v. Local 334*, *United Ass'n of Journeymen and Apprentices* 452 U.S. 615, 626 (1981)).

192. *Cent. Transp., Inc. v. Int'l. Bhd. of Teamsters*, 805 F. Supp. 26, 28-29 (E.D. Mich. 1992) (discussing *Heussner*, 887 F.2d at 676 n.2).

193. 21 F.3d 1381 (6th Cir. 1994).

194. *Adcox*, 21 F.3d at 1386.

195. Kevin Clermont calls the frivolity exception one that applies to "laughably weak" cases. Clermont, *supra* note 110, at 1011-12.

196. *Steel Co.*, 523 U.S. at 89.

197. *Bell*, 327 U.S. at 682.

198. *E.g.*, *Int'l. Bhd. of Teamsters v. Am. Delivery Service Co.*, 952, 50 F.3d 770 (9th Cir. 1995); *but see Rozay's Transfer*, 850 F.2d at 1334-35.

199. *See, e.g., Adcox*, 21 F.3d 1381.

other than the Ninth agreed district courts did not have jurisdiction of fraud in the inducement cases.²⁰⁰ No courts held that Section 301 extended over claims for breach of superseded contracts. *Ergo*, the obvious question: Do superseded contract cases pass the laugh test?

Adcox v. Teledyne is a typical superseding contract case. An employer and union enter into a collective bargaining agreement.²⁰¹ Before the agreement expires, the employer announces it will close the plant.²⁰² The employer and union enter into "effects bargaining,"²⁰³ related to severance pay and the settlement of any outstanding grievances or other disputes between them.²⁰⁴ The product of these negotiations is a plant closing agreement.²⁰⁵ The employer agrees to pay severance and other benefits and in return, employees give up rights to pursue potentially lucrative claims.²⁰⁶ The agreement includes a provision that it "expressly supersedes" the prior collective bargaining agreement.²⁰⁷ Eventually, the former employees question the contract's validity: perhaps they learn of evidence that the employer procured the agreement by fraud.²⁰⁸ The former employees file suit for breach of the original collective bargaining agreement, with which the employer obviously has not complied.

In these types of cases, the union members typically lose, and their cases are usually dismissed for lack of subject matter jurisdiction, on the basis that once the parties execute the superseding contract, the prior contract ceases to exist, and so it cannot form the basis for breach even if the superseding contract—which has not been breached—is invalid.²⁰⁹ This reasoning appears counter-intuitive, because it assumes a fact most courts of the period agreed they had to decide:²¹⁰ whether the contract

200. See, e.g., *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1518 (11th Cir. 1988); *Kolentus v. Avco Corp.*, 798 F.2d 949, 960 (7th Cir. 1986); *Serrano*, 790 F.2d at 1287.

201. *Adcox*, 21 F.3d at 1383.

202. *Id.*

203. Many labor agreements contain clauses requiring "effects bargaining" if the employer decides to close the plant. They resolve disputes or implications of the decision on severance, additional benefits, grievances and other matters of contention between the employer and union. See 12 EMPLOYMENT COORDINATOR § 47:33 (West 2009).

204. *Adcox*, 21 F.3d at 1383-84.

205. *Id.* at 1384.

206. *Id.*

207. *Id.*

208. *Burklow*, 274 F. Supp. 2d at 902.

209. See *Bauer*, 368 F.3d at 579.

210. See *infra* Parts III.C.1 and C.2. *Textron* appeared to agree. *Textron*, 523 U.S. at 658 (stating "the federal court's power to adjudicate the contract's validity is ancillary to and not independent of, its power to adjudicate '[suits] for violation of contracts'").

sued upon existed.²¹¹ Moreover, if the contract had been procured by fraud, the union members could disaffirm and obtain some form of relief.²¹²

There are two flaws with this theory. The first is that fraud in the inducement is normally a matter for the NLRB as a pre-formation unfair labor practice.²¹³ The second is that so may courts have held that by virtue of being a "superseded contract" case, the claim does not pass the "laugh test."²¹⁴

What "frivolous," et al., means is not apparent. "What is to one person a frivolously or immaterial argument on a foreclosed issue is to another a legitimate attempt to overturn bad precedent,"²¹⁵ notes Professor Friedenthal. Especially as to superseding contract cases, where the Supreme Court has not ruled and the claim is otherwise brought in good faith, by definition it should not be foreclosed by prior Supreme Court decisions.²¹⁶ In general, labor contracts are to be liberally construed²¹⁷ and federal courts tend to be more broad minded than the common law would require as to what constitutes an enforceable labor contract.²¹⁸

211. *Heussner*, 887 F.2d at 674.

212. RESTATEMENT (SECOND) OF CONTRACTS §§ 164 & 376 (1981). A party's decision to disaffirm a contract and request relief remedies the consequences of "contracts" that never came into existence, such as when agreement is fraudulently induced. *Id.* § 7, cmt. c. "Breach of contract" necessarily implies the existence of a contract in the first place, however, and damages attempt to give the innocent party the prospective benefit of her bargain. *Id.* § 344, cmt. a. Disaffirming a contract because it is void, such as when procured by fraud, is therefore conceptually distinct from entitlement to damages for breach of a valid contract.

213. *E.g.*, *Nat'l Labor Relations Bd. v. Waymouth Farms, Inc.*, 172 F.3d 598, 599-600 (8th Cir. 1999); *Serrano*, 790 F.2d at 1284-88. The Ninth Circuit has held that a district court may have concurrent jurisdiction over a fraud in the inducement case. *See, e.g.*, *Rozay's Transfer*, 850 F.2d at 1326 (collecting cases); *cf. Tr. of the ALA-Lithographic Pension Plan v. Crestwood Printing Corp.*, 127 F. Supp. 2d 475, 481-82 (S.D.N.Y. 2001) (citing *Textron*, the district court has jurisdiction to hear defense of fraud in the execution when claiming a prior agreement controls).

214. *See supra* notes 201-212 and accompanying text.

215. Friedenthal, *supra* note 92.

216. *See Davoll*, 194 F.3d at 1130 (holding (post-*Steel Co.*) that where courts uncertain as to interpretation of a statute, a complaint based on one interpretation of that statute is not frivolous). *Cf.* Friedenthal, *supra* note 92. *Textron's* "it does not restrict the legal landscape they may traverse" dictum may even remove doubt as to the viability of superseding contract claims. *Textron*, 523 U.S. at 1629.

217. *See LAREAU, supra* note 22, § 41.02[2][b] (stating term "contract" is liberally construed for purposes of Section 301).

218. *See* 12 EMPLOYMENT COORDINATOR § 47:16 (West 2004) (stating labor contracts to be construed liberally).

Therefore, jurisprudential room existed even pre-*Steel Co.* and *Textron* to reconsider the apparent bar against superseded contract claims on the apparent basis that they are frivolous. Moreover, appropriate analogies to other sources of law also defining "frivolous" legal theories help answer the laugh test in favor of Section 301 jurisdiction. For example, Federal Rule of Civil Procedure 11 states that a lawyer's signature on a document represents that its "claims, defenses, and other legal contentions are warranted by existing law or by a *nonfrivolous* argument for extending, modifying, or reversing existing law or for establishing new law."²¹⁹ Rule 11 does not bar a complaint predicated on an argument to reverse a Supreme Court's decision, let alone circuit precedent.²²⁰ It would therefore be odd if a superseding contract case was so frivolous as to bar jurisdiction.

III. *TEXTRON* AND THE "BURKLOW PROBLEM"

Everyone knew *Textron* was a watershed in Section 301 jurisprudence, but not nearly as many knew what it meant. It both narrowed a district court's jurisdiction to "suits that claim a contract has been violated," while hypothesizing that once a plaintiff had grasped jurisprudence on that basis, maybe "anything goes."²²¹ Together with *Steel Co.*, however, *Textron* provided sufficient basis—and perhaps sufficient confusion—for superseding contract cases to appear that much more substantively plausible and therefore more likely to come within a district court's jurisdiction.²²² The Seventh Circuit tested the synthesis of *Steel Co.* and *Textron* and created a mode of analysis that might have squeezed superseding contract cases into federal court.²²³ Unfortunately, no one noticed.

A. *Textron v. UAW*

*Textron*²²⁴ is especially relevant to "the *Burklow* problem," because it is a fraudulent inducement case. The United Auto Workers sued *Textron* in federal court, seeking a declaratory judgment that the parties' collective bargaining agreement was voidable.²²⁵ During the negotiations

219. FED. R. CIV. P. 11(b)(2) (emphasis added).

220. Were it otherwise, we would have neither *Brown v. Board of Education*, 347 U.S. 483 (1954) nor *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

221. See *infra* Part III.A.

222. See *infra* Part III.B.

223. See *infra* Part III.C.

224. 523 U.S. 653.

225. *Id.*

of this collective bargaining agreement, the UAW had asked Textron if it had any plans to subcontract work that might adversely affect the employment of UAW employees.²²⁶ Textron failed to provide any information concerning subcontracting during the negotiation period.²²⁷ Two months after the CBA went into effect, Textron announced a plan to subcontract out work, resulting in the loss of about half of the unionized jobs.²²⁸ The UAW argued that Textron had knowledge of the subcontracting plan during the negotiations; therefore, Textron had fraudulently induced the Union to sign the contract, making the contract voidable.²²⁹ The District Court dismissed the UAW's complaint, because Section 301(1) of the Labor Management Relations Act (LMRA) did not provide subject matter jurisdiction for claims that did not allege a breach of contract.²³⁰

The Third Circuit reversed, hearkening back to *Mack Trucks*. The court relied on its broad language from that decision, stating that "the language of *Mack Trucks* itself—that a suit 'involving a dispute over the agreement's existence' is subject to Section 301(a) jurisdiction—compels the result that a party challenging an agreement's existence can establish Section 301(a) jurisdiction."²³¹ The word "disputes" may have again guided the Third Circuit when it noted that if courts could resolve "disputes over the agreement's existence," there was no reason they should not have jurisdiction to decide if an agreement was enforceable.²³² The Third Circuit pointed specifically to an action for a declaratory judgment that the agreement was enforceable where the defending party would raise the affirmative defense of fraud in the inducement if it had been refusing to honor the agreement,²³³ a harbinger of things to come.

The Supreme Court also reversed and held that because the UAW did not allege a violation of the CBA, the district court lacked jurisdiction under Section 301.²³⁴ The Court found that the language of Section 301(a), which grants federal court subject matter jurisdiction for "[s]uits for violation of contracts," looked backward to a violation that

226. *Id.* at 1628. See also *Waymouth Farms, Inc.*, 172 F.3d at 599-600 (holding employers have obligation to provide such information during collective bargaining).

227. *Textron*, 523 U.S. 653.

228. *Id.*

229. *Id.*

230. *Id.* at 656.

231. *UAW v. Textron Lycoming Reciprocating Engine Div.*, 117 F.3d 119, 124 (3d Cir. 1997), *overruled by Textron*, 523 U.S. 654.

232. *Textron Lycoming*, 117 F.3d at 124-25.

233. *Id.* at 125.

234. *Textron*, 523 U.S. at 661-62.

had already occurred and not forward to one that might occur.²³⁵ Therefore, Section 301(a) only granted jurisdiction where a suit alleged that a contract had been violated in the past, not that it might be violated in the future.²³⁶ The Court held that “[s]uits for violation of contracts’ under Section 301(a) are not suits that claim a contract is invalid, but suits that claim a contract has been violated.”²³⁷

Though *Textron*’s narrow interpretation of Section 301 implicitly overturned many jurisdictions’ precedent,²³⁸ the opinion did not end there. In dicta, Justice Scalia stated that though federal courts have jurisdiction over “suits for violations of contracts”²³⁹—that is, suits that claim a contract has been violated—that did not mean that under Section 301(a) they could never adjudicate the validity of collective bargaining agreements.²⁴⁰ Justice Scalia explained: Section 301 “erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may transverse.”²⁴¹

Justice Scalia gave two examples of not “restrict[ing] the legal landscape [the parties] may traverse.”²⁴² The first is where a defendant sued for violating a collective bargaining agreement raises its validity as an affirmative defense.²⁴³ The second is where “a declaratory judgment plaintiff accused of violating a collective bargaining agreement asks the court to declare the agreement invalid.”²⁴⁴ The context does not imply that the list is exhaustive.

Textron does not state definitively what a litigant must show to establish a cause of action, or lack thereof, for a “suit for violation of a collective bargaining agreement” where a superseding contract is at issue. Consistent with most of the pre-*Textron* cases, however, the Court’s dictum confirmed that a district court did have jurisdiction to decide a validity question if ancillary to a suit for violation of a contract.²⁴⁵ Moreover, an affirmative defense that a collective bargaining agreement is invalid was sufficient as a defense to an alleged violation of

235. *Id.* at 656.

236. *Id.* at 657.

237. *Id.*

238. See, e.g., *Albertson’s*, 207 F.3d at 1196 (stating that *Textron* overrules the circuit’s prior decision in *McNally Pittsburg*, 812 F.2d at 617-19).

239. 29 U.S.C. § 185(a) (emphasis added).

240. *Textron*, 523 U.S. at 657.

241. *Id.* at 657-58.

242. *Id.* at 658.

243. *Id.*

244. *Id.*

245. *Id.*; see also *infra* Parts III.C.1 and C.2 (discussing pre-*Textron*).

that collective bargaining agreement.²⁴⁶ Therefore, at minimum, the broadest statements, at least in Sixth Circuit cases such as *Heussner* and *Adcox*, stating that district courts did not have jurisdiction even to decide "questions" of contract validity²⁴⁷ could not possibly survive *Textron*. Even more important to "the *Burklow* problem," *Textron* opened the door to more creative theories of Section 301 jurisdiction than it closed.

B. The "Burklow Problem"

Unlike many superseding contract cases, *Burklow* brought a particularly opaque set of facts before the court. The plaintiff union members' allegations amounted to not merely one, but two, collective bargaining agreements procured by fraud due to employer/union collusion. Because the district court decided the case on a motion for summary judgment, the following exposition takes the facts as alleged by the plaintiffs as true.²⁴⁸ Nevertheless, the complexity in the "real" *Burklow* case underscores that not all superseding contract cases are the same, and if a claim so discombobulated as that in *Burklow* can be "credible," so may many others.²⁴⁹

1. The Burklow Story

In either 1998 or 1999, Defendant, Baskin-Robbins, Inc., embarked on an asset rationalization strategy, called the "Chatham Project," to proceed over approximately four years and result in closing plants and eliminating jobs in a number of communities.²⁵⁰ Until 2001, Baskin-Robbins operated an ice cream production plant in Owensboro, Kentucky, but the Owensboro plant closed on March 15, 2001 pursuant to the project.²⁵¹ Baskin-Robbins then transferred its Owensboro operations to a Dean Foods plant in Chicago.²⁵² The plaintiffs in *Burklow* are among the employees who lost their jobs when the plant closed.

246. *Textron*, 523 U.S. at 658.

247. See *infra* Part III.C.3.

248. *Burklow*, 274 F. Supp. 2d at 903. This Article does not represent that a jury would ultimately have found these facts to be true; in fact, the district court held that aside from the jurisdictional issues in the case, the plaintiffs had failed to demonstrate material facts in dispute. *Burklow*, 274 F. Supp. 2d at 908.

249. *Rabine*, 161 F.3d at 430.

250. Memorandum in Response to Defendant's Motion for Summary Judgment at 2, *Burklow*, 274 F. Supp. 2d 899 (W.D. Ky. 2003) [hereinafter *Summary Judgment Memo in Response*].

251. *Id.* at 2.

252. *Id.*

Plaintiffs alleged that Baskin-Robbins knew by 1999 that the Owensboro plant was on the cutting board, but the parties' collective bargaining history as well as Baskin-Robbins' other conduct convinced them that the company planned a long-term presence in Owensboro.²⁵³ In 1998, the Teamsters and Baskin-Robbins entered into a four-year collective bargaining agreement (the 1998 Agreement) as though the Owensboro plant would remain open until 2002.²⁵⁴ In the 1998 Agreement, the membership agreed to forego wage increases in the first two years of the contract in return for sizeable increases in the last two.²⁵⁵ No bargaining representative of Baskin-Robbins mentioned a potential plant closing during the ratification process, but evidence indicated that a Baskin-Robbins official rejoiced that the union had accepted this unfavorable wage structure given the second good year was one Baskin-Robbins probably knew would not exist.²⁵⁶

The Owensboro plant employees did know Baskin-Robbins was closing other plants, and they asked Baskin-Robbins and Teamsters Local 783 to confirm the security of their contract.²⁵⁷ Repeatedly, Baskin-Robbins gave employees and the Union assurances that the members jobs were secure for four years, despite Baskin-Robbins' officials probably knowing the opposite was true.²⁵⁸ But employees also noticed Baskin-Robbins making capital expenditures to improve the Owensboro plant, which confirmed its other reassurances.²⁵⁹

On April 6, 2000, Baskin-Robbins and the Union added a successors and assigns clause to the 1998 Agreement.²⁶⁰ The clause provided for \$1,000,000.00 liquidated damages clause and other wage benefits available to be paid to employees if the plant's operations were transferred and the 1998 Agreement was not otherwise honored.²⁶¹ At no time during the negotiations over the successors and assigns clause did either Baskin-Robbins or the Union tell employees that Baskin-Robbins intended to transfer the plants operations to Dean Foods and close the Owensboro plant in less than a year.²⁶²

253. *Id.* at 2-3.

254. *Id.*

255. *Id.*

256. *Summary Judgment Memo in Response*, *supra* note 250, at 2-3.

257. *Id.* at 3.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 3-4.

262. *Summary Judgment Memo in Response*, *supra* note 250, at 3-4. *See also Waymouth Farms*, 172 F.3d at 600 (holding in decision on petition from NLRB for enforcement of an order, employer "had a duty to supply truthful information so that the

In January 2001, Baskin-Robbins announced to the Owensboro employees that it was closing the plant on March 15, 2001.²⁶³ On behalf of Local 783, the chief steward filed a grievance alleging breach of the 1998 Agreement, requesting damages pursuant to the successors and assigns clause.²⁶⁴ Soon afterwards, a group of employees met with the Secretary-Treasurer of Local 783 to discuss their rights under the various contracts, and he said a grievance would be filed related to the plant closing after March 15.²⁶⁵ Plaintiffs also alleged that Union officials left them with the impression that if they left Baskin-Robbins employment prior to March 15, 2001, they would receive no severance or other benefits.²⁶⁶

Baskin-Robbins and the Union then began negotiating a plant closing agreement.²⁶⁷ Many members did not understand that if they ratified it, they would be settling the grievance dispute.²⁶⁸ Others looked to Union representatives for guidance, but they put out mixed messages; now they told members the grievance lacked merit.²⁶⁹

Plaintiffs alleged that when the members met to vote on ratification, union representatives told them they could have their cake and eat it, too: vote for the severance and also pursue the grievance.²⁷⁰ Naturally, the union members voted to ratify.²⁷¹ Some time later they learned that the

bargaining over the effects of the relocation decision could be conducted in a meaningful manner"). Had the *Burklow* members known of the closing, they might have better protected themselves, such as by leaving Baskin-Robbins for different employment. *Summary Judgment Memo in Response*, *supra* note 250, at 3-4. Union members later hypothesized that Baskin-Robbins and the Union hoped workers would not leave, which might explain why the employees were never told. *Id.* Given that the Teamsters represented the workers in both Owensboro and at Dean, the primary legal theory in support of their "hybrid action," a suit against both the employer and the union by aggrieved members under Section 301 is that Baskin-Robbins and Local 783 were in cahoots in the negotiations. No such relationship was ever proved, and both Baskin-Robbins and the Teamsters denied it vociferously.

263. *Id.* at 4.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Summary Judgment Memo in Response*, *supra* note 250, at 4.

268. *Id.* Even if Plaintiffs' allegations about what they knew and when they knew it are somewhat self-serving, the way they described their misunderstanding is heartbreaking. For example, "I'm not a real educated person, but from the way I read [the successors and assigns clause] it stated that we would have a four year contract. If the plant was to close or be sold to anyone, that the company would pay us our wages up to the four years." *Id.* at 4-5.

269. *Id.* at 5-6.

270. *Id.* at 7.

271. *Id.* at 8.

Union did not intend to pursue the grievance.²⁷² They filed suit against Baskin-Robbins for breach of the 1998 Agreement and the Teamsters for breach of the duty of good faith and fair dealing.

The Western District of Kentucky followed *Heussner* and *Adcox* and ruled that it lacked federal question jurisdiction to decide the case.²⁷³

To find that Baskin-Robbins breached the 1998 CBA, it must first be established that the provisions of that agreement were still in force. The Closing Agreement, however, expressly released all "grievances and claims relating to the plant closing and the contract." The Closing Agreement appears on its face to be a valid and binding collective bargaining agreement which expressly precludes Plaintiffs' claim that Baskin-Robbins breached the 1998 CBA. Thus, in order to prevail on their claims here, the Plaintiffs must prove that the Closing Agreement is not valid and binding. Like the district court in *Adcox*, however, this Court lacks jurisdiction to determine the validity of the Closing Agreement. Accordingly, Baskin-Robbins is entitled to summary judgment on Plaintiffs' Section 301 claim.²⁷⁴

Plaintiffs argued that *Textron* permitted the district court to take jurisdiction on the theory that it had implicitly overruled *Adcox* and *Heussner*.²⁷⁵ *Textron* did curb these Sixth Circuit cases' reach. *Adcox* and *Heussner* did not even acknowledge a district court's jurisdiction to decide "cases concerning the validity of a contract"²⁷⁶ and "questions of the validity of collective bargaining contracts,"²⁷⁷ but *Textron*'s dictum specifically stated that a court could decide a validity issue when presented as an affirmative defense.²⁷⁸ The district court chose, however, to read *Textron*'s dictum narrowly, characterizing its two examples of the

272. *Id.* at 8-9. Not relevant to this Article is the fact that Baskin-Robbins did ultimately pay all benefits under the plant closing agreement. That fact became contentious in the *Burklow* litigation. Under contract law, the plaintiffs could not just "have their cake and eat it, too;" assuming the plant closing agreement was voidable, they had to choose their remedy. They could affirm the agreement and keep Baskin-Robbins' payout on the plant closing agreement, RESTATEMENT (SECOND) OF CONTRACTS § 380 (1981), or they could avoid/disaffirm, return the funds, and sue for restitution. *Id.* §§ 376 & 384. The plaintiffs essentially disaffirmed but kept the payout.

273. *Burklow*, 274 F. Supp. 2d at 904.

274. *Id.* at 904-05.

275. *Id.* at 904 n.1.

276. *Heussner*, 887 F.2d at 676 (emphasis added).

277. *Adcox*, 21 F.3d at 1386 (emphasis added).

278. *Textron*, 523 U.S. at 1629.

court's power to determine the validity of contracts as exhaustive.²⁷⁹ Because Baskin-Robbins had not specifically pled an affirmative defense of invalidity, the court held *Textron* did not apply and granted defendants' motion for summary judgment.²⁸⁰

2. Burklow's \$64,000 Question: Could a Superseding Contract Claim Ever Pass the "Laugh Test?" Answer: Yes

The real *Burklow* is much more compelling than the average superseding contract case, because the plaintiffs alleged two intertwined episodes of fraud in the inducement: (1) Baskin-Robbins' failure to reveal the details of the Chatham project during 1998 Agreement negotiations; and (2) its failure to reveal that misconduct as to the 1998 Agreement while negotiating the plant closing agreement with its express terms that it settled all claims.²⁸¹ Superseding contract complaints do allege "suits for violation of contracts,"²⁸² at least facially, but whether they can form the basis for jurisdiction under Section 301 facially superseded agreement can *arguably* form the basis for a claim with only the most limited exceptions. The *Burklow* case shows how they might.

Jurisdiction under *Steel Co.* and its progeny requires an arguable and not otherwise frivolous claim for breach of a collective bargaining agreement.²⁸³ The *Burklow* plant closing agreement to settle all claims would normally be enforceable whether the parties are or are not aware of claims they may have against the other; this is the purpose of such agreements.²⁸⁴ A plaintiff must have a credible theory to pierce the

279. *Burklow*, 274 F. Supp. 2d at 904 n.1.

280. *Id.* The district court also granted summary judgment to the defendants as to the state law claims on the bases of Section 301 preemption and the exclusive jurisdiction of the NLRB. *Id.* at 905-08.

281. That an employer has "a duty to supply truthful information" in the collective bargaining process "so that the bargaining over the effects [of the contract can] be conducted in a meaningful manner" is well established. *Waymouth Farms, Inc.*, 172 F.3d at 600. Vanilla fraud in the inducement cases do not necessarily raise the specter of Garmon preemption and the NLRB's exclusive jurisdiction over unfair labor practices, though they may still not be within the § 301 jurisdiction of the district court. *Cf. American Delivery Service*, 50 F.3d at 773-74 (pre-*Textron* holding that fraud in the inducement is not within NLRB's exclusive jurisdiction).

282. 29 U.S.C. § 185(a).

283. See *supra* notes 100 – 125 for a more specific discussion.

284. See 15A AM. JUR. 2D: COMPROMISE AND SETTLEMENT §§ 36 & 37. Only the Ninth Circuit has consistently held that district courts have federal question jurisdiction of fraud in the inducement claims in the absence of a claim for violation of a contract. See *supra* notes 198-200 and accompanying text. *Textron* now puts the lid on even that possibility. *Textron*, 523 U.S. at 1628-29 (holding that a contract's validity under fraud in the

settlement agreement to state a credible claim for breach of the underlying collective bargaining agreement, because a plant closing agreement's non-enforceability does not simply resurrect the superseded agreement.²⁸⁵

On the other hand, plaintiffs do have three potential weapons in their assault on the jurisdictional citadel. First is that the federal common law of labor contracts is not necessarily congruent with state law.²⁸⁶ For example, courts construe the term "contract" in Section 301 to capture many contracts other than traditional collective bargaining agreements.²⁸⁷ Therefore, what might be meritless as state claims could arguably be valid causes of action as federal claims. They are certainly not frivolous to the extent the Supreme Court has not ruled.²⁸⁸

The second weapon is *Textron's* dictum. Though courts previously open to a broad range of validity claims now interpret *Textron* as narrowing district court jurisdiction under Section 301,²⁸⁹ *Textron's* dictum tends to confirm that district courts may decide a variety of validity-related issues as long as they are ancillary to deciding the underlying claim for breach.²⁹⁰ Many circuits have interpreted Section 301 similarly, and *Textron* does nothing to distinguish or explain its dictum in light of the overwhelming weight of that authority.²⁹¹ At minimum, a claim for breach requiring a determination of contract validity is arguable per *Textron's* dictum, so under *Steel Co.* and its progeny, district courts do have Section 301 jurisdiction based on the allegations of the complaint, even if the claim turns out to lack merit substantively.²⁹²

inducement theory is ancillary to court's power to adjudicate suits for violation of contracts).

285. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

286. *Lincoln Mills*, 353 U.S. at 456-57.

287. LAREAU, *supra* note 22, § 41.02[2].

288. See *Steel Co.*, 523 U.S. at 89; cf. discussion of Rule 11, *supra* notes 190-91 and accompanying text.

289. *Voilas v. Gen. Motors Corp.*, 170 F.3d 367, 375 n.1 (3d Cir. 1999) (*Textron* took "very narrow view of federal jurisdiction under section 301 . . . [so] [b]ecause jurisdiction under section 301 is the obverse of preemption, the *Textron* decision suggests a correspondingly narrow scope for preemption."); See also, e.g., *Teamsters Nat'l. Auto. Transporters Indus. Negotiating Comm. v. Troha*, 328 F.3d 325, 328-29 (7th Cir. 2003); *Albertson's*, 207 F.3d at 1196.

290. *Textron*, 523 U.S. at 658 (stating "in these cases, the federal court's power to adjudicate the contract's validity is ancillary to, and not independent of, its power to adjudicate '[s]uits for violation of contracts'").

291. See Part II.B.1.

292. *Steel Co.*, 523 U.S. at 89; *Nowak*, 81 F.3d at 1189 (stating "where the asserted basis for subject matter jurisdiction is also an element of the plaintiff's allegedly federal

Solving a "*Burklow* problem" case with the *Textron* dictum does require interpreting it broadly, but breadth is not the key jurisdictional question: the question is whether the plaintiff has drawn the complaint to claim a right to recover under federal labor law.²⁹³ The *Burklow* plaintiffs had pled breach of the 1998 Agreement by virtue of Baskin-Robbins' failure to honor it for a full four years.²⁹⁴ Whether Baskin-Robbins responded with a formal Rule 8(c) defense or proceeded with an invalidity theory, the structure of the parties' positions were analogous to the *Textron* dictum.²⁹⁵ Then, plaintiffs would argue the plant closing agreement was invalid, a form of a second validity defense.²⁹⁶ All of this requires a district court to accept a broad reading of *Textron*'s "restrict the legal landscape [the plaintiffs] may traverse,"²⁹⁷ dictum, not easy in a circuit such as the First, Fourth and Sixth with well-established precedent holding otherwise.²⁹⁸

One flaw in this theory is its reliance on formalistic characterization and labeling of the cause of action as one for breach versus one to invalidate the contract.²⁹⁹ After all, the point of *Textron* is to explain that Section 301 jurisdiction exists to decide suits for violation of contracts but not suits to declare contracts invalid.³⁰⁰ *Textron* announces no test to differentiate between the two, permitting courts to continue

cause of action, we ask only whether – on its face the complaint is drawn so as to seek recovery under federal law").

293. *Bell*, 327 U.S. at 681.

294. Complaint at ¶ XV, *Burklow v. Baskin-Robbins*, 274 F. Supp. 2d 899 (W. K. Ky. 2003) (No. 4:01 CV-147-M).

295. *Textron*, 523 U.S. at 658 ("Thus if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with § 301(a), adjudicate that defense."). *Id.*

296. *Textron* specifically says "the federal court's power to adjudicate the contract's validity is ancillary to, and not independent of, its power to adjudicate '[s]uits for violation of contracts.'" *Textron*, 523 U.S. at 658. The Court gives no indication that this ancillary power stops only one step removed from the original claim for breach.

297. *Textron*, 523 U.S. at 658.

298. *See Burklow*, 274 F. Supp. 2d at 904 n.1.

299. This was the Seventh Circuit's concern in *Sign-Craft*. *Sign-Craft*, 864 F.2d at 502 (overruling *NDK*, 709 F.2d 491, on the basis that "[i]t rests too heavily on the mere labeling of the complaint as asserting either a violation of the contract or questioning its validity"), a case neither the Supreme Court nor the Seventh Circuit has held *Textron* abrogates or overrules. *J.W. Peters, Inc. v. Bridge, Structural and Reinforcing Iron Workers, Local Union 1, AFL-CIO*, 398 F.3d 967, 972-73 (7th Cir. 2005) (discussing both *Sign-Craft* and *Textron* without confirming *Sign-Craft*'s status in light of *Textron*). *But see Rabine*, 161 F.3d at 430-31 (applying broad interpretation of *Textron* and *Steel Co.* without citing *Sign-Craft*, though apparently overruling its mode of analysis).

300. *Textron*, 523 U.S. at 1629-30.

characterizing superseding contract cases as invalidity claims.³⁰¹ Up to now, however, the basis for denying jurisdiction in superseding contract cases has been the characterization of the cause of action as one to invalidate the settlement agreement as opposed to one for breach of the underlying contract.³⁰²

But if characterization of the cause of action is the basis for denying jurisdiction, *Steel Co.* mandates that district courts exercise jurisdiction, because the need to label the claim at all renders it "arguable" under federal law. Labeling at all means that a court could construe federal law to permit the plaintiff to recover, which means the court has jurisdiction of the suit.³⁰³ If the plaintiff has drawn the complaint as one for breach of a contract in an effort to "seek recovery under federal law" on its face, the question of whether the claim is *actually* legally sufficient goes to whether it states a claim.³⁰⁴ Again, such a claim is not frivolous if the Supreme Court has never ruled on the merits of such a cause of action.³⁰⁵ After all, only one circuit court has published on the issue since *Textron*.³⁰⁶ Not surprisingly, that circuit is the Sixth.

The third weapon is peculiar to *Burklow*, the principle that an agreement to settle all claims, including fraud, is not enforceable when one party is ignorant of those claims *because of* the other's fraud.³⁰⁷ The "double fraud" theory starts with an arguable claim for anticipatory breach of the 1998 Agreement.³⁰⁸ The actual breaches, however, are together the fraud inducing the plant closing agreement, the execution of

301. See, e.g., *Bauer*, 368 F.3d at 579 n.5 (interpreting the import of *Textron*'s dictum narrowly and discounting possible broader interpretations that might permit it to find jurisdiction in superseding contract case, and therefore relying on "the general principle that federal courts have limited jurisdiction in this area" in light of a mere "long ambiguous statement" from Supreme Court).

302. *Id.* at 579.

303. *Steel Co.*, 523 U.S. at 89.

304. *Nowak*, 81 F.3d at 1188-89 (quoting *Fair*, 228 U.S. at 25).

305. See *Steel Co.*, 523 U.S. at 89; see also, e.g., *supra* Part II.C.

306. *Bauer*, 368 F.3d 569.

307. The Restatement (Second) of Contracts states, for example, "[a] term unreasonably exempting a party from the legal consequences of a misrepresentation is unenforceable on grounds of public policy." RESTATEMENT (SECOND) OF CONTRACTS § 196 (1981).

308. *Leskiw*'s holding that there is no Section 301 jurisdiction of a claim for a violation by a labor contract of previously vested rights under another contract would not could undermine this theory. *Leskiw*, 464 F.2d at 723. *Leskiw* alleged no breach of contract; *Leskiw* was a claim of failure to bargain in good faith against the plaintiffs' union. *Burklow* included such a claim against the Teamsters, but under Section 301, jurisdiction over such a claim depends on jurisdiction over the contract claim against the employer. The *Leskiw* plaintiffs stated no such claim, so this Third Circuit case is not even particularly persuasive.

the plant closing agreement, and its performance. This theory has more potential: fraud subsequent to execution, in this case of the 1998 Agreement, could arguably form a basis for recovery under federal labor law.³⁰⁹

Beyond *Burklow* and potential substantive contract theories supporting "arguable" causes of action, were the Sixth Circuit's inexplicable decisions to uphold *Adcox* and *Heussner* in *Bauer v. RBX*,³¹⁰ a post-*Textron* and *Steel Co.* decision. *Bauer*'s failure to overrule or at least limit *Adcox* and *Heussner* could only have turned upon a theory that "expressly supersedes" language rendered a breach of contract claim frivolous.³¹¹ But even regardless of *Bauer*,³¹² the *Burklow* plaintiffs had been trying to bring their claims under the regulatory language of the common law of labor and Section 301.³¹³ Perhaps the NLRB's exclusive jurisdiction preempted all superseding contract cases,³¹⁴ but few if any courts considering superseding contract cases had ever so held,³¹⁵ and the district court would have taken jurisdiction to make that determination

309. Tr. of the *Crestwood Printing Corp.*, 127 F. Supp. At 481-82 (citing *Textron*, the district court has jurisdiction to hear defense of fraud in the execution when claiming a prior agreement controls).

310. 368 F.3d 569.

311. Actually, there is one more possibility. The procedural posture of the case was that plaintiffs were arguing that the district court did not have jurisdiction of their own claim, but that the defendants, in the hope of a better judgment on remand, were arguing otherwise. *Bauer*, 368 F.3d at 578. It is possible that the case was not well briefed, but the opinion does both cite and discuss *Textron*. *Id.* at 579, 579 n.5. On review of a motion to dismiss for lack of jurisdiction, in particular, the court had an obligation to confirm both its own and the district court's jurisdiction.

312. The Sixth Circuit upheld *Burklow* in an unpublished opinion not even appearing on Westlaw shortly after and based on *Bauer*. The district court decided *Burklow* prior to *Bauer*, which the Sixth Circuit handed down on the eve of argument in *Burklow*.

313. *Rabine*, 161 F.3d at 431 ("the power of a federal court to act with respect to a CBA . . . depends critically upon the question whether that agreement has been brought within the federal regulatory structure or not"); *Nowak*, 81 F.3d 1189 ("we ask only whether – on its face – the complaint is drawn so as to seek recovery under federal law"). *Rabine* and *Nowak* are pre-*Burklow* decisions fully briefed as to their import in all memoranda in the former case.

314. *Cf. Davoll*, 194 F.3d at 1130.

315. *Bauer*, *Adcox*, and *Heussner* all relied on the absence of an existing contract the light of the "expressly superseding" language in the subsequent agreement. *Bauer*, 368 F.3d at 579; *Wheeler v. Johnson Controls, Inc.*, No. CIV-06-1288-C, 2007 WL 1409752 at *1-2 (W.D. Okla., Apr. 10, 2007) (relying on *Bauer*, *Adcox*, and *Heussner* despite being a 10th Circuit case); *Taylor*, 157 Fed. Appx. at 561-62 n.3 (stating that in an "exceedingly weak" case, Fourth Circuit precedent forestalls an investigation into the validity of a contract).

because preemption is an affirmative defense and not a matter arising from a plaintiff's well-pleaded complaint.³¹⁶

Nevertheless, the theory grounding the precedents supporting *Burklow* and other superseding contract cases is simply an unstated frivolity conclusion. But even *Bauer* gingerly questioned that possibility.³¹⁷ Instead, superseding contracts may fail to state claims based on potential competing contract law arguments presented,³¹⁸ but these are worthy matters for a court to decide on the merits given courts' willingness to recognize so many arrangements between all sorts of parties as Section 301 contracts.³¹⁹

One of the better arguments against a federal court taking jurisdiction of a superseding contract case is that the plaintiff may have attempted to plead the case in order to obtain federal court jurisdiction.³²⁰ This may not actually be much of an argument. *Bell*, which makes it, takes a grim view of the frivolity exception generally, including that based solely on efforts to get into federal court.³²¹

The "solely to obtain federal jurisdiction" exception is less frightening in labor contract cases than in cases brought under other statutes, however. First, one consideration common to all statutory jurisdictional grants is that if the question of a contract's existence meets the lower "arguable" standard for jurisdiction but not the more exacting standards for failure to state a claim or summary judgment, then the court may quickly dismiss on the merits.³²² Since stating a claim to get federal question jurisdiction in some way must benefit the plaintiff or otherwise plaintiff would have pled it differently, defendants benefit from a decision on the merits where *res judicata* attaches.³²³

Second, a significant motivation for the district court jurisdiction exception is the potential deluge of state claims pouring into federal court via supplemental jurisdiction.³²⁴ Again, the nature of Section 301 minimizes this concern, because the NLRB's exclusive jurisdiction

316. See LAREAU, *supra* note 22, § 36.01[3].

317. *Bauer*, 368 F.3d at 579 n.5.

318. See *Davoll*, 194 F.3d at 1130.

319. LAREAU, *supra* note 22, § 41.02[2][b].

320. *Bell*, 327 U.S. at 682.

321. *Id.* at 682-83. *Steel Co.* does repeat the language (quoting *Steel Co.*, 523 U.S. at 89).

322. See, e.g., Wasserman, *supra* note 28, at 703-04.

323. Cf. *Nowak*, 81 F.3d at 1188. Few would argue that attempts to plead suits for violation of labor contracts under state law must benefit plaintiffs in state courts (often because punitive damages are available); there is no reason to assume the opposite is not true. See LAREAU, *supra* note 22, at § 41.08[1].

324. See *Da Silva v. Kinsho Int'l. Corp.*, 229 F.3d 358, 362, 365-66 (2d Cir. 2000); *Nowak*, 81 F.3d at 1188 (ERISA).

preempts many of these claims,³²⁵ as may Section 301 itself.³²⁶ If a claim is not preempted, federal question, not supplemental jurisdiction, may actually be the "real" basis for jurisdiction anyway. In fact, district courts publishing in this area have tended to be either stingy,³²⁷ open to supplemental jurisdiction partly because the state and federal claims do so plainly form part of the same case or controversy, or inclined to deny supplemental jurisdiction³²⁸ because Section 301 jurisdiction applied anyway.³²⁹

Federal common law of labor is also broader and more flexible than state contract law. Given these state law principles, the claims and theories presented here are at least arguably meritorious under federal law.³³⁰ A federal court could rule one way or another depending on the construction given under federal common law.³³¹ If they do turn out to lack merit, they should be dismissed for failure to state a claim.³³²

C. Interlude

The Western District of Kentucky handed down its *Burklow* opinion in 2003, but since *Textron*, the federal courts had given little guidance on how to decide superseding contract cases or to apply *Textron* more generally. The weight of appellate court precedent interpreted *Textron* to announce a more narrow,³³³ but also more ordered method for

325. See LAREAU, *supra* note 22, § 36.01[2].

326. Section 301 preemption actually converts a state claim into a federal claim. See LAREAU, *supra* note 22, § 36.06[3].

327. E.g., *Hanley v. Lobster Box Rest., Inc.*, 35 F. Supp. 2d 366, 369 (S.D.N.Y. 1999).

328. Cf. 12 EMPLOYMENT COORDINATOR § 53:7 (West 2009).

329. *Paper, Allied, Chem., & Energy Workers Int'l. Union v. Slurry Explosive Corp.*, 107 F. Supp. 2d 1311, 1327 (D. Kan. 2000).

330. See, e.g., *Lincoln Mills*, 353 U.S. at 457 (state law may inform federal courts fashioning a common law of contract labor disputes). The beauty of both theories is that they would not turn on whether the plant closing agreement was void, voidable, valid or in existence, but simply whether it bound plaintiffs on one point.

331. Cf. *Steel Co.*, 523 U.S. at 89.

332. *Id.*; see also *Vencl v. Int'l Union Operating Engineers, Local 18*, 137 F.3d 420, 425 (6th Cir. 1998) ("Where the union member produces a 'colorable allegation' that the employer breached a collective bargaining agreement . . . jurisdiction lies under § 301.") (quoting *White v. Anchor Motor Freight*, 899 F.2d 555, 561 (6th Cir. 1990)) (not citing *Textron*); *Rabine*, 161 F.3d at 431.

333. In general, courts read *Textron* to curb district courts' exercise of jurisdiction under Section 301. See, e.g., *Troha*, 328 F.3d at 329 (7th Cir. 2003) (noting that cases prior to *Textron* read Section 301 jurisdiction more broadly than afterwards).

determining their jurisdiction in Section 301 cases.³³⁴ Two other federal appellate courts saw potential for expansive Section 301 jurisdiction,³³⁵ but federal courts continued to hold that they lacked jurisdiction over superseding contract cases.³³⁶

In *Rabine*,³³⁷ the Seventh Circuit teased out a mode of analysis for determining Section 301 jurisdiction from *Steel Co.* and *Textron* by assigning a substantive component to *Textron*³³⁸ and a procedural component to *Steel Co.*³³⁹ In *Rabine*, a union brought a “[s]uit for violation of contracts between an employer and a labor organization,”³⁴⁰ but the alleged “employer”—a group of entities—asserted the affirmative defense that they were not a Section 301 employer and therefore the district court lacked jurisdiction.³⁴¹ Following *Textron*, the Seventh Circuit held the contract had to be “a suit . . . between an employer and a labor organization,” but once a district court established that it had such a suit before it, pursuant to *Textron*’s dictum, it had jurisdiction over the employer’s validity defense.³⁴² *Rabine*’s analysis of *Textron*’s substantive requirements did not need to be broad based on the facts, but pursuant to *Steel Co.*, it took an expansive view of Section 301’s

334. *E.g.*, *Miner v. Local No. 373*, 513 F.3d 854 (8th Cir. 2008); *Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324 (8th Cir. 2006); *Cisneros* 217 F.3d 1299; *Rabine*, 161 F.3d 427.

335. *Local 159 et al. v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 984 (9th Cir. 1999) (“Section 301 does not limit the parties who may bring suit so long as the object of the suit is the enforcement of rights guaranteed by an agreement between an employer and a labor organization.”); *Rabine*, 161 F.3d at 430,

[T]oday we follow the guidance of *Steel Co.* and hold that the absence of a statutory ‘employer’ does not deprive this court of jurisdiction to hear a claim to enforce an arbitral award. Rather, a complaint which fails to allege the presence of such an employer fails to state a claim, and a plaintiff who fails to prove the presence of such an employer loses on the merits.

336. *E.g.*, *Taylor*, 157 Fed. Appx. at 562 (holding no jurisdiction over validity claim based on *A.T. Massey Coal Co.* without substantial analysis of implications of *Textron*); *Bauer*, 368 F.3d at 579, n.5 (relying on *Heussner* and *Adcox* but noting possibility that *Textron* dictum might permit jurisdiction over superseding contract case); *Wheeler*, 2007 WL 1409752 at *1 (holding that once Settlement Agreement was in place, a prior Collective Bargaining Agreement ceased to exist and could not serve as the basis for a breach of contract claim); *Lopresti v. Merson*, No. 99 Civ. 4255(JGK), 2001 WL 1132051 (S.D.N.Y. 2001).

337. 161 F.3d 427.

338. *Id.* at 430.

339. *Id.* at 431.

340. 29 U.S.C. § 185(a) (1947).

341. *Rabine*, 161 F.3d at 428-29. Section 301 requires not only that a plaintiff assert a violation of a contract but also that the contract be between “an employer and a labor organization.” 29 U.S.C. § 185(a).

342. *Rabine*, 161 F.3d at 428-31 (quoting 29 U.S.C. § 185(a)).

jurisdictional reach.³⁴³ The union thought it had a collective bargaining agreement with an entity that had "Rabine" in its name.³⁴⁴ Actually, it did not, and the Rabine family owned so many interconnected entities called "Rabine this" and "Rabine that," that both the union and the district court realized that not only had the union sued the wrong party, but no party existed to sue.³⁴⁵ The district court dismissed for lack of subject matter jurisdiction.³⁴⁶

The Seventh Circuit reversed. It criticized its own precedent for casually labeling a "valid agreement between an employer and a labor organization as a 'jurisdictional' prerequisite" in past Section 301 cases,³⁴⁷ and now applied *Steel Co.* to Section 301 cases:

[T]he absence of a statutory 'employer' does not deprive this court of jurisdiction to hear a claim to enforce an arbitral award. Rather, a complaint which fails to allege the presence of such an employer fails to state a claim, and a plaintiff who fails to prove the presence of such an employer loses on the merits.³⁴⁸

The correct process for district courts to follow was to examine the complaint's allegations, and to take jurisdiction if "the right of petitioners to recover under the complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," just as *Steel Co.* required.³⁴⁹ *Rabine* then proceeded to perform such an analysis, actually citing particular paragraphs of the complaint where the union alleged that Rabine Brothers was a statutory employer.³⁵⁰

As long as the plaintiff had pled breach of an agreement between an employer and a labor organization, "that agreement or plan ha[d] been brought within the federal regulatory structure."³⁵¹ Otherwise, the federal

343. *Rabine*, 161 F.3d at 430-31.

344. *Id.* at 429.

345. *Id.* at 429-30.

346. *Id.* at 429.

347. *Id.* at 430. (citing *Sheet Metal Workers Local Union No. 20 v. Baylor Heating and Air Conditioning, Inc.*, 877 F.2d 547, 556 (7th Cir. 1989)); cf. *Arbaugh*, 546 U.S. at 511 (referring to these as "drive-by jurisdictional rulings" (quoting *Steel Co.*, 523 U.S. at 91)).

348. *Rabine*, 161 F.3d at 430. *Rabine* concerned a different Section 301 requirement than did *Textron*: that the plaintiff alleged a contract between an employer and a labor organization. *Id.* Nevertheless, there is no reason not to apply the same analysis to both.

349. *Id.* at 430 (quoting *Steel Co.*, 523 U.S. at 89). Professor Wasserman recommends a similar analysis, chiding courts for jurisdictional fact-finding. Wasserman, *supra* note 28, at 699-702.

350. *Rabine*, 161 F.3d at 430.

351. *Id.* at 431.

court lacked jurisdiction.³⁵² The federal courts' limited jurisdiction "[did] not mean the federal courts are incapable of adjudicating where the statutory boundaries fall,"³⁵³ and the ruling avoided the spectacle of courts having to make factual findings *sua sponte* as to every element in a jurisdictional statute that also went to merits.³⁵⁴ Therefore, "if a party makes an arguable, but ultimately unsuccessful claim for coverage, a federal court does have the power to make the coverage determination, although the result may simply be a decision to dismiss for failure to state a claim."³⁵⁵

By linking *Steel Co.* to *Textron*, *Rabine* revealed Section 301 as a jurisdictional statute with elements intertwined with the substantive merits of a breach of labor contract claim and also announced a mode of analysis for determining district court jurisdiction consistent with that applied to other jurisdictional statutes.³⁵⁶ As long as the plaintiff pled breach of a contract as *Textron* required and otherwise made an "arguable" claim for coverage under the federal regulatory structure, a district court had jurisdiction.³⁵⁷ If a defendant could show on the face of the complaint that the plaintiff had not stated a cause of action, then the district court would dismiss on the merits.³⁵⁸ As discussed above, plaintiffs in "*Burklow* problem" cases do make "arguable" claims, so especially under the *Rabine* analysis, a district court has jurisdiction of them. Nevertheless, despite *Rabine's* consistency with interpretations of

352. *Id.*

353. *Id.*

354. *Id.* at 430; see also *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 83 (3rd Cir. 2003) (noting that in Title VII cases, where the fifteen-employee requirement jurisdictional, federal appellate courts might have to "dig through an extensive record, including paystubs and time sheets").

355. *Rabine*, 161 F.3d at 431.

356. See, e.g., *Safe Air for Everyone*, 373 F.3d at 1039-40 (discussing the Resource Conservation and Recovery Act. Where the statute provides the basis for both subject matter jurisdiction and the substantive claim, the two are intertwined and court should find jurisdiction and proceed to decide case on merits.); *United States v. Morros*, 268 F.3d 695, 701 (9th Cir. 2001) (recasting complaint to determine jurisdiction is improper); *Novartis Seeds, Inc. v. Monsanto Co.*, 190 F.3d 868, 871 (8th Cir. 1999) (discussing the effects of *Steel Co.*); *Davoll*, 194 F.3d at 1129; *Nowak*, 81 F.3d at 1188-89. But see, e.g., *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1131 (D.C. Cir. 2004) (stating if a defendant invoking substantive immunity challenges the factual basis of the court's jurisdiction, the district court has great latitude to make factual findings and may fashion its own summary proceedings to do so); *Godfrey v. Pulitzer Pub. Co.*, 161 F.3d 1137, 1141 (8th Cir. 1999) (holding that the unique "in commerce" jurisdictional requirement under Robinson-Patman Act requires a factual finding beyond pleadings, but other statutory elements go to merits).

357. *Rabine*, 161 F.3d at 431.

358. *Id.* at 430.

other jurisdictional statutes,³⁵⁹ only a few courts definitively adopted its analysis in Section 301 cases.³⁶⁰

D. The Arbaugh-Winnett "Non-Solution"

In 2006, the Supreme Court held in *Arbaugh v. Y & H Corp.* that the "numerosity requirement" in Title VII of the Civil Rights Act of 1964 did not create a jurisdictional bar to employment discrimination claims against employers with fewer than fifteen employees.³⁶¹ Title VII creates a federal remedy for persons damaged when an "employer" engages in an employment practice that discriminates against them on the basis of "race, color, religion, sex or national origin."³⁶² For purposes of the Act, Congress defined "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."³⁶³ Though Title VII contains a separate jurisdictional provision, extending federal courts power to hear "actions brought under this subchapter," the circuits had long battled over whether the fifteen-or-more-employees definition created a jurisdiction or merits question.³⁶⁴ Their debate had even informed thinking as to the jurisdictional

359. See *supra* notes 73-74 and accompanying text.

360. The only published decisions openly crediting *Rabine* with their application of a similar mode of analysis are *Hansen Bros. Const. v. Int'l. Union of Operating Engineers*, 39 F. Supp. 2d 957, 958 n.1 (N.D. Ill. 1999) (holding that "the presence of a statutory employer is not a jurisdictional fact" and "absence of such an employer does not deprive a court of jurisdiction to hear a claim to enforce an arbitral award"), and *Kaelin v. Tenneco*, 28 F. Supp. 2d 489, 490 (N.D. Ill. 1998) (holding that a complaint failing to allege "statutory employee" should be dismissed on merits, not lack of jurisdiction). *Albertson's* cited *Rabine* for a related point, that no federal common law of contracts permitted a generalized § 1331 jurisdiction, a federalism issue that had worried the Seventh Circuit despite adopting its expansive mode of analysis. *Albertson's*, 207 F.3d at 1196. *United States v. Bank of Farmington* mentions *Rabine* for a tangential point, 166 F.3d 853, 859 (7th Cir. 1999), and *Prou v. United States* discusses *Rabine* only to criticize it. 199 F.3d 37, 45-46 (1st Cir. 1999). *Prou's* complaint was that both *Steel Co.* and *Rabine* really implicated the Court's power to provide a remedy, not the Court's power to hear the case, but it adopted the former interpretation as a matter of Congressional intent. *Id.*

361. *Arbaugh*, 546 U.S. at 516.

362. 42 U.S.C. § 2000e-2(a)(1).

363. 42 U.S.C. § 2000e(b).

364. See generally Christine Neylon O'Brien & Stephanie Greene, *Employee Threshold on Federal Antidiscrimination Statutes: A Matter of the Merits*, 95 KY. L.J. 429, 431 (2006-2007) (identifying the Second, Third, Seventh and District of Columbia Circuits as those holding that the employee numerosity requirement was a matter for the merits and the Fourth, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits as holding that the requirement was jurisdictional).

relevance of the "employer" definition in Section 301³⁶⁵ and relied in turn on the plain language interpretation of the statute in *Textron*.³⁶⁶

Jennifer Arbaugh filed a sexual harassment suit against her former employer, Y & H Corporation under Title VII and Louisiana law.³⁶⁷ The jury found in her favor and the trial court entered judgment against Y & H.³⁶⁸ Only then did Y & H move to dismiss for lack of jurisdiction based on evidence that it did not have fifteen or more employees during the relevant time period and later discovery justified the motion.³⁶⁹ After decrying Y & H's waste of resources as a result of bringing their motion only after receiving an adverse verdict, the district court dismissed Arbaugh's Title VII and state claims without prejudice for lack of subject matter jurisdiction.³⁷⁰

The Supreme Court held that the employee-numerosity standard was not jurisdictional in Title VII cases.³⁷¹ Whether the district courts have subject matter jurisdiction of a case is a matter of Congressional intent,³⁷² and the Court could discern no hint in the statutory language to suggest Congress intended the numerosity requirement to bar a Title VII plaintiff's access to a federal court.³⁷³ The fifteen-employee requirement appeared not in Title VII's jurisdictional provision, but rather in a section headed "Definitions."³⁷⁴

The Court relied on many of the principles from the *Steel Co.* plurality and consistent cases, if it did not make the connection transparently. If the fifteen-employee requirement were jurisdictional, for example, courts would have to determine *sua sponte* whether a defendant did, in fact, have fifteen or more employees.³⁷⁵ The Court was skeptical that Congress intended to foist that burden on federal courts.³⁷⁶ The Court also observed with circumspection that finding the fifteen-employee requirement to be jurisdictional would mean that the judge

365. *E.g.*, *Rabine*, 161 F.3d at 430 (citing *Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676, 677 (7th Cir. 1998)).

366. *E.g.*, *Da Silva*, 229 F.3d at 365.

367. *Arbaugh*, 546 U.S. at 507.

368. *Id.* at 508.

369. *Id.* at 508-09.

370. *Id.*

371. *Id.* at 516.

372. *See Grable & Sons*, 545 U.S. 308; *see also Nesbit*, 347 F.3d at 81 (Title VII employee numerosity requirement not jurisdictional). *Arbaugh* makes frequent reference to Congressional intent in its analysis. *E.g.*, *Arbaugh*, 546 U.S. at 506, 514.

373. *Id.* at 515-16.

374. *Id.* at 505, 515. Compare 42 U.S.C. § 2000e ("Definitions" section), with 42 U.S.C. § 2000e-5(f)(3).

375. *Arbaugh*, 546 U.S. at 514; *cf. Steel Co.*, 523 U.S. at 90.

376. *Arbaugh*, 546 U.S. at 514.

would become the effective trier of fact as to an element of the cause of action.³⁷⁷ The Court also questioned the wisdom of dismissing supplemental claims after trial on a motion to dismiss for lack of subject matter jurisdiction³⁷⁸ when a district court could maintain supplemental jurisdiction of state law claims even if it dismissed the federal claims for failure to state a claim.³⁷⁹ The latter two considerations were certainly prudential, but they do not appear to have carried the same weight as the Court's statutory language analysis of Congress' intent.

The Court did not cite *Textron* and gave short shrift to *Steel Co.*³⁸⁰ In fact, the foundational issues in those two cases are not the same as in *Arbaugh*. *Arbaugh* prescribes a mode of analysis based on Congressional intent for determining if an element of a cause of action may also be a jurisdictional fact. *Textron*'s and *Steel Co.*'s signal contribution is explaining what the plaintiff must plead and prove to earn a ticket to federal court. *Steel Co.* underscores that the allegations of the complaint must assert an "arguable" federal cause of action even if they do not actually state a claim, as long as those allegations are not "frivolous or immaterial."³⁸¹ *Textron* makes that generalized description concrete for Section 301 cases: suits that claim a contract is invalid, without more, are not "arguable" "suits for violation of a contract."³⁸²

Most of the overlap between the cases is superficial. *Arbaugh* confirms what should have been well understood: that federal courts have power to hear Section 301 cases even if it turns out later that the plaintiff is unable to prove in fact that a contract existed for the defendant to violate.³⁸³ *Textron* simply insists that plaintiff plead a claim for violation of a contract at all for the privilege of litigating in federal court pursuant to Section 301.³⁸⁴ *Arbaugh* does not speak to whether a plaintiff must allege a contract violation in a Section 301 case; its

377. The reason is that judges are the ones who weigh the evidence and determine the existence of jurisdictional facts. *Id.* at 514; *cf. Da Silva*, 229 F.3d at 363 (observing that as a result, "institutional requirements of the judicial system weigh in favor of narrowing the number of facts or circumstances that determine subject matter jurisdiction").

378. *Arbaugh*, 546 U.S. at 514.

379. FED. R. CIV. P. 1367(c); *see also Gibbs*, 383 U.S. 715 (holding that even though the district court entered judgment notwithstanding the verdict on the Section 303 claims, the federal claims "were not so remote or played such a minor role at the trial that in effect the state claim only was tried" so that district court could maintain jurisdiction of state claims for purposes of entering a judgment).

380. The *Arbaugh* Court mentioned *Steel Co.* only in a string cite for the "laugh test" exception to subject matter jurisdiction. *Arbaugh*, 546 U.S. at 512.

381. *Steel Co.*, 523 U.S. at 89.

382. *Textron*, 523 U.S. at 657-58 (quoting in part 29 U.S.C. § 185(a)).

383. *See Winnett*, 553 F.3d at 1007.

384. *Textron*, 523 U.S. at 657.

reasoning indicates only that plaintiff need not prove a contract exists for jurisdictional purposes.

Arbaugh's relationship to *Burklow* problem cases, however, is at best indirect. To the extent *Arbaugh* overturns or provokes a rethink of decisions that the existence of a Section 301 contract is "jurisdictional," it removes a point of confusion concerning the breadth of Section 301. It does not, however, speak to whether any given set of allegations in a complaint constitutes a suit for violation of a contract whether the contract will ultimately turn out to exist or not.

The *Arbaugh* analysis does clarify that *Burklow* problem cases raise two distinct jurisdictional issues. The first is whether the actual existence of a contract is jurisdictional. Answer: *Arbaugh* says "no."³⁸⁵ The second is whether a *Burklow* problem plaintiff can plead a non-frivolous suit for violation of a contract at all.³⁸⁶ Answer: *Arbaugh* specifically states frivolity is not at issue in that case.³⁸⁷ In a *Burklow* problem case, however, jurisdiction turns on whether a superceded contract can ever be a Section 301 contract. *Arbaugh* addresses a related but not controlling issue only.

The Sixth Circuit rendered an expansive decision in *Winnett v. Caterpillar* that more than implied that *Arbaugh* might control *Burklow* problem cases.³⁸⁸ *Winnett* addresses whether a district court has jurisdiction to decide if retirees can claim a right to welfare benefits based on a collective bargaining agreement that expired before they retired.³⁸⁹ In the process, it slashes and burns its way through Section 301 precedent, leaving in its wake a jurisprudential wasteland in which it overrules *Heussner*, *Adcox*, and *Bauer* "to the extent" that they are inconsistent with the principle that "the existence of a union contract is an element of Plaintiffs' merits claim, not a limit on federal subject-matter jurisdiction."³⁹⁰

385. See *Arbaugh*, 546 U.S. at 514-16. *Arbaugh* does not actually say this indirectly, of course, but the Sixth Circuit has read it to do so. See *Winnett*, 553 F.3d at 1005-07. In fact, the view that Title VII and Section 301 are distinguishable, because the "contract" element appears in Section 301 while the employee numerosity requirement does not appear in the Title VII jurisdictional provision, is a serious indictment of the Sixth Circuit's reasoning given the importance of the location of the alleged jurisdictional element in *Arbaugh*.

386. Cf. *Bell*, 327 U.S. at 682-83.

387. *Arbaugh*, 546 U.S. at 513 n.10 ("Arbaugh's case surely does not belong in that category.").

388. 553 F.3d 1000 (6th Cir. 2009).

389. *Id.* at 1004.

390. *Id.* at 1007.

To applaud the final result in *Winnett* is not to endorse its reasoning. *Winnett* is distinguishable from the three plant closing cases it purports to overrule, because it does not address the impact of a superceding contract that abrogates the prior agreement on its face.³⁹¹ In *Winnett*, the issue is whether welfare benefits vested while the expired agreement was in effect,³⁹² so that a suit for failure to pay those benefits is in fact a "suit[] for violation of a contract."³⁹³ The plaintiffs failed to convince the Sixth Circuit that the right to benefits had vested prior to the agreement's expiration, but the court held that plaintiffs failed to state a claim upon which relief could be granted, but not that it lacked subject matter jurisdiction to consider the matter at all.³⁹⁴

You know that jurisprudence is out of control, however, when a court requires more than three West Reporter pages and significant analysis of *Arbaugh* and *Winnett* to conclude a plaintiff did not have to *establish* breach of a Section 301 contract to litigate in federal court.³⁹⁵ Of all the strange intellectual tangles arising from Section 301, this was one of the few perhaps no one had ever before even seen fit even to ask at the appellate level, let alone do so seriously. Yet ask it the parties did in *Tackett v. M & G Polymers*, and only two months after *Winnett*, the Sixth Circuit answered mercifully: "no."³⁹⁶

Arbaugh, *Winnett*, and *Tackett* create immense heat but no light as to the *Burklow* problem. Superficially, *Winnett* purports to solve it by apparently overruling *Heussner*, *Adcox*, and *Bauer*, labeling them

391. Cf. *Adcox*, 21 F.3d at 1383-84 (plant closing agreement includes provision that it "expressly supercedes" the prior collective bargaining agreement).

392. *Winnett*, 553 F.3d at 1004.

393. See 29 U.S.C. § 185(a) (1947).

394. *Id.* at 1007-08.

395. This is what the Sixth Circuit did in *Tackett v. M & G Polymers*, 561 F.3d 476, 483-87 (6th Cir. 2009). Such a decision should cry out for non-publication under 6th Cir. R. 206(a)(1) if only to underscore that it so clearly fails to establish a new rule of law or alter or modify an existing rule. Nor was this one of those situations where two panels are the equivalent of ships passing in the night, ruling on the same essential issue unaware of what the other is doing; no, *Tackett* actually analyzes *Winnett* in some depth. See *Tackett*, 561 F.3d at 485-86. On the other hand, the Sixth Circuit was reversing a district court decision the latter had published, providing bases in the court's rules for publication. 6th Cir. R. 206(a)(5) & (6). That the Sixth Circuit apparently felt publication was necessary, even in light of *Steel Co.* and *Textron*—the factors for making the publication decision are not dispositive under the rule. See 6th Cir. R. 205(a) ("the following criteria shall be considered")—could not speak more eloquently of jurisprudence out of control. Cf. *Patterson v. Shumate*, 504 U.S. 753 (1992) (Scalia, J., concurring) (calling it "mystifying" that the appellate court could possibly have considered interpreting non-ambiguous statutory language as it did).

396. *Tackett*, 561 F.3d at 487.

nothing more than “drive-by jurisdictional rulings.”³⁹⁷ By mechanistically applying *Winnett*’s actual ruling that existence of a contract is not jurisdictional, the Sixth Circuit signals that district courts have jurisdiction of superceding contract cases,³⁹⁸ because all require a court to determine whether one or more “contracts” is valid or “exists.”

Reliance on *Arbaugh* to determine Section 301’s jurisdictional reach is fraught with analytical risk, however, because the purposes of the two statutes are very different. Section 301 carves out a narrow jurisdiction for district courts from a much larger, general grant to the National Labor Relations Board in labor cases.³⁹⁹ Title VII’s jurisdictional grant provides jurisdiction in most employment discrimination cases to the extent that the Equal Employment Opportunity Commission does not act.

Congress’ comparative allocation of jurisdiction between the two statutes supports the notion that the breadth of Section 301 should be measured with circumspection. Since Congress eliminated the amount in controversy requirement for federal question jurisdiction, Title VII’s jurisdiction provision “has served simply to underscore Congress’ intention to provide a federal forum for the adjudication of Title VII claims.”⁴⁰⁰ Section 301 is consistent with the policy that federal courts should enforce collective bargaining agreements,⁴⁰¹ but in many such cases, federal courts’ jurisdiction is concurrent with that of the National Labor Relations Board, and only by virtue of the Board’s policy and practice to defer to district courts’ jurisdiction do they decide so many of such cases.⁴⁰² These two very different contexts leave open the possibility that *Arbaugh*’s reasoning is only tangentially authoritative in Section 301 cases.

Other indicators of Congressional intent undermine *Arbaugh*’s significance to Section 301 cases. For example, Title VII’s jurisdiction provision makes no mention of “15 employees,”⁴⁰³ while Section 301 specifically refers to “contracts” on its face as it defines the set of cases federal courts have the power to hear.⁴⁰⁴ Continuing to exploit this

397. See *Winnett*, 553 F.3d at 1005 (stating “[b]ut these holdings [*Bauer*, *Adcox* and *Heussner*] do not survive *Arbaugh*’s effort to bring clarity to this area”).

398. Cf. *Winnett*, 553 F.3d at 1007.

399. *Vaca*, 386 U.S. at 179.

400. *Arbaugh*, 546 U.S. at 505-06 (noting that the continued existence of Title VII’s jurisdiction provision).

401. See *Hines*, 424 U.S. at 562.

402. See *William E. Arnold, Co.*, 417 U.S. at 18.

403. See 42 U.S.C. § 2000e-5(f)(3) (stating that district courts “shall have jurisdiction of actions brought under this chapter”).

404. See 29 U.S.C. § 185; but see *Rabine*, 161 F.3d at 430 (a complaint that fails to allege the presence of [a § 301] employer fails to state a claim).

difference, Section 301 may imply that there would be times that the allegation that a contract exists may not even be colorable for purposes of jurisdiction, rendering the claim frivolous and robbing the district court of jurisdiction. "Actions brought under this subchapter" is much more apparently analogous to the broad "arising under" language of 28 U.S.C. § 1331 than is the very specific "suits for violation of contracts" language in Section 301.⁴⁰⁵ Perhaps Congress intended Section 301 to subsume more substance.⁴⁰⁶

Superseding contract cases in plant closing situations such as *Burklow*, *Bauer*, *Adcox*, and *Heussner*, raise a question distinct from that presented in *Winnett*: whether after *Textron*, the complete phrase "suits for violations of contracts" should be read functionally, to deny jurisdiction over what at bottom may be nothing more than a fraud in the inducement case and not a true breach of contract case; or whether Section 301 should be read formally, to extend jurisdiction to cases alleging breach of a contract, even though that contract is facially "superseded" by another contract.⁴⁰⁷ Whether a district court has jurisdiction of a claim for breach of a superseded contract depends not on whether such a contract "exists" but whether an allegation that it exists has sufficient merit to pass the laugh test. *Arbaugh* and *Winnett* are welcome additions to the pantheon of Section 301 jurisprudence, but they do not address that issue.⁴⁰⁸ Once again, the Sixth Circuit's jurisprudence in Section 301 sweeps too broadly, only this time in the opposite direction.

405. Cf. *Arbaugh*, 546 U.S. at 505-06 (using Title VII's historic relationship with § 1331 to support broad reading of district court jurisdiction in employment discrimination cases).

406. See *supra* Parts II and IV.A and accompanying text.

407. Cf. *Textron*, 523 U.S. at 657. *Textron* explains that "[s]uits for violation of contracts' under § 301 are not suits that claim a contract is invalid, but suits that claim a contract has been violated." To "claim a contract has been violated" does presuppose existence and validity of a the contract alleged to have been violated, but often this would be a question of fact on the merits that might arise, depending on how the plaintiff crafts the complaint, simply as an affirmative defense, so it would have no effect on the existence of federal question jurisdiction. See *id.* at 658; cf. *Mottley*, 211 U.S. 149. Again, this is really to say that there is a threshold question as to whether superseding contracts can ever be Section 301 contracts as a matter of law. If not, a complaint alleging breach is frivolous—so completely devoid of merit as not to involve a federal controversy because "breach" of superseded contracts plaintiffs were fraudulently induced to abandon simply do not entitle the plaintiff to a federal forum under Section 301. See *Steel Co.*, 523 U.S. at 89.

408. *Steel Co.*, 523 U.S. at 89.

IV. THE TUCKER ACT

At the same time federal district courts and the numbered circuits were coping with the impact of *Steel Co.* and *Textron* on Section 301 jurisdiction, the Court of Federal Claims and Federal Circuit were becoming much more satisfied with their own mode of analysis for determining their jurisdiction under the Tucker Act.

A. The Tucker Act and Section 301: Analogous Statutes

The Tucker Act waives the United States' sovereign immunity⁴⁰⁹ and provides the Court of Federal Claims with jurisdiction to hear claims against the United States based on express or implied contracts:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.⁴¹⁰

This jurisdiction is exclusive.⁴¹¹

The Tucker Act and Section 301 have numerous substantive and procedural similarities. Most apparent is that through them, Congress has extended original jurisdiction over specific contractual claims: the Tucker Act to contract claims against the United States,⁴¹² and Section 301 to suits for violations of labor contracts.⁴¹³ Neither creates the

409. *United States v. Mitchell*, 463 U.S. 206, 216 (1983).

410. 28 U.S.C. § 1491(a)(1) (2008). This is the "Big" Tucker Act. There are two other such jurisdictional statutes: the "Little" Tucker Act, 28 U.S.C. § 1346(a)(2) (1997), and the "Indian" Tucker Act, 28 U.S.C. § 1505 (1949). *See generally* *Fisher v. United States*, 402 F.3d 1167, 1172 n.4 (Fed. Cir. 2005).

411. *See e.g.*, *Jan's Helicopter Service, Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299, 1304 (Fed. Cir. 2008). The "Little" Tucker Act expressly provides concurrent jurisdiction with the district courts over claims against the United States for less than \$10,000, and numerous courts have interpreted the "Big" Tucker Act, which does not expressly limit its grant of jurisdiction to the Court of Federal Claims to grant exclusive jurisdiction based on statutory construction. *Id.*

412. 28 U.S.C. § 1491 (2008).

413. 29 U.S.C. § 185(a) (1947). The difference between the constitutional source of the jurisdictional grant is not irrelevant. The Federal Circuit interprets the Tucker Act to extend broader jurisdiction to the Court of Federal Claims than § 1331 in some instances

substantive cause of action for breach of contract,⁴¹⁴ and the source of law for both is a federal common law of contracts.⁴¹⁵ They straddle the line between being remedial statutes and true subject matter jurisdiction statutes according to *Steel Co.*,⁴¹⁶ but perhaps not under more recent Supreme Court precedent.⁴¹⁷

The two statutes do have different and complicated relationships with Article III. Actually, the Tucker Act has none. Congress' power to enact the Tucker Act comes not from the "arising under" language of Article III but from its "controversies to which the United States is a party" provision;⁴¹⁸ Section 301 is an "arising under" provision, but as a carve out from the NLRB's exclusive jurisdiction, it does have jurisdictional significance beyond Section 301.⁴¹⁹ Functionally, however, courts in the federal circuit use the same § 1331 cases in most instances,⁴²⁰ as do courts in Section 301 cases,⁴²¹ and therefore also interpret them in their subject matter jurisdiction analysis.

and will sometimes affect the applicability of cases such as *Bell* and *Steel Co.*, otherwise routinely cited in Tucker Act cases. *See, e.g., Jan's Helicopter*, 525 F.3d at 1305-06 n.4.

414. The Supreme Court has stated "in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate course of substantive law that creates the right to money damages. *Mitchell*, 463 U.S. at 216. The issue is more complicated with Section 301. *Lincoln Mills* identifies the LMRA, not Section 301 specifically, as one source of the federal common law of labor federal courts should fashion and apply in § 301 cases. 353 U.S. at 456-57. Section 301(a) preemption does theoretically give Section 301 some substantive content, but its real significance is to provide a forum for federal common law cases. *See supra* note 122 and accompanying text.

415. *See Lincoln Mills*, 353 U.S. at 456-57 (§ 301); *Seaboard Lumber Co. v. United States*, 15 Ct. Cl. 366, 369 (Ct. Cl. 1988) (Tucker Act).

416. The Tucker Act is a statutory grant the Court of Federal Claims could not have under § 1331, especially since it also waives sovereign immunity, however, the statute does not merely give the court power; it also provides for particular relief, "judgments." 28 U.S.C. § 1491. Similarly, the district courts would not have jurisdiction to hear labor contract cases under § 1331; *cf. Textron*, 523 U.S. at 1630-31, given under the NLRB's exclusive jurisdiction, except for Section 301's carve out. *See supra* note 95 and accompanying text. But even the carve out is a form of remediation given the NLRB's jurisdiction. On the other hand, Justice Scalia quotes and cites several "jurisdictional" statutes in *Steel Co.*; all are far more specific as to remedies permitted and import more elements of the cause of action beyond the contract dispute itself. *See Steel Co.*, 523 U.S. at 89-91.

417. *Cf. Arbaugh*, 546 U.S. at 506-07.

418. *See Jan's Helicopter*, 525 F.3d at 130 (quoting U.S. CONST. art. III, § 2, cl. 1).

419. District court jurisdiction would not exist over suits for violations of contracts under the LMRA even in light of § 1331, because the NLRB would have exclusive jurisdiction of those cases. *See supra* notes 87-88 and accompanying text.

420. Because the federal circuit is protecting the Tucker Act's exclusive jurisdiction resulting from its different constitutional source, it does not require that the Court of Federal Claims determine whether allegations of the complaint beyond the existence of a

Because the Tucker Act emanates from a separate constitutional source than Section 301, it evaluates the frivolity requirement for jurisdiction differently than labor contract cases. As a grant of jurisdiction without substance, the Tucker Act's only jurisdictional "fact" is whether a separate source—the United States Constitution, federal statute or a contract—mandates payment of money to persons in the same "class" as the plaintiff.⁴²² It need not go further and determine whether, if being heard in district court pursuant to § 1331 jurisdiction, the district court would have jurisdiction of the entire claim as stated according to the source of substantive law or, most importantly, whether such a claim would be frivolous.⁴²³ Nevertheless, the Tucker Act and Section 301 remain analogous as to the frivolity analysis, because the "*Burklow* problem" goes primarily to the frivolity of pleading a cause of action under the particular contract chosen, which is essentially the same analysis as under the Tucker Act. Plus, where contract claims are concerned, the analyses overlap sufficiently as to make them almost identical.⁴²⁴

Most importantly, however, when considering the reach of both statutes, *existence of a contract is intertwined in both jurisdiction and merits*. *Textron* holds that pursuant to Section 301, a court's subject matter jurisdiction only attaches to a suit for violation of a contract,

contract or money mandating source (which permits recovery under other laws of the United States) must be non-frivolous. This makes the Tucker Act of limited, though not limitless utility on the frivolity issue. See *Jan's Helicopter*, 525 F.3d at 1309. These are known as "money mandating" sources, although the term generally only applies to statutes and the Constitution. See *id.*

421. See, e.g., *id.* (Prost, J., dissenting in part) (citing and relying on *Steel Co.*); *Moden v. United States*, 404 F.3d 1335, 1341 (Fed. Cir. 2005) (quoting *Steel Co.*) *Spruill*, 978 F.2d at 687 (relying on *Montana-Dakota Utilities Co. v. Nw. Pub. Service Co.*, 341 U.S. 246 (1951) and *Fair*, 228 U.S. at 25).

422. See *Jan's Helicopter*, 525 F.3d at 1307-08. In fact, the tests even among these categories are different. As will be discussed *infra*, a plaintiff in a contract action need only plead a valid contract for the Court of Federal Claims to have Tucker Act jurisdiction. See, e.g., *Total Medical Mgmt.*, 104 F.3d at 1319. In a case under the Constitution or a federal statute, the court must conclude whether it is a "fair interpretation" of the law sued upon or if that law is "reasonably amenable" to the interpretation that it is a "money mandating" provision under which someone in the position of the plaintiff is entitled to recover. See *Fisher*, 402 F.3d at 1173-74 (quoting *Mitchell*, 463 U.S. at 217 and *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003)).

423. *Id.*

424. See, e.g., *Kawa v. United States*, 77 Fed. Cl. 294, 303 (2007) (citing specific paragraphs of the complaint to illustrate how plaintiff pled implied contract).

therefore by definition presupposing an allegation of a contract.⁴²⁵ A court must also dismiss the case if the plaintiff cannot show a contract as a matter of fact, because without a contract, there cannot be a breach.⁴²⁶ The same is true of the Tucker Act. Again, the Court of Federal Claims has jurisdiction over claims founded on a contract, also presupposing an allegation of a contract.⁴²⁷ A plaintiff cannot obtain relief in a Tucker Act case, however, without proving the existence of that contract.⁴²⁸

Therefore, the Court of Federal Claims' more developed mode of analysis for determining its own jurisdiction in Tucker Act cases may provide guidance in Section 301 cases.

B. Jurisdiction Analysis Under the Tucker Act

In 1992, *Spruill v. Merit Systems Protection Board*⁴²⁹ became the Federal Circuit's *Steel Co.*, synthesizing its mode for determining Court of Federal Claims' jurisdiction in Tucker Act cases. In *Spruill*, an employee of the Department of Veterans Affairs petitioned the Merit Systems Protection Board for review of a three-day suspension.⁴³⁰ The Board dismissed for lack of subject matter jurisdiction, and the employee appealed.⁴³¹ The underlying jurisdictional issue was whether the Board or the Department was the appropriate responding party, which depended on whether the Board's decision had been "solely one of the procedure or jurisdiction of the MSPB" or whether "the case raises a mixture of these issues, *i.e.*, if the merits of the agency action are reached by the MSPB, and at the same time a matter of important MSPB procedure or jurisdiction is involved."⁴³² *Spruill*, therefore, explored what "jurisdiction" means more carefully, especially the difference between dismissal for lack of jurisdiction and dismissal for failure to state a claim when certain facts as to both were intertwined.⁴³³

425. *Cf. Textron*, 523 U.S. at 656; *Rome Indus.*, 437 F.2d at 882 (holding that a court can make initial determination of whether contract exists for the purpose of determining its own jurisdiction).

426. *E.g., Kozera*, 909 F.2d at 52; *cf. Rabine*, 161 F.3d at 430.

427. *Trauma Service Group v. United States*, 104 F.3d 1321, 1324-25 (Fed. Cir. 1997) (quoting *Hercules, Inc. v. United States*, 516 U.S. 417 (1996)).

428. *Moore v. United States*, 48 Fed. Cl. 394, 399 (2000).

429. 978 F.2d 679 (1992). *Spruill* is technically not a Tucker Act case, but it is foundational to the Federal Circuit's analysis, so we discuss it here.

430. *Id.* at 680-81.

431. *Id.*

432. *Id.* at 686.

433. *Id.* at 686-87.

Like *Steel Co.*,⁴³⁴ *Spruill* defined "jurisdiction" in terms of power, the Board's power to hear the case. But the Federal Circuit warned that lower courts should not confuse that power with a plaintiff's "entitlement to relief," which depended on whether the complaint stated a cause of action.⁴³⁵ The court explained the procedural interplay between the two concepts by reference to the Supreme Court's foundational decision in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*:⁴³⁶ "If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has."⁴³⁷ If a successful claim turned on compliance with all the statutory elements of the claim, failure of proof of one of those elements simply meant that the Court of Federal Claims should dismiss on the merits.⁴³⁸

Five years later, the Federal Circuit applied this analysis in two contract-based Tucker Act cases decided on the same day and published back to back.⁴³⁹ Complaints in both requested relief for the government's failure to perform under alleged contracts for reimbursement and facilities-sharing arrangements pursuant to the Civilian Health and Medical Program of the Uniformed Services.⁴⁴⁰ The primary issue on the merits was whether an enforceable contract existed.⁴⁴¹ Just as in many Section 301 cases,⁴⁴² however, the government moved for dismissal for lack of *jurisdiction* on the basis that "no contract existed."⁴⁴³

The government had the wrong "labels," the Federal Circuit said: "Although the government argues that jurisdiction is lacking because there was no enforceable contract, the law is clear that for the Court of Federal Claims to have jurisdiction, a valid contract must only be

434. *Steel Co.*, 523 U.S. at 94.

435. *Spruill*, 978 F.2d at 686.

436. 341 U.S. 246 (1951).

437. *Spruill*, 978 F.2d at 687 (quoting *Montana-Dakota*, 341 U.S. at 249). In many respects, this is the court's jurisdiction to decide its own jurisdiction, and a very similar philosophical approach to the boundaries of jurisdiction as presented in *Rabine. Rabine*, 161 F.3d at 431.

438. *Spruill*, at 687.

439. See *Total Medical Mgmt.*, 104 F.3d 1314; *Trauma Service Group*, 104 F.3d 1321. These were "watershed" opinions said the Court of Federal claims a few years later, and "not easily reconciled with the earlier line of cases . . . dealing with jurisdictional issues stemming from claims involving agreements under federal programs," but by 2000, the *Trauma Service* and *Total Medical Mgmt.* "jurisdictional analysis . . . is now well-established in the law." *Moore*, 48 Fed. Cl. at 398-99.

440. See *Total Medical Mgmt.*, 104 F.3d at 1318; *Trauma Service Group*, 104 F.3d at 1324. From this point, we will cite only to *Total Medical Mgmt.*, the earlier opinion and the one with deeper reasoning, unless *Trauma Service Group* substantially differs.

441. *Total Medical Mgmt.*, 104 F.3d at 1320.

442. Cf., e.g., *Bauer*, 368 F.3d at 578; *Rabine*, 161 F.3d at 429.

443. *Total Medical Mgmt.*, 104 F.3d at 1318.

pleaded, not ultimately proven."⁴⁴⁴ Plaintiff had pled a valid contract.⁴⁴⁵ Unfortunately, the alleged contract was void because it was in direct violation of relevant federal regulations, a determination apparent from the allegations of the pleadings.⁴⁴⁶ That fact—the plaintiff's inability to show entitlement to relief under the alleged contracts—did not mean the Court of Federal Claims had lacked jurisdiction.⁴⁴⁷ It simply meant the plaintiffs had failed to state a claim.⁴⁴⁸

By the end of the 1990s, therefore, the Federal Circuit had honed several principles useful to determining post-*Textron* Section 301 jurisdiction. The first was that where merits and jurisdiction were intertwined, a court with original jurisdiction should determine its subject matter jurisdiction based on the allegations of the plaintiff's complaint alone, and if taking the allegations of the complaint as true, the court would be able to grant relief,⁴⁴⁹ and the court must accept jurisdiction to do so.⁴⁵⁰ This analysis was well-established as to many statutory jurisdiction provisions,⁴⁵¹ but inexplicably not as to Section 301.⁴⁵² Nevertheless, it was very similar to *Rabine*: look for an "arguable" claim for coverage under the federal regulatory structure, and then if a plaintiff's claim proves unsuccessful, dismiss for failure to state a claim.⁴⁵³ *Rabine*, therefore, despite having been somewhat ignored,⁴⁵⁴ has jurisprudential "legs."

444. *Id.* at 1319.

445. *Id.*

446. *Id.* at 1320.

447. *Id.* at 1319.

448. *Id.*

449. Whether this statement of the rule goes to "power" versus "relief"—and therefore true jurisdiction per *Steel Co.* is not clear. *Cf. Steel Co.*, 523 U.S. at 90. On the other hand, superseding contract plaintiffs may find it a useful door into federal court.

450. *Spruill*, 978 F.2d at 687 (quoting *Bell*, 327 U.S. at 682).

451. *E.g., Nesbit*, 347 F.3d at 80 (quoting and citing numerous authorities in a Title VII case for the principle that dismissal for lack of jurisdiction is not appropriate just because "the legal theory alleged is probably false"); *Da Silva*, 299 F.3d at 363-65 (stating in a Title VII case, plaintiff's "ultimate failure to prove single employer status is not a ground for dismissing for lack of subject matter jurisdiction or even for failure to state a claim; it is a ground for defeating her federal claim on the merits"); *Nowak*, 81 F.3d at 1188 (stating in an ERISA case that the general practice in intertwined merits/jurisdiction cases is to accept jurisdiction based on the allegations of the complaint and continue with adjudication on the merits).

452. *See supra* Part III.C. One conceivable explanation is to protect the NLRB's exclusive jurisdiction by not reading Section 301's too broadly. *Cf. Mack Trucks*, 856 F.2d at 585-86. But, every federal court is one of limited jurisdiction and has responsibilities of constitutional magnitude to the federal system to read the extent of its jurisdiction accurately. *See Rabine*, 161 F.3d at 431; *New Orleans Pub. Serv.*, 491 U.S. at 359.

453. *See Rabine*, 161 F.3d at 431. The case also states:

The second principle was that plaintiff's burden of proving statutory jurisdiction based on violation of a contract was to plead a valid contract.⁴⁵⁵ Clearly, a Section 301 plaintiff must show more than a valid contract to show jurisdiction, but the principle remains useful. The ultimate determination of whether such a contract existed, even as a matter of law on the pleadings, was on the merits.⁴⁵⁶ This principle revealed *Textron's* implicit vision of Section 301 jurisdiction.

Textron, a case interpreting the breadth of Section 301, is a subject matter jurisdiction case, but its dictum does not speak solely, if at all, to jurisdiction. Plaintiff gets her ticket to federal court by alleging a valid contract in a well-pleaded complaint.⁴⁵⁷ Once she has done that, the district court has jurisdiction. The question becomes what constitutes a well-pleaded complaint.

The Tucker Act cases show that defendant's affirmative defense of contract invalidity made pursuant to *Textron's* dictum goes to the merits.⁴⁵⁸ The plaintiff does not plead an invalidity defense in a Section 301 complaint; a defense is for the defendant to assert and has no effect on district court jurisdiction.⁴⁵⁹ Therefore, the first example in *Textron's* dictum permitting courts to decide a contract invalidity defense is simply one of perhaps many things the "parties" may do once they pass through the "gateway . . . into federal court" and has nothing to do with jurisdiction under Section 301.⁴⁶⁰

This interpretation of *Textron* supports district court jurisdiction under Section 301 for superseding contract cases. Plaintiff need not rely on the *Textron* dictum's examples not being exhaustive or a "defense to a defense" theory of jurisdiction.⁴⁶¹ Nor must she argue that the well-

[T]oday we follow the guidance of *Steel Co.* and hold that the absence of a statutory 'employer' does not deprive this court of jurisdiction to hear a claim to enforce an arbitral award. Rather, a complaint which fails to allege the presence of such an employer fails to state a claim, and a plaintiff who fails to prove the presence of such an employer loses on the merits.

Id. at 430.

454. See *supra* notes 257-258 and accompanying text.

455. *Total Medical Mgmt.*, 104 F.3d at 1320; *Spruill*, 978 F.2d at 686.

456. *Total Medical Mgmt.*, 104 F.3d at 1319.

457. *Id.*; *Spruill*, 978 F.2d at 686. See also *Mottley*, 211 U.S. 149; *supra* notes accompanying Part II.A and accompanying text.

458. Compare *Total Medical Mgmt.*, 104 F.3d at 1319, with *Textron*, 523 U.S. at 658.

459. This is the point of the well-pleaded complaint rule. Allegations that in substance anticipate a defendant's defenses are not well-pleaded and have no impact on the jurisdictional analysis. *Mottley*, 211 U.S. at 153.

460. See *Textron*, 523 U.S. at 658.

461. See *supra* notes 236-237 and accompanying text. A "defense to a defense" theory of superseding contract case jurisdiction would be for a plaintiff to plead breach based on the prior collective bargaining agreement; the defendant to allege invalidity of the

pleaded complaint opens the gateway to federal court and once in there are few restrictions on the legal landscape she may traverse.⁴⁶² Instead, plaintiff can argue that a defendant claiming lack of jurisdiction because of contract validity is in essence making an affirmative defense pursuant to *Textron's* dictum, which in light of analogous Tucker Act analysis goes to the merits.

The final principle from Tucker Act analysis after *Total Medical Management* useful to Section 301 relates to the impact of "labeling" the cause of action. The underlying essence of superseding contract cases has always been labeling: implying that as a matter of law the case was a validity case as opposed to a suit for violation of a contract.⁴⁶³ On the other hand, to some degree both the Third Circuit in *Mack Trucks* and the Seventh Circuit in *Sign-Craft* justified interpreting Section 301 to extend jurisdiction to all validity issues partly because of an almost defeatist inability to cope with the labeling problem: whether a complaint was *really* a suit for violation of a contract or a suit to invalidate a contract.⁴⁶⁴

Interpreting *Textron* through the Tucker Act cases shows substantively that contract validity need have nothing analytically to do with jurisdictional questions and "labeling" need not apply. After all, a court can hardly justify failure to decide contract validity on jurisdictional grounds if contract validity does not implicate its jurisdiction.⁴⁶⁵

collective bargaining agreement in light of the "expressly superseded" language of the superseding contract; and then the plaintiff, responding with a sort of "defense to a defense," that the superseding contract was invalid because it had been procured by fraud.

462. See *supra* notes 121-122 and accompanying text.

463. See *Bauer*, 368 F.3d at 579 n.5 ("There is some ambiguity over whether the expiration or supersession of a labor contract that is the subject of a § 301 claim is better viewed as raising a jurisdictional problem or, instead, a failure-to-state-a-claim problem."). *Bauer* does discuss the issue more thoughtfully in its footnote 5, but *Heussner* labeled superseding contract cases as "cases concerning the validity of contracts" and not "suits for violation of contracts" and dismissed them with little analysis. *Heussner*, 887 F.2d at 676 (quoting 29 U.S.C. § 185(a)).

464. See *supra* notes 98-99 and accompanying text (discussing *Mack Trucks's* loose use of language); see *supra* note 117 and accompanying text (discussing decision to overturn *NDK* on basis that it relied too much on labeling and criticizing district courts for failing to label correctly). *Textron* must overrule both *Mack Trucks* and *Sign-Craft*, of course, and *Peters* comes very close to saying this about *Sign-Craft*. *Peters*, 398 F.3d at 972. Both cases did not need to turn on their reasoning, so what might remain is uncertain.

465. Cf. *Heussner*, 887 F.2d at 676.

C. *Another Solution to the "Burklow Problem"*

Labeling concerns bring the analysis back to where it began: if a court could view a superseding contract case as one where alleging affirmative defense of contract invalidity does not implicate jurisdiction because of *Textron*, could a court view a superseding contract case as the combination of two similar such defenses going too far beyond *Textron* as to become a frivolous claim to begin with? Based on the analysis above, they should not, but this is the labeling decision district courts must make or they have no solution to "the *Burklow* problem."⁴⁶⁶

One description of superseding contract cases is that they are suits for violations of contracts that are superficially, at least, unenforceable. This Article has focused much of its attention on enforceability of superseding contracts, most often a plant closing agreement. This section of the article will focus on enforceability of the superseded contract, the original plant closing agreement. It will show that in Tucker Act and other government contracting cases, a superseded contract sometimes is enforceable, and the reasons why are applicable to Section 301 cases.

Under the Tucker Act, the Court of Federal Claims will take jurisdiction of breach of contract claims if the plaintiff pleads a valid contract, even if that contract is one of a class of unenforceable contracts.⁴⁶⁷ For example, in *Total Medical Management*, the complaint alleged a valid contract, and the court found that the actual contracts included all the elements of a government contract.⁴⁶⁸ Nevertheless, the court did dismiss for failure to state a claim, because the contracts were void for directly and plainly conflicting with the relevant government regulations.⁴⁶⁹ Unlike in prior superseding contract cases,⁴⁷⁰ however, the

466. District courts do have the benefit of all the arguments made previously in this Article, of course, and we hope some will find them persuasive.

467. See generally *Total Medical Mgmt.*, 104 F.3d at 1319-21. That the contract is "unenforceable as a matter of law" is essentially the position courts take in superseding contract cases when they dismiss for lack of jurisdiction without analysis of whether the subsequent contract might not be valid. Cf. *Adcox*, 21 F.3d at 1386 (stating "[b]ecause that Agreement superseded the 1988 collective bargaining agreement, including the Service Award Agreement, upon which the plaintiffs' § 301 claim against Teledyne depends, there was no breach here that would support a § 301 claim").

468. *Total Medical Mgmt.*, 104 F.3d at 1319-20.

469. *Id.* at 1320-21.

470. See, e.g., *Bauer*, 368 F.3d at 579 (finding "virtually no difference between the facts of *Adcox* and *Heussner* and this case" where district court's ruled there could be no breach of contract case when the Plant Closing Agreement abrogated the 1988 CBA that was allegedly violated); *Heussner*, 887 F.2d at 676 ("Any claim based on the terms of the apparently superseded 1984 Agreement clearly cannot be pursued unless and until the 1987 Agreement is invalidated."); *Taylor*, 157 Fed. Appx. at 561-62 (plaintiffs'

Court of Federal Claims took jurisdiction first and then scrutinized the contracts and applicable law.⁴⁷¹ Like the and *Total Medical Management* contracts, even if superseded contracts are invalid as a matter of law from the face of the complaint by virtue of superseding contracts, a court should take jurisdiction to make that decision on the merits.

Perhaps more importantly, the parties' legal positions in *Total Medical Management* and many superseding contract cases are surprisingly similar. *Total Medical Management* turns not only on the voidness of the contracts, but on the principle that the government is not bound when its agents act "beyond their authority and contrary to law," as they would when negotiating void contracts.⁴⁷² The contracting party bears the risk of such government agents' conduct.⁴⁷³

Appropriate risk allocation in the labor/superseding contract case context is trickier. Unions and their members may be responsible for the actions of union representatives despite failure to fulfill duties of good faith and fair dealing if a third party, such as an employer, reasonably believed a representative was acting within his or her authority.⁴⁷⁴ In *Burklow*, however, plaintiffs brought a "hybrid" case,⁴⁷⁵ alleging that the union officials and Baskin-Robbins were in cahoots⁴⁷⁶ so that Baskin-Robbins could not reasonably have believed the union was acting within its authority as to its members. Therefore, individual union members should not bear the risk of loss in superseding contract cases that are also hybrid cases, and therefore, not be bound by the superseding agreement.⁴⁷⁷

arguments that MOU was invalid because it had not been submitted for a vote, signed or ratified did not permit plaintiffs to pursue breach of contract claim on superseded contract claim because they did not plead MOU had been breached and under circuit law, the district court was "prohibited from making an inquiry into the validity of a contract"); *Wheeler*, 2007 WL 1409752 at *1 (stating "[t]he problem with Plaintiffs' position is that once the Settlement Agreement was in place the CBA ceased to exist"); *Lopresti*, 2001 WL 1132051 at *6 ("A plant closing agreement that supersedes a collective bargaining agreement precludes jurisdiction pursuant to section 301.").

471. *Total Medical Mgmt.*, 104 F.3d at 1319-20.

472. *Id.* at 1321.

473. *Id.*

474. See *Kozera*, 909 F.2d at 54 (citing *NLRB v. Local 815, Int'l Bhd. of Teamsters*, 290 F.2d 99, 103 (2d Cir. 1961) (Friendly, J.)).

475. A hybrid case is one in which the alleged breach of a union's duty of good faith and fair dealing is related to the employer's breach of contract. See *Vaca*, 386 U.S. at 184-86; 12 EMPLOYMENT COORDINATOR § 53:5 (West 2009).

476. See *Burklow*, 274 F. Supp. 2d at 902; *supra* note 233 and accompanying text.

477. Cf. *Vaca*, 386 U.S. at 184-85 (where compulsory grievance procedures not followed by employer nor advanced by union, and are thereby "unsatisfactory or unworkable" for individual employee, employee may sue both in hybrid suit).

In pure breach of contract cases, agency is not at issue, but similar principles may apply. For example, in *Burklow*, plaintiffs alleged "double fraud:" fraud in the inducement of the 1998 Agreement which left union employees financially disadvantaged when Baskin-Robbins announced the Owensboro Plant closing and alleged fraud in the inducement of union members to vote for the plant closing agreement.⁴⁷⁸ In general, courts may frown on union members' claims of fraudulent inducement to enter a collective bargaining agreement⁴⁷⁹ simply because there are limits to how much a union or union member should rely on an employer's representations,⁴⁸⁰ even in the collective bargaining context.⁴⁸¹ On the other hand, the reasonableness of the union members' reliance in a fact set analogous to *Burklow* is worthy of more than summary adjudication. Further, however adverse district courts may be to deciding fraud in the inducement claims for fear of intruding on the NLRB's exclusive jurisdiction, they have often done so when pre-formation conduct was as bound up with contract enforcement as it was in *Burklow*,⁴⁸² with Supreme Court and NLRB approval.⁴⁸³

The Supreme Court's decision in a Tucker Act case arising from the government's breach of agreements with investors who had purchased failing thrifts illustrates these principles at a more compelling level. In *United States v. Winstar*,⁴⁸⁴ the investors alleged that federal regulators had breached contracts permitting them to give favorable accounting treatment to certain thrift assets.⁴⁸⁵ When Congress realized that transferring thrifts to such investors had not saved the Federal Deposit Insurance Corporation from the risk of exhausting its funds, it enacted the Financial Institutions Reform, Recovery and Enforcement Act of

478. See generally *Summary Judgment Memo in Response*, *supra* note 250.

479. See *Serrano*, 790 F.2d at 1287.

480. Courts will and do protect parties' reliance interests in a variety of contexts as long as it is reasonable. Cf. *ExxonMobil Oil Corp. v. F.E.R.C.*, 487 F.3d 945, 968 (D.C. Cir. 2007); *Bridges v. Dep't. of State Police*, 441 F.3d 197, 210 (4th Cir. 2006).

481. In collective bargaining, reliance may be even more reasonable as to representations about plant closings based on the NLRA and other federal labor law. See *Waymouth Farms, Inc.*, 172 F.3d at 599-600.

482. See, e.g., *Rozay's Transfer*, 850 F.2d at 1326; *Mack Trucks*, 856 F.2d at 584-85; *Serrano*, 790 F.2d at 1288. Not all such cases can be said to survive *Textron* as to all issues.

483. See, e.g., *Arnold Co.*, 417 U.S. at 14; *Smith*, 371 U.S. at 197.

484. 518 U.S. 839 (1996) (Souter, J., giving opinion of the court).

485. *Id.* at 848-56.

1989 (FIRREA),⁴⁸⁶ which had the ultimate effect of breaching the agreements between the regulators and investors.⁴⁸⁷

Not unlike collective bargaining agreements, some different legal principles, not generally applicable to contracts made and enforceable under common law, governed the contracts at issue in *Winstar*.⁴⁸⁸ No such agreement or prior law could bind Congress not to change the law and thereby render the government unable to perform.⁴⁸⁹ Nevertheless, one universal principle of contract law was applicable to such a government contract: to the extent that the regulators had promised the investors something beyond the regulators' absolute control and because Congress acted, the regulators breached and the contract should be read to insure the investors against loss arising from Congress' action.⁴⁹⁰ Justice Souter for the Court stated, "So long as such a contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of [Congress' power to enact future law], the enforcement of the risk allocation [component] raises nothing for the unmistakability doctrine to guard against."⁴⁹¹

The labels of the applicable law may be different, but the fundamental principles are not. Investors and regulators make a contract as do a union and employer. Events, possibly unforeseeable and uncontrollable by the regulators and employer, occur, resulting in their breaching the contract. These events are not in themselves unlawful, nor can they, or perhaps should they, be stopped. That legislatures cannot be bound by prior legislatures was a longstanding principle of common law.⁴⁹² It is well established that employers may close plants and collective bargaining agreements may reach only the effects of doing so.⁴⁹³

Both types of contracts, however, can be construed as containing risk allocation terms. *Winstar* provides that precedent for certain government contracts. Labor law does the same with its requirement that employers closing plants engage in "effects bargaining." *Winstar* holds that regulators cannot claim that the Congress-negotiated superseding

486. Pub. L. No. 101-73, 103 Stat. 183, *codified at* 12 U.S.C. § 1464(t)(1)(A) (West 2006); *see Winstar*, 518 U.S. at 856-58.

487. *Winstar*, 518 U.S. at 860.

488. *Id.*

489. *Id.* at 872-83. This is the "doctrine of unmistakability" and is applicable to any contract claim with the government.

490. *Id.* at 868-69 (citing RESTATEMENT (SECOND) OF CONTRACTS § 264 (1981)).

491. *Winstar*, 518 U.S. at 880.

492. *Fletcher v. Peck*, 6 Cranch 87, 135 (1810) (Marshall, C.J.).

493. *E.g.* Worker Adjustment and Retraining Notification Act, *codified at* 29 U.S.C. § 2101 *et seq.*; *see also Adcox*, 21 F.3d at 1385-86.

"contract" invalidates the prior contract so that it is judicially incognizable under the unmistakability doctrine.⁴⁹⁴ By extension, the Tucker Act's jurisdiction of contract claims does not bar such a theory.

District courts should consider the equivalent true of their own jurisdiction of superseding contracts. Effects-bargaining is a non-judicial remedy of an employer's breach of contract.⁴⁹⁵ It is a risk-shifting requirement of every collective bargaining agreement. Fraud in the inducement of a superseding contract is therefore a failure to comply with the requirement of the prior agreement to shift the risk of loss to the union, the innocent party. As *Winstar* illustrates, the innocent party may reach back and require enforcement of prior contract, whether that means damages for loss of favorable accounting methods or remedies for dishonest bargaining over the effects of a plant closing.

V. CONCLUSION

These are the solutions to the "*Burklow* problem" favorable to employees seeking district court jurisdiction under Section 301 of the Labor-Management Relations Act of suits for violations of contracts superseded by fraudulently induced agreements. To the extent a court denies jurisdiction on the basis that a claim for breach of a superseded contract is frivolous, sufficiently credible substantive legal theories exist to support the claim. Among those are reasonable applications of the *Textron* dictum that validity defenses to Section 301 contract claims are cognizable in district court. Analogies to jurisdiction analysis in under a comparable jurisdiction statute, the Tucker Act, further confirm that district courts should exercise jurisdiction of superseding contract cases, especially the Supreme Court's decision in *United States v. Winstar*. It is time for district courts to reassess the practice of summary dismissal of these claims for lack of jurisdiction. They have it.

494. *Winstar*, 518 U.S. at 880.

495. See 12 EMPLOYMENT COORDINATOR, *supra* note 203.