Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jnrisdiction†

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INTRODUCTION

Article III authorizes and the Judicial Code grants federal subject matter jurisdiction over civil cases "arising under" federal law. The Supreme Court has interpreted these words differently, however, in their constitutional and statutory contexts.[1] While the constitutional text is read broadly, the Court has imposed three limitations on the same words in the statutory grants of federal question jurisdiction:[2] (1) the "well-pleaded complaint" rule;[3] (2) a requirement that the federal issues be sufficiently "direct" or

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1. *See, e.g.*, Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 807 (1986) ("Although the constitutional meaning of 'arising under' may extend to all cases in which a federal question is 'an ingredient' of the action, we have long construed the statutory grant of federal question jurisdiction as conferring a more limited power." (quoting Osborn v. Bank of U.S., 22 U.S. 738, 823 (1824))).

2. The general federal question statute is 28 U.S.C. § 1331 (2000). Other specialized grants of federal question jurisdiction also employ the "arising under" language, and the Court has generally equated the interpretation of the phrase in these other statutes in the same manner as § 1331. *See, e.g.*, Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 830 (2002) (equating statutory "arising under" standard under 28 U.S.C. § 1338 for patent cases with that established for claims invoking § 1331). For convenience, I will refer only to § 1331.

3. This requires that the federal issues on which subject matter jurisdiction is based appear

"central"[4] to the dispute to justify access to the federal courts; and (3) a requirement that the federal assertion be "substantial."[5] These limitations are meant to filter those cases that should invoke lower federal court jurisdiction from those that should not.

My primary focus is the second limitation—the centrality requirement—which has long vexed courts and commentators.[6] The Supreme Court sent conflicting signals regarding centrality in the first third of the twentieth century and then ignored the topic for fifty years.[7] When it returned to the issue in 1986, in *Merrell Dow Pharmaceuticals Inc. v. Thompson*,[8] a sharply divided Court created more debate than certainty, particularly on the question of when (if ever) a state-created claim might invoke federal question jurisdiction. In 2005, the Court revisited the topic and issued a unanimous opinion in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*.[9] This case addresses significant questions and concerns raised by courts and commentators in the wake of *Merrell Dow* and throughout the Court's tortured treatment of the centrality requirement.

Why has the Court had such difficulty with centrality? I believe it is because Justices have been animated by different views of the purpose of federal question jurisdiction. Some, notably Justice Holmes in the early twentieth century and the majority of Justices in *Merrell Dow*, seem to have embraced a narrow view, in which

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as an essential part of plaintiff's claim. *See infra* notes 47–64 and accompanying text.

4. *See, e.g.*, RICHARD D. FREER & WENDY C. PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 249–52 (4th ed. 2005) (discussing requirement as one of "centrality"); William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967). The Supreme Court has recently referred to this area as the "centrality of the federal issue." Empire Healthchoice Assurance, Inc. v. McVeigh, 126 S. Ct. 2121, 2136 n.5 (2006).

5. More precisely, the federal assertion must not be "so patently without merit" that the court rejects it as frivolous. Hagans v. Lavine, 415 U.S. 528, 535, 542–43 (1974). Though this requirement is stated in jurisdictional terms, it appears to be aimed at the merits of the case. Thus, a dismissal on substantiality grounds may be essentially a dismissal for failure to state a claim. Bell v. Hood, 327 U.S. 678, 682–83 (1946). As the Supreme Court said most recently: "A claim invoking federal question jurisdiction . . . may be dismissed for want of subject matter jurisdiction if it is not colorable, i.e., if it is 'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'" Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1244 n.10 (2006) (quoting *Bell*, 327 U.S. at 678). Throughout this Article, I will assume that the substantiality requirement is satisfied.

6. "The most difficult single problem in determining whether federal question jurisdiction exists is deciding when the relationship of the federal law to a case is such that the action may be said to be one 'arising under' that law." 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3562, at 17–18 (2d ed. 1984). "[I]t cannot be said that any clear test has yet been developed to determine which cases 'arise under' federal law." *Id.* § 3562, at 19. *See also* Amoco Prod. Co. v. Sea Robin Pipeline Co., 844 F.2d 1202, 1205 (referring to the centrality requirement generally as "the Serbonian bog").

7. I will discuss the principal cases in Part III of this Article. The fifty-year hiatus was between Gully v. First Nat'l Bank in Meridian, 299 U.S. 109 (1936) and Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804 (1986).

8. 478 U.S. 804 (1986).

9. 545 U.S. 308 (2005). Justice Thomas filed a concurring opinion in which he expressed the possibility of the Court's adopting in a later case the test set forth by Justice Holmes, which is discussed in Part III.A of this Article. *Id.* at 320–21 (Thomas, J., concurring); *see infra* note 68.

the statutory grant of federal question jurisdiction provides a federal forum only for the vindication of federally created rights.[10] Others, however, notably Justice Brennan in his dissent in *Merrell Dow*, envision a broader role. While they agree that federal question jurisdiction is necessary for the vindication of federal rights, they also believe it should provide lower federal fora[11] for the consistent and sympathetic interpretation of federal law.[12] This difference in view clashes dramatically when a state-created claim implicates issues of federal law. The Holmes approach holds that no federal forum is needed, because no federal claim is being vindicated. The broader view is open to the possibility that federal question jurisdiction ought to be available to interpret or apply federal law. In *Grable*, the Court embraces the broader view of federal question jurisdiction and finally provides meaningful guidance for assessing when state-created claims may invoke federal question jurisdiction.

In my opinion, the Court does this by recognizing—implicitly, I admit—the difference between a rule and a standard. A rule affords the decisionmaker no discretion, but cabins its inquiry to whether a given set of facts exists.[13] A standard, in contrast, affords the decisionmaker greater discretion by prescribing a series of relevant factors to be weighed in view of a policy goal.[14] In illuminating the difference, we benefit by juxtaposing the centrality requirement with the well-pleaded complaint rule. The latter performs a task well-suited to a rule—it asks a question that can be answered yes or no. The centrality requirement, however, asks a fundamentally different kind of question—how much federal content is required to invoke jurisdiction. This sort of question is best addressed by a less determinate *standard*, which requires the court to balance federal and state interests and to consider, among

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10. *See* Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 225 (1948) ("The federal courts do not sit to give material for law review articles. Their business is the vindication of rights conferred by federal law.").

11. Recognition of federal question jurisdiction provides not only a federal trial forum, but also the possibility of appeal to the appropriate federal court of appeals. Thus, jurisdiction under § 1331 permits two layers of consideration by Article III judges—one for adjudication and another for correction of errors. Refusal to recognize federal question jurisdiction relegates litigants to the state courts, with the possibility of Article III review on federal matters only if the Supreme Court agrees to review the determination of the highest state court. Such review is a long shot. *See infra* notes 52, 137 and accompanying text.

12. *See* RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE 191 (2006) ("Federal judges may be expected to develop special expertise in matters of federal law, and might also be more sympathetic to the policies underlying federal law."); 15 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE § 103.31[3][a],at 103–38 (3d ed. 2005) ("[A] significant—if not primary—purpose for providing federal question jurisdiction is to take advantage of the federal courts' expertise on matters of federal law . . . .").

13. *See infra* notes 53–56 and accompanying text.

14. I realize that there is vast literature and substantial debate on the subject of rules versus standards. *See, e.g.*, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). For our purposes, it is sufficient to use the definitions laid out in the text, which reflect most directly the views of Judge Posner and Dean Sullivan.

other things, what I will call "litigation reality"—that is, what issues must be resolved if the underlying dispute is adjudicated.

Thus Holmes's view of federal question jurisdiction—that it exists to provide a federal trial forum for vindication of federally-created claims—erred by applying a rule (which I will call the "Holmes test") for an assessment that requires the subtlety of a standard. Like the Holmes test, the *Grable* standard for centrality may be a product of its time. It implicitly recognizes that today—perhaps unlike when Holmes wrote—case load makes it impossible for the Supreme Court to discharge the task of providing significant appellate review of state-court interpretations of federal law. Thus the holding, the language, and the overall tone of *Grable* support a broader role for lower federal courts than the grudging older cases. At the same time, there must be appropriate limits to ensure that federal question jurisdiction does not threaten either to inundate the federal courts or to rob the state courts of their legitimate authority to shape state law. I suggest that *Grable*, augmented by the types of considerations relevant to the discretionary decline of supplemental jurisdiction and applied with proper concern for state prerogatives, goes a long way toward achieving an appropriate balance.

Just a year after deciding *Grable*, the Court addressed centrality in *Empire Healthchoice Assurance, Inc. v. McVeigh*.[15] Though the Court in this more recent case could have been clearer in explicating its approach, the opinion is broadly consistent with *Grable* and gives us reason to believe that we are closer today than we have been to an apt and workable approach to the delicate allocation of judicial power between state and federal courts for cases arising under federal law.

I. CONSTITUTIONAL AND STATUTORY GRANTS OF JURISDICTION

Our concern is the *statutory* grant of federal question jurisdiction. Generally, of course, federal courts have subject matter jurisdiction only over cases or controversies included within the judicial power of the United States in Article III of the Constitution and as to which Congress has enacted a statutory grant of subject matter jurisdiction. In other words, the federal judicial power created in Article III is not self-executing, and Congress must vest it in the lower federal courts by statute.[16] As a policy matter, we expect constitutional authorization of subject matter jurisdiction to be broad. Breadth gives Congress leeway in determining how much of the judicial power to bestow upon the lower federal courts. If Congress is too parsimonious, it can remedy the problem by statute, without need for constitutional amendment. Hence it does not surprise us that the Framers employed broad language in Article III, such as that providing jurisdiction for cases "arising under" federal law and for controversies "between citizens of different states."[17]

Similarly, we expect statutory grants of subject matter jurisdiction to be relatively narrow, for Congress to pick and choose among available aspects of the constitutional

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15. 126 S. Ct. 2121 (2006).

16. There are narrow exceptions found in Article III, Section 2, Clause 2, which provides that in cases affecting ambassadors and similar officers, and in which a state is a party, the Supreme Court has trial jurisdiction. These grants are self-executing; no legislation is required to vest the power to determine such cases in the Supreme Court.

17. U.S. CONST. art. III, § 2.

judicial power. In doing so, Congress presumably is mindful of the need to avoid overloading the lower federal courts with the universe of cases that could constitutionally be placed there.[18] In its choice of operative language in jurisdictional statutes, though, Congress has seemed unaware of the policy difference between constitutional and statutory provisions.[19] With both federal question and diversity of citizenship jurisdiction, Congress adopted verbatim the broad operative language from the Constitution.[20]

The Supreme Court, and not Congress, has animated the policy of broad constitutional authorization with narrow statutory grants. It has done so by interpreting identical language to mean different things, depending upon whether the language is found in Article III or in the Judicial Code. Properly, the Court interprets the constitutional grants broadly.[21] For diversity of citizenship jurisdiction, the Court held that the Constitution requires only "minimal diversity"—that at least one plaintiff be of different citizenship from at least one defendant.[22] For federal question jurisdiction, the Court early imbued the Article III phrase "arising under" with stunning breadth. In

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18. Congress determines the number of federal judgeships, and thus presumably has a sense of appropriate workload. Were it to expand federal jurisdiction dramatically, we would expect it to increase the number of judgeships.

19. Perhaps I am too harsh here. Maybe Congress has intended to vest the full constitutional extent of subject matter jurisdiction. *See, e.g.*, *infra* note 28. Or perhaps it has intended to delegate to the federal courts the responsibility of setting the statutory limits. Congress has understood the need for docket control to the extent that it has imposed amount-in-controversy requirements in jurisdictional grants. It has always imposed such a limitation in diversity of citizenship cases and has increased it several times; today it requires an amount in excess of $75,000. 28 U.S.C. § 1332(a)(1) (2000). Congress imposed a similar restriction on cases invoking the general federal question statute from its inception in 1875, but abolished it in 1980. 13B WRIGHT ET AL., *supra* note 6, § 3562, at 17 ("After 105 years the anomaly of putting a price tag on entrance to federal court by those seeking to vindicate federal rights is ended."). But in terms of the operative language of the grants, Congress's use of the constitutional language may demonstrate, as I suggest, blindness to the difference between constitutional and statutory grants.

20. Article III, Section 2 of the Constitution creates federal judicial power over claims "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Section 1331 grants original jurisdiction over all civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2000). This is also true of diversity of citizenship jurisdiction, where Article III, Section 2 creates judicial power over cases "between citizens of different states" and § 1332(a)(1) requires a dispute "between citizens of different states." 28 U.S.C. § 1332(a)(1) (2000).

21. In a nonjurisdictional context, John Marshall explained the appropriateness of broad constitutional interpretation: "[W]e must never forget that it is a *constitution* we are expounding . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." McCulloch v. Maryland, 17 U.S. 316, 407–415 (1819) (emphasis in original).

22. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967) (upholding grant of statutory interpleader jurisdiction based upon minimal diversity). This broad interpretation of the constitutional grant of diversity of citizenship jurisdiction has enabled Congress to enact the Multiparty, Multiforum Trial Jurisdiction Act of 2002, 28 U.S.C. § 1369 (2002) and the Class Action Fairness Act of 2005, 28 U.S.C. § 1711 (2005), which base jurisdiction upon minimal diversity.

Osborn v. Bank of the United States, the Court, in an opinion by Chief Justice John Marshall, held that the Constitution requires only that federal law potentially "forms an ingredient" in the overall litigation.[23] Under *Osborn*, the federal issue does not have to be one of particular difficulty or importance to the outcome of the case. Indeed, the federal issue does not even have to be contested. As a constitutional matter, federal question jurisdiction can attach if *any* federal issue *could* come up in the case.[24]

And the Court has interpreted the identically worded statutory grants narrowly. For diversity of citizenship, the phrase "between citizens of different states" has, since 1806, required *complete* diversity—each plaintiff must be of diverse citizenship from each defendant.[25] With federal question jurisdiction, however, the Court adopted narrow statutory interpretation only after flirting with the alternative. In the *Pacific Railroad Removal Cases*,[26] decided ten years after Congress passed the general federal question statute,[27] the Court equated the statutory grant for "arising under" jurisdiction with that of Article III as explicated in *Osborn*.[28] This meant that run-of-the-mill common law tort actions against federally chartered railroads invoked federal question jurisdiction. Because the validity of the railroad's formation (under federal law) might conceivably be raised in any case involving such a railroad, the requisite federal content under *Osborn* was present.[29] Three significant and closely related problems must have come to light in short order.

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23. 22 U.S. 738, 823 (1824). In *Osborn*, the Bank of the United States sued to enjoin an Ohio official from collecting taxes from it under an Ohio statute that provided for the taxation of non-Ohio banks. The Bank contended that the Supremacy Clause of the Constitution prohibited the state from taxing an instrumentality of the federal government. *Id.* at 739–40, 744–45. That federal issue satisfied the "arising under" requirement of Article III. *Id.* at 824–26.

24. Professor Redish notes that the Court arguably narrowed the reach of *Osborn* in subsequent cases. *See* 15 REDISH, *supra* note 12, § 103.21. For our purposes, however, it is certain that the constitutional grant of federal question jurisdiction is broader than the statutory grant.

25. Strawbridge v. Curtiss, 7 U.S. 267, 267 (1806).

26. 115 U.S. 1 (1885).

27. Congress passed the precursor to 28 U.S.C. § 1331 in 1875. Act of March 3, 1875, Sec. 1, 18 Stat. 470. Before that, there were several specific grants of federal question jurisdiction for particularized subject matter, such as patents and copyrights. But aside from a grant of general federal question jurisdiction in the famous Midnight Judges Act of 1801, repealed in 1802 (U.S. Judiciary Act of 1801, 2 Stat. 89 (repealed 1802)), there was no general federal question jurisdiction until 1875. *See* FREER & PERDUE, *supra* note 4, at 240.

28. There is actually reason to believe that Congress intended to vest the full constitutional range of federal question jurisdiction in the 1875 statute. Senator Matthew Carpenter, who sponsored the legislation, asserted that the "bill gives precisely the power which the Constitution confers—nothing more, nothing less." 2 CONG. REC. 4987 (1874). *See* Ray Forrester, *Federal Question Jurisdiction and Section 5*, 18 TUL. L. REV. 263, 276–80 (1943). Some scholars have noted, however, that Senator Carpenter was speaking broadly of the overall bill, and not necessarily the federal question portion of it. RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 857–58 (5th ed. 2003). It seems likely that those advocating this breadth in the statute did not foresee the problems it would cause.

29. In dissent, Chief Justice Waite argued that "Congress did not intend to give the words . . . in the act of 1875, the broad meaning they have when used by Chief Justice Marshall in the argument of the opinion in *Osborn*." *Pacific Railroad Removal Cases*, 115 U.S. at 24 (Waite,

First, this broad reading of the statutory grant threatened to smother the lower federal courts. The mischief of the *Pacific Railroad Removal Cases* would not be limited to cases involving federally chartered railroads. As courts have frequently pointed out, equating the statutory and constitutional definitions of "arising under" would mean that every dispute over real property in the vast majority of states would invoke federal question jurisdiction.[30] In each such case, the question of whether title was validly derived from the United States could conceivably be raised. The breadth of this floodgate is hard to imagine. Permitting every case in which a federal issue might be raised to invoke federal question jurisdiction would do far more than create a workload problem necessitating some means of docket control. The sheer volume of cases would imperil the lower federal courts' ability even to function. It is not an overstatement to say that the Court's retreat from *Osborn* as the statutory standard for "arising under" was rooted ultimately in institutional self-preservation.[31]

Second, employing the *Osborn* test would permit federal question jurisdiction when there is simply no need for it. Unless a federal claim is asserted or some issue of federal law is actually to be engaged in the litigation, why (absent diversity of citizenship)[32] should there be a federal forum? Letting the tail of a *potential* federal issue wag the jurisdictional dog in this way would engage the federal courts in cases not requiring the expertise of the federal bench. Surely it is appropriate, in considering the reach of jurisdictional statutes, to consider whether placing cases in the federal courts serves the underlying purposes for which the jurisdiction was created.

Third, overly broad invocation of federal question jurisdiction threatens the legitimate interest of the states in having their courts interpret state law. True, Article III envisions concurrent jurisdiction in many instances. But to recognize federal question jurisdiction when no issue of federal law will actually arise insinuates the federal courts in cases involving only matters of state law. Absent diversity of citizenship, there is no warrant for depriving state courts of exclusive authority over such cases. Put bluntly, the federal courts are too busy and the state interests too

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C.J., dissenting).

30. *See, e.g.*, Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900) (noting that if statutory and constitutional standards were coextensive, "every action to establish title to real estate (at least in the newer States) would [invoke federal question jurisdiction]"); T.B. Harms Co. v. Eliscu, 339 F.2d 823, 826 (2d Cir. 1964) (Friendly, J.) ("If the ingredient theory of Article III had been carried over to the general grant of federal question jurisdiction now contained in 28 U.S.C. § 1331, there would have been no basis . . . why federal courts should not have jurisdiction as to all disputes over the many western land titles originating in a federal patent, even though the controverted questions normally are of fact or of local land law.").

31. *Cf.* 15 REDISH, *supra* note 12, § 103.30, at 103-32 ("[T]o give the federal question statute a reading as broad as the one given the constitutional provision in *Osborn* would flood the federal courts with countless cases totally unrelated to federal law.").

32. Cases invoking diversity of citizenship jurisdiction are governed, of course, by state substantive law. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Though diversity of citizenship has been much criticized, the Founders envisioned the need for access to an independent federal forum in diversity cases to avoid at least the fear of local bias in local courts. *See generally* FREER, *supra* note 12, at 157–59. The Supreme Court continues to recognize this policy basis for diversity of citizenship jurisdiction. "The Court . . . has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants." Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553–54 (2005).

important to countenance the broad placement of state-law centered litigation into federal fora absent some *need*—a need rooted in the reasons for federal question jurisdiction: the vindication of federal rights or the necessity of consistent and sympathetic interpretation of federal provisions.[33]

Two aspects of federal jurisdiction exacerbate these problems and counsel restraint in interpreting the statutory grant of federal question jurisdiction. The first is the defendant's right to remove a federal question case from state to federal court.[34] If the plaintiff files a concurrent-jurisdiction case[35] in federal court, the defendant can do nothing to trump that choice of forum. If the plaintiff files such a case in state court, however, the defendant can remove it to federal court. Thus, a concurrent-jurisdiction case "will be litigated in state court only if both plaintiff and defendant so choose."[36] The second aspect of federal jurisdiction that exacerbates these problems is supplemental jurisdiction. Finding that a claim arises under federal law allows the federal court to entertain nonfederal, nondiversity claims that share a common nucleus of operative fact with the federal question claim.[37] Again, we should worry about a relatively small kernel of federal law forcing a state-law based case into federal court.[38]

Congress and the Court learned a lesson from the *Pacific Railroad Removal Cases*.[39] Congress largely overruled their result by removing jurisdiction over cases involving most federally chartered corporations.[40] The Court came to regard its holding in those cases as an "unfortunate decision"[41] and ultimately rejected *Osborn* in construing the statute.[42] In its stead, the Court imposed two significant restrictions: the

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33. Professors Chadbourn and Levin long ago noted the need "to protect the lower federal courts from a flood of litigation technically within the broad limits staked out by [Chief Justice] Marshall [in *Osborn*], but actually unrelated to the purpose of the Act." James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 649 (1942).

34. As a general proposition, a defendant may remove any case falling within the original jurisdiction of the federal district courts. 28 U.S.C. § 1441(a) (2000). There are statutory exceptions to the right to remove diversity of citizenship cases. For instance, such a case cannot be removed if any defendant is a citizen of the forum. § 1441(b). There are no such exceptions to removal in federal question cases. If the case satisfies the statutory requirements for federal question jurisdiction, and the defendant acts timely, the defendant can remove.

35. Any federal question case could be entertained in state court, except in those relatively rare instances in which federal question jurisdiction is exclusive. FREER, *supra* note 12, at 190–91 (listing examples of exclusive federal question jurisdiction, including patent infringement and antitrust claims).

36. FALLON ET AL., *supra* note 28, at 861.

37. 28 U.S.C. § 1367(a) (2000) (granting supplemental jurisdiction to the full extent of Article III).

38. The federal court could refuse to exercise supplemental jurisdiction over the state law claims, *inter alia*, if questions of state law present novel or complex questions or would predominate substantially in the case. 28 U.S.C. § 1367(c)(1)–(2) (2000). *See infra* notes 143–44 and accompanying text.

39. 115 U.S. 1 (1885).

40. Under § 1349, federal question jurisdiction cannot be based upon incorporation by Congress unless the United States owns more than half of the capital stock of the entity. 28 U.S.C. § 1349 (2000).

41. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 n.50 (1959).

42. *See* FALLON ET AL., *supra* note 28, at 858 (noting that the *Pacific Railroad Removal*

well-pleaded complaint rule and the centrality requirement.[43] When Congress reenacts the jurisdictional statutes without undoing such judicial limitations—as it has done throughout history[44]—the Court then may invoke traditional tenets of statutory construction to conclude that Congress approved of the Court's interpretations of the jurisdictional statutes.[45] In other words, when Congress fails to reject a court-imposed restriction on jurisdiction, it is deemed to have ratified the restriction. In this way, these Court-made restrictions on federal question jurisdiction have become "statutory" limitations.[46]

The well-pleaded complaint rule and the centrality requirement are thus statutory filters for the invocation of federal question jurisdiction. On the one hand, the filters must not set the gate so wide as to replicate the inundation of federal courts and invasion of state prerogatives seen when *Osborn* was the statutory limit. On the other hand, the filters must not set the gate so narrow that the lower federal courts are unable to realize the purposes underlying federal question jurisdiction. Though our primary concern is the centrality requirement, our discussion will benefit from comparing it to an antecedent filter, which will introduce the topic of "litigation reality."

II. THE WELL-PLEADED COMPLAINT RULE AND LITIGATION REALITY

The first filter for determining whether a case invokes statutory federal question jurisdiction is the well-pleaded complaint rule. Typified by the famous case of *Louisville & Nashville Railroad v. Mottley*,[47] the well-pleaded complaint rule requires that the federal content for a federal question case appear in the complaint; it simply cannot be injected by another pleading. Moreover, in looking at the complaint, the court is compelled to view only the plaintiff's claim, and not material extraneous to the claim (such as an anticipated federal defense) to determine whether the case arises under federal law. A "well-pleaded complaint," then, would not contain more than a

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Cases "can no longer be regarded as authoritative" concerning interpretation of a federal question statute); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 105 (6th ed. 2002) ("The *Osborn* theory . . . has been rejected in construing the statute.").

43. As noted earlier, I will assume throughout this Article that a third Court-imposed limitation on federal question jurisdiction, the substantiality requirement, is satisfied. See *supra* note 5.

44. Congress occasionally increases the amount-in-controversy requirement in diversity of citizenship cases under § 1332(a), but has not for 200 years tinkered with the operative "citizens of different states" language. As noted in the text, it removed the amount-in-controversy requirement in federal question cases under § 1331, but has not changed the operative "arising under" language. *See supra* note 19.

45. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 282 (1985) (discussing the canon of construction with regard to interpretation of jurisdictional statutes). Some commentators refer to this as the "inaction canon" of interpretation. *See* WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION (forthcoming 2007).

46. The same is true, of course, of the "statutory" requirement of complete diversity under diversity of citizenship jurisdiction. *See supra* note 25 and accompanying text.

47. 211 U.S. 149 (1908). The plaintiffs, who held lifetime free passes on a railroad, sued to force the railroad to honor the passes. The defendant had refused because of a federal statute prohibiting such passes. The plaintiffs' claim was for breach of contract. *Id.* at 150–51. Federal issues (of whether the statute applied to the plaintiffs and, if so, was unconstitutional) were matters of defense and thus could not support federal question jurisdiction. *See id.*

claim; the court will ignore all else in determining whether federal question jurisdiction is invoked.

One of the things the court ignores in applying the well-pleaded complaint rule is litigation reality—that is, an assessment of the issues that actually must be addressed when the court adjudicates the merits of the dispute. The rule admits of no exception for cases in which the federal issue is important or as to which the federal bench's interpretation would be salutary. Notice what this means. The well-pleaded complaint rule often channels *away* from federal trial courts and *into* state courts cases in which the only issues to be adjudicated involve interpretation or application of federal law.[48] In *Mottley*, for instance, the only issues contested in the case were federal: whether a federal statute prohibiting railroads from honoring free passes applied to the plaintiffs and, if so, whether it deprived them of property without due process.[49] Because those issues were rebuttals of anticipated defenses, however, the complaint did not invoke federal question jurisdiction.[50] These determinative federal issues had to be litigated in the state-court system.[51] In such cases, the only possible review by an Article III tribunal comes from the Supreme Court—in the unlikely event that it grants discretionary oversight after a final ruling by the state's highest court.[52]

To state the obvious, the well-pleaded complaint rule is a *rule*. As such, it "binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts."[53] And, like most rules, it has its pluses and its minuses. On the plus side, the well-pleaded complaint rule is relatively easy to use[54] and, because it is applied early in the case (looking only at the complaint), avoids the jurisdictional limbo that could result if federal question jurisdiction could be based upon the defendant's assertions.[55] On the minus side, the well-pleaded complaint rule is a rough-hewn instrument. As we just saw, it often rejects federal jurisdiction in cases in which the only litigable matters will involve interpretation or application of federal law. But rules are blunt, because they "capture[] the background principle or policy in a form that from then on operates independently. A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness."[56]

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48. This assumes, of course, that there is no other basis for federal subject matter jurisdiction, such as diversity of citizenship jurisdiction.

49. *Mottley*, 211 U.S. at 150–51.

50. *Id.* at 152–53.

51. *Id.*

52. 28 U.S.C. § 1257 (2000) (defining discretionary Supreme Court review of state high court decisions concerning federal law). Interestingly, the federal issues in *Mottley* proved to be of such importance that the Supreme Court entertained the case on the merits after it had been litigated through the state court system. Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 (1911) (ruling for the railroad).

53. Sullivan, *supra* note 14, at 58.

54. This is notoriously not the case when the plaintiff seeks a declaratory judgment. Moreover, the rule creates anomalous results in various disputes over title to real property. *See generally* WRIGHT & KANE, *supra* note 42, at 114–15. *See also infra* note 98.

55. "This bright-line rule prevents the disruption, to both the system and the litigants, of shifting a case between state and federal fora in the middle of an action as federal issues arise or fall out." Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1783 (1998).

56. Sullivan, *supra* note 14, at 58.

It is precisely this rigid under-inclusiveness that has led many to criticize the well-pleaded complaint rule.[57] But the rule has withstood all assaults. It is inconceivable that the Supreme Court will jettison it.[58] Far from retreating from the rule, in 2002, the Court extended the rule to counterclaims.[59] Even Justice Brennan, who argued so forcefully for federal question jurisdiction in *Merrell Dow*,[60] never tried to eviscerate the well-pleaded complaint rule.[61] In fact, he praised it for performing an indispensable docket-control function and for avoiding needless clashes between state and federal courts.[62] With all its faults, then, the well-pleaded complaint rule "makes sense as a quick rule of thumb."[63]

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57. *See, e.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 608–11 (1981) (arguing that the well-pleaded complaint rule ignores the defendants who claim immunity from suit based upon federal law); Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987) (containing the leading general criticism of the well-pleaded complaint rule).

58. I am astonished at the vehemence with which colleagues have urged me to take up the cudgel and argue for the rejection of the well-pleaded complaint rule. I am sorry to disappoint them, but stronger voices than mine have been heard on that score and have failed. Pragmatically, the rule's sacrosanct status makes it all the more important that the centrality requirement not replicate the blindness to litigation reality of the well-pleaded complaint rule. *See infra* notes 75–76 and accompanying text. While it is true that assessing litigation reality in the centrality inquiry cannot recapture those cases lost to state courts through the well-pleaded complaint rule, I do not consider it realistic to argue for abolition of the well-pleaded complaint rule.

59. In *Holmes Group v. Vornado Air Circulation*, 535 U.S. 826, 831 (2002), the Court stated that:

> [O]ur prior cases have only required us to address whether a federal defense, rather than a federal counterclaim, can establish "arising under" jurisdiction. Nonetheless, those cases were decided on the principle that federal jurisdiction generally exists "only when a federal question is presented on the fact of the plaintiff's properly pleaded complaint." . . . It follows that a counterclaim—which appears as part of the defendant's answer—cannot serve as a basis for "arising under" jurisdiction.

(citation omitted) (emphasis omitted). In my view, this extension of the well-pleaded complaint rule is unfortunate and unwarranted.

60. Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 818–32 (1986) (Brennan, J., dissenting). I will discuss Justice Brennan's dissent in Part III.E.

61. *See, e.g.*, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 10 n.9 (1983) ("It is possible to conceive of a rational jurisdictional system in which the answer as well as the complaint would be consulted before a determination was made whether the case 'arose under' federal law, or in which original and removal jurisdiction were not coextensive . . . . Commentators have repeatedly proposed that some mechanism be established to permit removal of cases in which a federal defense may be dispositive. But those proposals have not been adopted.") (citations omitted).

62. "One powerful doctrine has emerged . . . —the 'well-pleaded complaint rule'—which as a practical matter severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts." *Id.* at 9–10.

63. *Id.* at 11.

I do not praise the well-pleaded complaint rule; but neither can I bury it. For better or worse, we are stuck with this rule. And it is roughly consonant with the view that the purpose of federal question jurisdiction is to provide a forum for the vindication of federally created *claims*. After all, under the rule, the court may look only at the plaintiff's *claim*, and at no other aspect of the dispute. But the rule's blindness to litigation reality should be borne in mind when we consider the centrality requirement. If it is important to have access to federal courts for the interpretation of federal law, and not only to vindicate federal claims, it will be important for the court at some point to ascertain whether issues of federal law actually will be presented in adjudicating the merits. Because the well-pleaded complaint rule does not allow such an assessment, only the centrality requirement can do so.[64]

III. CENTRALITY AND THE SEARCH FOR A STANDARD

A. The Holmes Test for Centrality: Well-Pleaded Complaint Redux

The well-pleaded complaint rule addresses a question that can be answered yes or no: is the federal element of the case injected by the plaintiff's claim?[65] The blunt instrument of a rule works well enough for that inquiry. But the centrality requirement addresses whether the plaintiff's claim is "federal enough" to justify invocation of federal question jurisdiction. Centrality asks how much—an assessment ill-suited to a cut-and-dried rule. It calls for a *standard* that employs relevant factors to guide the decision. A standard

> tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances.[66]

We should not be surprised or disappointed, then, if the centrality inquiry does not always yield litmus-like answers. The nature of the inquiry requires nuance and balancing. Courts routinely engage in such assessments in other areas, even some other jurisdictional areas.[67] Curiously, though, when addressing centrality, courts and commentators seem timid; they want to seize upon a hard-and-fast rule.[68] There may be

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64. I do not suggest that the centrality requirement can overcome the effect of the well-pleaded complaint rule. That rule often channels cases presenting matters of federal law to state court: those cases cannot be recaptured for federal courts by the centrality requirement. Rather, I argue that we should not replicate one of the shortcomings of the well-pleaded complaint rule by failing to assess litigation reality in applying centrality. Because the well-pleaded complaint rule is sacrosanct, *see supra* notes 57–58, the only chance courts have to inject litigation reality into the federal question equation is through centrality.

65. Again, many may question the wisdom of limiting the assessment to the claim, but as discussed in Part II, that rule is not going to change. *See supra* notes 57–63 and accompanying text.

66. Sullivan, *supra* note 14, at 58–59.

67. *See infra* note 207 and accompanying text.

68. In his concurring opinion in *Grable*, Justice Thomas pondered the Court's possible

two explanations for this penchant. First, until the recent decision in *Grable*, the Supreme Court had not done a good job of explicating the factors to be assessed in the centrality equation. My hunch is that objections to the "minimum contacts" test for personal jurisdiction waned after the Court gave meaningful guidance on what factors ought to be considered in applying it. The same thing should happen here. Second, the starting point for many (probably most) judicial discussions of centrality is itself a rule.

That starting point is Justice Holmes's "creation test" in *American Well Works Co. v. Layne & Bowler Co.*[69] In that case, Plaintiff manufactured and marketed a water pump. Defendant held a patent on a water pump and contended that Plaintiff's pump infringed its patent.[70] Plaintiff sued in state court, alleging that its pump did not violate Defendant's patent and that Defendant was driving away Plaintiff's customers by threatening to sue for infringement anyone who bought Plaintiff's pump.[71] Defendant removed the case to federal court on the basis of federal question jurisdiction, but the Court rejected jurisdiction.[72] Plaintiff's claim was that its business was harmed by Defendant's conduct. How the harm was accomplished was immaterial. Thus the fact that the conduct was related in some way to a patent did not make the claim "arise under" federal law. Holmes explained: "[a] suit for damages to business caused by a threat to sue under the patent law is not itself a suit under the patent law."[73] The harm alleged—damage to Plaintiff's business—was actionable only because state law made it so. Thus, Holmes concluded, a suit "arises under the law that creates the cause of action."[74] Because state law created the trade libel claim being asserted, the claim did not arise under federal law.

The Holmes test is strikingly similar to the well-pleaded complaint rule, and replicates that rule's principal shortcoming.[75] The well-pleaded complaint rule asks a simple yes-or-no question: is the federal content found in the complaint? The Holmes test asks the same sort of question: did federal law create the claim being asserted? The well-pleaded complaint rule focuses only on the claim and ignores litigation reality. So does the Holmes test. The well-pleaded complaint rule frequently funnels to state-court cases in which the only contested issues concern federal substantive provisions. So does the Holmes test. In *American Well Works* (as in *Mottley*), the only issues to be adjudicated—whether Defendant's patent was valid and was infringed by Plaintiff's pump—involved the application of federal law. The Holmes test, like the well-pleaded complaint rule, is relatively easy to apply and affords a ready answer.

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adoption of the Holmes test, expressly for the sake of certainty. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 320–21 (2005) (Thomas, J., concurring); *see also* FALLON ET AL., *supra* note 28, at 886 ("[I]s the game worth the candle?"); Linda R. Hirshman, *Whose Law is it Anyway? A Reconsideration of Federal Question Jurisdiction Over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17 (1984) (proposing adoption of the Holmes test).

69. 241 U.S. 257 (1916).

70. *Id.* at 258.

71. *Id.*

72. *Id.*

73. *Id.* at 259.

74. *Id.* at 260.

75. Indeed, the Holmes test renders the well-pleaded complaint rule unnecessary. Because it requires a federally created *claim*, the Holmes test focuses only on the plaintiff's claim itself, just as the well-pleaded complaint rule does.

But simplicity and certainty are purchased at a price. The well-pleaded complaint rule fails to recognize that important federal issues might be injected into a case by a pleading other than the complaint. So too the Holmes test fails to recognize that important federal issues can be raised in a state-created claim. We saw above that the Court has characterized the well-pleaded complaint rule as a "quick rule of thumb."[76] It is inappropriate to employ an equally rough-hewn, blunt instrument for centrality; the balance of judicial power between the federal and state courts would seem to call for more sophistication. The Holmes test for centrality simply fails to provide a counterbalance to the well-pleaded complaint rule's blindness to litigation reality.

The Holmes approach seems rooted in the notion that statutory federal question jurisdiction exists to provide a forum for the assertion of federally created claims. No one doubts that it does. The issue is whether federal question jurisdiction serves another function. It does. The Founders envisioned federal question jurisdiction as a means of providing for consistent and sympathetic federal court interpretation of federal substantive provisions.[77] Does the Holmes test facilitate this broader function of federal question jurisdiction? The answer would be yes *if* the adjudication of federally created claims always turned on the interpretation of federal law and if the adjudication of state-created claims always turned on the interpretation of state law. The Holmes test seems to assume this congruence. In Holmes's view, every federally created claim will invoke federal question jurisdiction and no state-created claim will—regardless of whether federal issues will actually be raised in the adjudication. In other words, Holmes intended his test as one for inclusion (what *will* invoke federal question jurisdiction) as well as for exclusion (what *will not* invoke federal question jurisdiction).[78] The problem, of course, is that the implicit congruence is not borne out in the real world. Interestingly, when an assessment of litigation reality demonstrates that the congruence will not exist, the Court has been willing to deviate from the Holmes test.

B. Litigation Reality Trumps the Holmes Test as a Test of Inclusion

As a test for inclusion, the approach set out in *American Well Works* was inconsistent with that which the Court had taken sixteen years earlier in *Shoshone Mining Co. v. Rutter*.[79] In that case, federal law created a right to sue to determine mining rights between adverse claimants.[80] The federal law expressly instructed the

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76. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 11; *see supra* text accompanying note 63.

77. *See supra* note 12. *Cf.* THE FEDERALIST NO. 80, at 533 (Alexander Hamilton) (Carl Van Doren ed., 1945) ("The mere necessity of uniformity in interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.").

78. *See* 15 REDISH, *supra* note 12, § 103.31[2][a], at 103-35 (establishing the Holmes test as the measure of exclusion).

79. 177 U.S. 505 (1900).

80. *Id.* at 506. Professor Oakley has argued that the federal law at issue in *Shoshone Mining* did not create a federal right of action until local claim processes were invoked. John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under"*

court hearing such cases to make its determinations on the basis of local mining custom. The case was thus the reverse image of *American Well Works*: federal law created the claim, but the outcome would hinge on the application of state law. Holmes (who was not on the bench when *Shoshone Mining* was decided), we presume, would have upheld federal question jurisdiction because federal law created the claim asserted by one miner against another.[81]

But the Court rejected federal question jurisdiction in *Shoshone Mining*. It did so after considering litigation reality and concluding that there was no need for federal jurisdiction. Because adjudication would require only the interpretation and application of local mining custom, there was no need for the expertise of the federal bench or for solicitude for federal policies. And because local mining custom varies from place to place, there was no need for uniformity. Thus, the Court explained, "a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the [statutory] jurisdiction clauses."[82] There must be "a controversy between the parties in regard to the operation and effect of the Constitution or laws *upon the facts involved*."[83]

The Court was undoubtedly right in *Shoshone Mining*.[84] Recognizing federal jurisdiction simply because a federal law created the claim would have elevated form over substance.[85] It would have burdened the federal courts with disputes in which there was no federal interest[86] and in which no federal expertise was required, and would have robbed state courts of jurisdiction over cases that presumably were of some local import. Thus, the Court in *Shoshone Mining* appropriately tailored federal

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Federal Law?, 76 TEX. L. REV. 1829, 1841 n.63 (1998). The Court, in decisions before and after Professor Oakley espoused his theory, has consistently discussed *Shoshone Mining* as a case in which the claim was created by federal law. *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 317 n.5 (2005); Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 814 n.12 (1986). In addition, most commentators appear to agree. *See, e.g.*, WRIGHT & KANE, *supra* note 42, at 106 n.21; David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 568–69 (1985).

81. *See* 15 REDISH, *supra* note 12, § 103.31[2][b], at 103-36 ("[I]t . . . appears that under Holmes's narrow test, there should have been federal question jurisdiction, and therefore, that *Shoshone Mining* should have been overruled in *American Well Works*. Federal law was solely responsible for the adverse claimant's right to sue, so the cause of action was clearly created under federal law.").

82. *Shoshone Mining*, 177 U.S. at 507.

83. *Id.* (quoting Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203 (1877)) (emphasis added).

84. *See* Shapiro, *supra* note 80, at 569–70 (praising *Shoshone Mining* as engaging in appropriate statutory interpretation).

85. *See* 15 REDISH, *supra* note 12, § 103.31[2][a], at 103–34.

86. The Court in *Shoshone Mining* "was properly concerned with the volume of litigation which a contrary decision would have loosed upon federal trial courts." Cohen, *supra* note 4, at 903. Professor Mishkin reflected the sentiment by noting that allowing such claims in federal courts "would place upon them—and many of the litigants—an unnecessary burden." Paul J. Mishkin, *The Federal "Question" in District Courts*, 53 COLUM. L. REV. 157, 162 (1953). "Cases like *Shoshone* must have arisen with monotonous regularity at the turn of the century, but the degree of federal interest in an outcome dependent on local custom was marginal at best." Shapiro, *supra* note 80, at 570.

question jurisdiction to situations in which it was needed and would not unduly interfere with state jurisdiction.

C. Litigation Reality Trumps the Holmes Test as a Test of Exclusion

In *Shoshone Mining*, the Court was willing to consider litigation reality to *defeat* federal question jurisdiction over a federally created claim. The case raises the possibility that a court should (notwithstanding Holmes) *recognize* federal question jurisdiction over a state-created claim. And indeed the Court did so over Holmes's objection only five years after *American Well Works*. In *Smith v. Kansas City Title & Trust Co.*,[87] Plaintiff owned stock in a corporation which was planning to invest in bonds issued under the Federal Farm Loan Act ("FFLA").[88] Missouri law forbade corporations chartered in that state from investing in unlawful securities.[89] Plaintiff sued the corporation in federal court to enjoin it from investing in the bonds, contending that such an investment violated Missouri law because the FFLA was unconstitutional.[90]

Though state law created the claim, the Court upheld federal question jurisdiction. As in *Shoshone Mining*, the Court focused on litigation reality, and said "where it appears from the [complaint] . . . that the right to relief depends upon the construction or application of the Constitution or laws of the United States . . . the District Court has jurisdiction."[91] Adjudication of the state-created claim would require the trial court to address whether the FFLA was constitutional. Thus, "the controversy concerns the constitutionality of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue."[92] The Court undoubtedly was influenced by the gravity of the question—whether a federal bond issuance was constitutional. One purpose of federal question jurisdiction is to provide a federal trial forum to avoid possible hostility to federal programs.[93] Without federal question jurisdiction, the issue would have been subject to conflicting outcomes in the state courts, with ultimate clarity coming only when the Supreme Court could review a final decision of a state high court. In the interim, the validity of the federal bonds might be in serious doubt.

Justice Holmes dissented in *Smith*. Though he recognized that "it is desirable that the question raised in this case should be set at rest,"[94] Holmes was relentless in focusing on the claim asserted, and in ignoring litigation reality. Thus, he asserted:

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87. 255 U.S. 180 (1921).

88. *Id.* at 195–97 (citing the Federal Farm Loan Act of July 17, 1916, ch. 245, 39 Stat. 360 (codified as amended in scattered sections of 12 U.S.C.)).

89. *See id.* at 214 (Holmes, J., dissenting).

90. *Id.* at 195.

91. *Id.* at 199.

92. *Id.* at 201.

93. "Another reason Congress conferred original federal question jurisdiction on the district courts was its belief that state courts are hostile to assertions of federal right. . . . [T]his rationale is, like the rationale based on the expertise of the federal courts, simply an expression of Congress's belief that federal courts are more likely to interpret federal law correctly." Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting).

94. *Smith*, 255 U.S. at 213 (Holmes, J., dissenting).

> [I]t is the *suit*, not a question in the suit, that must arise under the law of the United States. The mere adoption by a state law of a United States law as a criterion or test, when the law of the United States has no force *proprio vigore*, does not cause a *case* under the state law to be also a *case* under the law of the United States.[95]

Thus, to Holmes, there can be no federal question jurisdiction unless at least part of the claim itself is created by federal law.

Smith was not decided on an entirely clean slate. Four years earlier, in *Hopkins v. Walker*,[96] the Court had upheld federal question jurisdiction over a state-law claim to remove a cloud from title to real property.[97] The Court engaged in little meaningful discussion of the jurisdictional issue, but it is worth noting that adjudicating the claim would unquestionably require the trial court to interpret a federal land grant. Litigation reality thus indicated that determination of a federal issue was unavoidable and relevant to the outcome of the dispute.[98]

D. Seeds of Confusion: Cases Through 1936

Thirteen years after *Smith*, in *Moore v. Chesapeake & Ohio Railway*,[99] the Court retreated from its consideration of litigation reality. There, Plaintiff sued his employer in federal court for personal injuries, pursuant to the Kentucky employers' liability statute.[100] The employer wanted to defend either on the basis of contributory negligence or assumption of the risk.[101] The Kentucky law provided that an employer could not raise either defense, however, if the employer had violated a statute "enacted for the safety of employees."[102] Plaintiff claimed that the employer had violated the Federal Safety Appliance Acts (FSAA) and thus could not raise either defense.[103] The Court held that Plaintiff's claim did not arise under federal law. As a matter of centrality analysis, the Court basically hewed to the Holmes creation test and ignored litigation reality. (Holmes had retired from the Court two years earlier.) Thus the Court concluded that the plaintiff "set forth a *cause of action* under the Kentucky statute, and, as to this *cause of action*, the suit is not to be regarded as one arising under the laws of

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95. *Id.* at 215 (emphasis added).

96. 244 U.S. 486 (1917).

97. *See id.*

98. Real property disputes can raise arcane well-pleaded complaint rule problems. Assume the plaintiff has a state-law claim to land and that the defendant's competing claim is based upon federal law. Under pleading rules, if the plaintiff sues to remove a cloud on title, the complaint must set forth the competing claim and thus will properly inject a federal element. This was the situation in *Hopkins*. If the plaintiff sues to quiet title, however, the pleading rules do not require the plaintiff to plead the competing title. Accordingly, the well-pleaded complaint in such a case would not inject a federal issue and could not invoke federal question jurisdiction. *See, e.g.*, Shulthis v. McDougal, 225 U.S. 561, 569–70 (1912).

99. 291 U.S. 205 (1934).

100. *Id.* at 208–09.

101. *Id.* at 210.

102. *Id.* at 212–13 (citing CARROLL'S KY. STAT., 1930, § 820b-1 to 3).

103. *Id.* at 208 (citing the Federal Safety Appliance Acts, 45 U.S.C. §§ 1, 6, 8–11 (repealed 1994)).

the United States."[104] Had the Court been willing to look to litigation reality, it would have found significant similarity to *Smith*—though the claim was created by state law, the adjudication would turn entirely on whether the employer had violated the FSAA. Accordingly, commentators generally assert, *Smith* and *Moore* are inconsistent and cannot readily be reconciled.[105]

Why did the Court ignore litigation reality in *Moore*? In my judgment, the Court was just sloppy. First, it should have rejected federal question jurisdiction on the basis of the well-pleaded complaint rule. Plaintiff raised the federal issue as a way to rebut an anticipated defense. In this regard, the case was indistinguishable from *Mottley*.[106] If this is correct, it is not surprising that the Court failed to assess litigation reality. As discussed above, the well-pleaded complaint rule and the Holmes test for centrality share a focus on the law that created the claim and a blindness to litigation reality. So the Court got the right answer, but for the wrong reason.[107] Second, the jurisdictional issue was raised in an odd way in *Moore*. The case invoked diversity of citizenship jurisdiction; the question of whether the case also arose under federal law was relevant to venue.[108] Nonetheless, the Court treated *Moore* as a centrality case. As such, it left the lower federal courts to reconcile the seemingly inconsistent approaches in *Smith* and *Moore*. The task was rendered more difficult by the fact that the Court in *Moore* did not even refer to *Smith*, let alone attempt to distinguish it.

Help should have been on the way in short order, as the Court's next effort came only two years later in *Gully v. First National Bank in Meridian*.[109] Surprisingly, however, the opinion in that case failed to cite either *Smith* or *Moore*, and did not undertake to resolve their apparent inconsistency. In *Gully*, a national bank went into receivership and transferred all of its rights and liabilities to another bank.[110] By contract, the successor bank was liable for state taxes, which were assessed in part on

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104. *Id.* at 217 (emphasis added).

105. *See, e.g.*, 15 REDISH, *supra* note 12, § 103.31[3][b], at 103-39 ("In each, state law provided the cause of action, but each still presented a significant issue of federal law; yet the Court found jurisdiction in *Smith* and denied it in *Moore*."); Ronald J. Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289, 293 (1969).

106. In *Mottley*, Plaintiffs sued for breach of contract. Assuming that Defendant would rely upon a federal statute prohibiting railroads from giving free passes, Plaintiffs undertook to rebut the federal defense in their complaint by alleging that the federal law did not apply to them (or, if it did, that it was unconstitutional). Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 150–51 (1908). In *Moore*, Plaintiff sued under state tort law; because he worked in intrastate commerce, federal law did not create a claim for him. *See Moore*, 291 U.S. at 214–15. Anticipating that Defendant would assert a defense of contributory negligence or assumption of the risk, Plaintiff undertook to rebut the defense by alleging that its violation of a federal statutory standard rendered the two defenses unavailable to the railroad. *Id.* at 210.

107. *See* FALLON ET AL., *supra* note 28, at 882 ("[T]he *Moore* and *Smith* decisions can readily be reconciled. . . . [B]ecause the federal issue . . . came in, as in *Mottley*, by way of reply to a defense, *Moore* failed the well-pleaded complaint rule.").

108. Plaintiff had laid venue where he resided, which was at that time permitted under the venue statutes only if the case were based solely on diversity of citizenship jurisdiction. Thus, had the claim also invoked federal question jurisdiction, the Court would have concluded that venue was improper. *Moore*, 291 U.S. at 217.

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

110. *Id.* at 111.

the shares of stock of the predecessor national bank.[111] When the suecessor bank failed to pay the tax, the state of Mississippi sued it in state court.[112] The bank removed the case to federal court.[113] Because the state's power to tax the stock of the predecessor bank derived from a federal statute, the bank asserted that the state's claim arose under federal law.[114]

The Court rejected jurisdiction. Part of the opinion is consistent with the Holmes test, where the Court notes that the cause of action, based upon the contractual obligation to assume the debts of the predecessor bank, was state-created.[115] But in the main, the opinion seems consistent with *Smith* in assessing litigation reality. On the facts of the case, the Court concluded that the federal issue (whether the state could tax the predecessor national bank) was merely "lurking in the background."[116] In *Smith*, the legality under state law of the corporation's investment in the federal bonds could not be assessed without determining the federal issue of whether the bonds were constitutional. In *Gully*, by contrast, the successor bank's contractual liability for the state tax could be litigated without addressing the federal issue.[117]

Through *Gully*, then, the Supreme Court had established this track record:

Case	Law creating claim	Law to be interpreted	Arise under?
Shoshone Mining	Federal	State	No
American Well Works	State	Federal	No
Smith	State	Federal	Yes
Moore	State	Federal	No
Gully	State	State	No

With this track record, the Court had left open significant questions, including the viability of the Holmes test and potential reconciliation of *Smith* and *Moore*. After *Gully*, the Court did not return to centrality for half a century, until its decision in *Merrell Dow*.[118] During the interregnum, lower courts generally followed the Holmes

111. *Id.*

112. *Id.* at 112.

113. *Id.*

114. *Id.* (arguing that plaintiff "counts upon that statute in suing for the tax").

115. *Id.* at 114.

116. *Id.* at 117. On this point, the opinion contains some much-quoted language: to invoke federal question jurisdiction, a right or immunity created by federal law "must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the [federal law is] given one construction or effected, and defeated if [it] receive[s] another." *Id.* at 112 (citations omitted).

117. Under Mississippi law, the tax was valid only if exacted on the shares of the national bank, and not on the bank itself. *Id.* at 116. Thus, "a finding upon evidence that the Mississippi law has been obeyed may compose the controversy altogether, leaving no room for a contention that the federal law has been infringed. . . . A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states." *Id.* at 117.

118. During this period, the Court's federal question decisions generally focused on other aspects of federal question jurisdiction, including the well-pleaded complaint rule and the requirement of substantiality. *See, e.g.*, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 28 (1983).

test as one of inclusion and were quite adrift on the question of when federal question jurisdiction was appropriate for state-created claims.[119] Courts wanting to deny jurisdiction could apply the Holmes test and cite *American Well Works*. Courts wanting to find federal question jurisdiction could cite *Smith* and, to some extent, *Gully*. When the Court returned to the question of centrality in *Merrell Dow*, observers hoped that it would resolve the unanswered questions and make sense of its track record.

E. Merrell Dow *and the Suggestion of Discretion*

In *Merrell Dow*, Plaintiffs sued for personal injuries allegedly suffered because their mothers had ingested Bendectin while pregnant with Plaintiffs. They sued in state court and asserted only state-law claims.[120] One of the claims was negligence per se, the theory for which was that Defendant, which manufactured Bendectin, had violated the Federal Food, Drug, and Cosmetic Act ("FDCA") by misbranding Bendectin.[121] Specifically, Plaintiffs asserted that Defendant's labeling violated the FDCA by promoting the drug without providing adequate warning of potential dangers of its use.[122] This violation of the FDCA, Plaintiffs argued, constituted negligence as a matter of law.[123] Defendant removed the case to federal court under federal question jurisdiction.[124] The parties stipulated (and the Court accepted) that the FDCA does not create a private right of action, so no federal claim could be asserted under that Act.[125] Thus, the case presented a state-law claim (negligence per se), the resolution of which would hinge on the interpretation of federal law (the FDCA regarding misbranding). It seemed to present a clear choice between *Smith* and *Moore*.

The majority of five, in an opinion by Justice Stevens, rejected jurisdiction.[126] Justice Brennan, joined by three others, wrote a spirited dissent.[127] The majority opinion has found few friends.[128] For example, Professor Redish concluded that while the cases from the early twentieth century "were by no means fully internally consistent, it was not until the *Merrell Dow* decision in 1986 that the Court's doctrine degenerated into a significant state of uncertainty."[129]

In holding that the claim of negligence per se did not arise under federal law, the majority made much of the fact that Congress had not created a federal right of action:

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119. *See generally* 15 REDISH, *supra* note 12, at § 103.31.

120. Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 805–06 (1986).

121. *Id.* (citing the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 301 (2000).

122. *Id.*

123. *Id.*

124. The dispute invoked no other basis of federal subject matter jurisdiction, such as diversity of citizenship.

125. *Merrell Dow*, 478 U.S. at 810.

126. *Id.* at 817.

127. *Id.* at 818–32 (Brennan, J., dissenting).

128. *See, e.g.*, FALLON ET AL., *supra* note 28, at 882–85; 15 REDISH, *supra* note 12, at § 103.31[4]; WRIGHT & KANE, *supra* note 42, at 108–10; Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After* Merrell Dow, 52 OHIO ST. L.J. 1478 (1991).

129. 15 REDISH, *supra* note 12, § 103.31[1], at 103-33.

> We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."[130]

To the majority, permitting federal question jurisdiction over a state-law claim in such circumstances would "flout" congressional intent.[131]

This reasoning would seem to imperil *Smith*. After all, if the existence of a federal claim is the sine qua non of federal question jurisdiction, the holding in *Merrell Dow* is tantamount to a return to the Holmes test: if there is a federal claim, there is federal question jurisdiction; if there is no federal claim, there is no federal question jurisdiction. But the majority went out of its way to stress that it was not overruling *Smith*. Indeed, it purported to reconcile *Smith* and *Moore*.[132] The discussion of the viability of those cases—both by the majority[133] and in Justice Brennan's dissent[134]—is found in footnotes. Justice Stevens explained that the different outcomes in those cases "can be seen as manifestations of the differences in the nature of the federal issues at stake."[135] While *Smith* concerned the constitutionality of "an important federal statute," the federal issue in *Moore* "did not fundamentally change the state tort nature of the action."[136]

The embrace of *Smith* seems feeble, and one is left with the impression that the majority, like Justice Holmes, envisioned federal question jurisdiction as permitting the vindication of federally created claims, and rarely (if ever) more. On the other hand, the majority's discussion of *Smith* and *Moore* did not hesitate to look to litigation reality—to the issues requiring adjudication—and to the relative importance of the federal interest, which are hallmarks of a subtler approach than the Holmes test. Still, one is left to wonder what facts would lead the *Merrell Dow* Court to conclude that a state-law claim could invoke federal question jurisdiction.

Justice Brennan's dissent plainly embraced a broader role for federal question jurisdiction, one in which the lower federal courts are needed to provide sympathetic and consistent interpretation of federal substantive provisions. He explained:

> Congress passes laws . . . to shape behavior; a federal law expresses Congress'[s] determination that there is a federal interest in having individuals or other entities conform their actions to a particular norm established by that law. Because all laws are imprecise to some degree, disputes inevitably arise over what specifically Congress intended to require or permit. It is the duty of courts to interpret these

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130. *Merrell Dow*, 478 U.S. at 817.

131. *Id.* at 812.

132. *See id.* at 814 n.12.

133. *Id.*

134. *Id.* at 821 n.1 (Brennan, J., dissenting).

135. *Id.* at 814 n.12 (majority opinion).

136. *Id.* at 815. Justice Stevens then noted that the "importance of the nature of the federal issue" explained why there is no federal question jurisdiction in cases such as *Shoshone Mining*. *Id.* at 815 n.12. Instead, I have argued that an assessment of litigation reality—what issues were to be adjudicated by the trial court—explains the rejection of the Holmes creation test as a principle of inclusion. In dissent, Justice Brennan concluded that *Smith* and *Moore* were irreconcilable and that *Moore* should be overruled. *Id.* at 821 n.1 (Brennan, J., dissenting).

> laws and apply them in such a way that the congressional purpose is realized. . . . Congress granted the district courts power to hear cases "arising under" federal law . . . to enhance the likelihood that federal laws would be interpreted more correctly and applied more uniformly. In other words, Congress determined that the availability of a federal forum to adjudicate cases involving federal questions would make it more likely that federal laws would shape behavior in the way that Congress intended.[137]

Justice Brennan was right to take the majority to task for its focus on a lack of a federal remedy. He was also right to espouse a broader vision of the role of federal question jurisdiction. In doing so, Justice Brennan made a remarkable admission: that the Supreme Court, in 1986, had reached a point at which it simply could not discharge its duty of ensuring consistent interpretation of federal law by exercising appellate jurisdiction over state-court decisions. To him, an expanded view of statutory federal question jurisdiction was necessary because the Court "realistically . . . cannot even come close to 'doing the whole job'" of correcting erroneous state-court decisions in that way.[138] While this admission strengthens the argument for federal question jurisdiction in cases in which state-law claims present embedded federal issues, Justice Brennan's conclusion (to uphold jurisdiction) is suspect in commonsense terms, for at least three reasons.

First, as seen in the passage quoted above, Justice Brennan argued that the existence of a federal scheme dealing with pharmaceuticals made it especially important to recognize federal question jurisdiction. In fact, however, the existence of the FDCA and the administrative apparatus supporting it might sometimes counsel against federal question jurisdiction. That is, Congress might have refused to create a private right of action under the FDCA precisely because administrative enforcement is available "to shape behavior."[139] It is in cases like *Smith*, where lack of federal question jurisdiction means that there can be no federal adjudicative tribunal, that courts might more appropriately find jurisdiction over state-created claims.

Second, as a matter of litigation reality, it was overwhelmingly likely that the trial court in *Merrell Dow* would not have had to interpret any provision of federal law. Plaintiffs in *Merrell Dow* asserted several claims, all of which were created by state law. In most of those claims, *every* issue to be adjudicated involved state law, on questions such as breach of warranty, fraud, and negligence. One of the claims, as noted, was for negligence per se, one basis for which was alleged to be violation of the FDCA. In other words, plaintiffs could have recovered on every claim—including

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137. *Id.* at 828 (Brennan, J., dissenting). For example, various federal regulatory schemes empower a federal administrative agency to oversee implementation of relevant statutes, but do not create a federal right of action. The agency typically has authority to initiate proceedings to enjoin violations of the statutes and to request that the U.S. Attorney institute criminal proceedings against those who violate the provisions. Justice Brennan seemed to envision federal question jurisdiction over state-law claims based upon such federal provisions as helpful in providing for uniform and sensitive interpretation and effectiveness.

138. *Id.* at 827 n.6 (Brennan J., dissenting); *see also* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005) (discussing reduced number of formal Supreme Court opinions rendered in recent years).

139. *See Merrell Dow*, 478 U.S. at 828 (Brennan J., dissenting).

negligence—without establishing a single federal issue.[140] In contrast, the trial court in *Smith* could not have adjudicated the merits of that case without interpreting federal law.[141]

This fact may suggest an important difference between federal question jurisdiction over federally created claims and over state-created claims. When a plaintiff sues to enforce a federal claim, jurisdiction attaches even if the only dispute is about the facts, and even when there is no need for interpretation of federal law.[142] This is entirely appropriate, of course, because federal question jurisdiction exists to permit enforcement of federal claims.[143]

But the state-law claim is different. With it, federal question jurisdiction is exercised (if at all) to promote the uniform and sympathetic interpretation of federal law and to gain access to the expertise of the federal bench. This function is implicated only if an issue of federal law necessarily must be adjudicated. Moreover, it augurs toward jurisdiction in those cases in which the question is one of *interpretation* of federal law, rather than merely a determination of underlying facts. Because it is not clear that a federal issue would have been adjudicated in *Merrell Dow*, the Court was correct to reject jurisdiction.[144]

Third, refusing to uphold jurisdiction in *Merrell Dow* was appropriate in terms of federalism. States have an interest in how broadly federal courts exercise federal question jurisdiction. To permit jurisdiction over a state-law claim because it *might* require the adjudication of a federal issue grants federal jurisdiction when there is no demonstrated need for it. As noted above, the mischief is exacerbated by supplemental jurisdiction. In *Merrell Dow*, finding that the negligence per se claim arose under federal law would have permitted the federal court to take subject matter jurisdiction over all of the other state-law claims as well. Because they arose from a common nucleus of operative fact with the "federal" claim, they would have invoked

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140. The Sixth Circuit made this clear:

> Plaintiffs' causes of action referred to the FDCA merely as one available criterion for determining whether Merrell Dow was negligent. Because the jury could find negligence on the part of Merrell Dow without finding a violation of the FDCA, the plaintiffs' causes of action did not depend necessarily upon a question of federal law. Consequently, the causes of action did not arise under federal law and, therefore, were improperly removed to the federal court.

Thompson v. Merrell Dow Pharms., Inc., 766 F.2d 1005, 1006 (6th Cir. 1985), *aff'd*, 478 U.S. 804 (1986).

141. To rule on the plaintiff's claim, the court would have to assess whether the federal law by which the United States issued particular securities was constitutional. So too in *Hopkins*, the trial court could not have ruled on the merits without interpreting the federal land grant under which the defendant claimed title. *See supra* note 98.

142. *See* FALLON ET AL., *supra* note 28, at 864 (stating that jurisdiction attaches in such cases "even when the only dispute between the parties is about the facts (or indeed when there is little dispute about facts or law, as may be true, for example, when a default judgment is entered)").

143. *Id.* at 847 ("[A] further, constitutionally permissible function of federal courts is to enforce federal law—to establish the facts determinative of the application of federal law even if the law's content and applicability are undisputed, and to enter and enforce the appropriate judgment.").

144. The case is thus reminiscent of *Gully*, in which any federal issue was merely "lurking in the background." Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 117 (1936).

supplemental jurisdiction.[145] Packing so much state law into a dispute in federal court (absent diversity of citizenship and absent a clearly litigable issue of federal law) is a questionable use of federal judicial resources. It also improperly infringes on state-court jurisdiction. *Merrell Dow* involved product liability claims, a cutting-edge area of tort law long entrusted to state-court development. The interests of federalism support allowing the state courts to shape the development of that law.

Principles from the law of supplemental jurisdiction prove instructive here. Under the discretionary factors governing the exercise of that jurisdiction, a federal court dismisses (or remands, if the case had been removed from state court) supplemental claims if the state law issue is novel or complex or if state law would predominate substantially in the adjudication of the case.[146] In *Merrell Dow*, any federal issue, even if actually presented in adjudication, would have been a very small part of the overall case, and the lower court might have exercised its discretion to reject supplemental jurisdiction over the other state-law claims. Perhaps this fact should counsel against finding that the embedded federal issue invokes federal question jurisdiction in the first place.

This discussion of what I have called commonsense reasons supporting the result (if not the reasoning) in *Merrell Dow* clearly envisions some role for the district court's exercise of discretion in assessing centrality. Leading scholars have concluded that the majority opinion in *Merrell Dow*—particularly the footnote discussing the viability of *Smith* and *Moore*—marks the first time the Court "explicitly indicated approval of any notion of 'discretion' in interpreting § 1331."[147] Indeed, the majority opinion "is replete with hints that the Court wishes to reserve discretion to tailor the 'arising under' jurisdiction to the practical needs of the particular situation."[148]

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145. The case was decided before the enactment of the supplemental jurisdiction statute, 28 U.S.C. § 1367(a) (2000) (enacted 1990) (granting supplemental jurisdiction to the full extent of Article III). Supplemental jurisdiction would have been proper, however, under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (defining Article III limit on supplemental jurisdiction).

146. 28 U.S.C. § 1367(c)(1) ("[T]he claim raises a novel or complex issue of State law."); 28 U.S.C. § 1367(c)(2) (state claim "substantially predominates" over claim or claims invoking federal subject matter jurisdiction); *see also* 28 U.S.C. § 1367(c)(4) (allowing jurisdiction to be declined when "exceptional circumstances" offer "compelling reasons" for doing so). Before the enactment of § 1367 in December 1990, courts had discretion to decline supplemental jurisdiction for similar reasons under *United Mine Workers v. Gibbs*, 383 U.S. 715, 726–27 (1966). *See* FREER, *supra* note 12, at 212–14.

Above, I criticized Congress for being unaware of the difference between statutory and constitutional grants of jurisdiction, and suggested that perhaps that criticism was unduly harsh. *See supra* note 19. Perhaps Congress demonstrates in § 1367 the sort of balance that *Grable* brings to § 1331. While it is true that § 1367 deals with supplemental, and not original, jurisdiction, both it and cases such as *Grable* address "mixed" cases, in which elements of federal and state law coexist. Thus § 1367(a) grants supplemental jurisdiction broadly and § 1367(c) employs discretionary factors to assess whether the state-law center-of-gravity outweighs the jurisdictional grant. Similarly, an assessment of whether a state-law claim invokes jurisdiction under § 1331 might employ similar center-of-gravity concerns.

147. FALLON ET AL., *supra* note 28, at 884. According to these scholars, the Court previously "ha[d] based its decisions . . . on statutory interpretation, finding in a particular substantive statute a congressional intent to create an exception to the usual § 1331 rules." *Id.* at 884–85.

148. *Id.* at 884. The Court cited works by academics embracing such discretion. Merrell Dow

The problem is that the Court in *Merrell Dow* failed to speak meaningfully about the scope of discretion or how to exercise it. The Court made much of "the nature of the federal interest at stake," which it seemed to equate with "importance."[149] Jurisdiction was proper in *Smith* because the case raised "the constitutionality of an important federal issue."[150] But was it the federal provision itself or the fact that it was subject to constitutional challenge that made it important? And importance is a slippery linchpin. But to whom is it important—the litigants, the federal government, or society at large? And is it important for the purpose of the litigation or governmental function? And what other factors, beside "the nature of the federal interest," are relevant?

In sum, though it reached the right result in *Merrell Dow*, the Court's analysis left the lower courts at a loss, fundamentally in two areas. First, notwithstanding the attempt to breathe life into *Smith*, the tenor of the opinion suggested that the existence of a federal claim is the only way to invoke federal question jurisdiction. Second, though the Court for the first time opened the door for an assessment of discretionary factors in determining whether a claim "arises under," it did little to inform the exercise of discretion. Proof that the guidance was flawed is provided by the subsequent confusion in the lower courts; they failed to reach anything like accord on the meaning of *Merrell Dow*.[151] Because of this confusion, the Court returned to centrality in 2005.

F. Grable *and the Emergence of a Standard*

In *Grable*, the Court upheld federal question jurisdiction over a state-law claim, litigation of which would focus on an issue of federal law.[152] Grable, a corporation, failed to pay its taxes, and the Internal Revenue Service (IRS) seized its realty. After

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Pharms. Inc. v. Thompson, 478 U.S. 804, 814 n.12. The academics' approaches to discretion differed, however. Professor William Cohen refused to embrace an overarching analytical framework and adopted instead an ad hoc, pragmatic assessment. Specifically, he asserted that the centrality decision "requires inquiries and guesses" about such things as litigation reality, the effect of finding jurisdiction on federal court caseload, and the need for federal expertise and sympathy to federal policy. Cohen, *supra* note 4, at 916. Professor David Shapiro, on the other hand, rejected this ad hoc approach in favor of more cabined discretion: "The discretion I advocate relates primarily to . . . a range of permissible choices under the relevant . . . precedent to narrow the scope of discretion and even to generate predictable rules." Shapiro, *supra* note 80, at 588–89. He embraces a range of choices based upon "considerations of judicial administration and the degree of federal concern." *Id.* at 568. Thus, Professor Shapiro notes, jurisdiction was proper in *Smith* because it would not affect federal caseloads appreciably and because the issue of whether the federally issued securities were valid was a question of "great federal moment" to the federal government and to investors. *Id.* at 568–70. In contrast, there was no federal interest in a case such as *Shoshone*, and finding jurisdiction would have flooded federal courts. *Id.*

149. *Merrell Dow*, 478 U.S. at 815 n.12.

150. *Id.*

151. "[C]onsiderable variation exists among and even within various circuits." FALLON ET AL., *supra* note 28, at 885 (discussing cases). An example of the uncertainty engendered by *Merrell Dow* appears in a study of courts of appeals opinions from the 1990s. In sixty-nine opinions dealing with federal question jurisdiction under *Smith*, the appellate courts reversed forty-five times. Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-*Merrell Dow, 115 HARV. L. REV. 2272, 2280 (2002).

152. Grable & Sons Metal Prods. v. Darue Eng'g, 545 U.S. 308, 309 (2005).

Grable did nothing to redeem the property, the land was sold to Darue. Years later, Grable sued Darue on a state-law claim of quiet title.[153] Grable asserted that the IRS had not properly divested it of ownership because the IRS failed to give Grable proper notice of the seizure of the property. Accordingly, Grable argued, Darue's record title was defective.[154] Grable conceded that it had actual knowledge of the seizure (because it was served with notice by certified mail), but argued that the seizure was invalid because federal law does not permit service of notice by mail.[155] Darue removed the case to federal court, and Grable sought remand. The lower courts upheld jurisdiction, and the Supreme Court affirmed.[156]

The opinion in *Grable* is immediately striking in two regards. First, it is unanimous—a welcome relief from the harsh split in *Merrell Dow*. Second is the tone of Justice Breyer's opinion, which openly embraces federal question jurisdiction over state-law claims. There is none of the stinginess of *Merrell Dow*, which relegated discussion of *Smith* to a footnote. Early in the opinion, Justice Breyer forthrightly states that the Court has recognized for nearly a century that "federal question jurisdiction will lie over state-law claims that implicate significant federal issues."[157] He calls *Smith* "[t]he classic example" of such a case and unflinchingly embraces "the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."[158] That notion did not seem so "commonsense" in *Merrell Dow*. Nor was the vitality of *Smith*—let alone its status as a "classic"—so plain in 1986.

Of course, not every state-law claim raising a federal issue can invoke federal question jurisdiction. For one thing, as a matter of litigation reality, the federal issue must actually be contested when the merits are adjudicated. But even this will not guarantee jurisdiction. Read literally, the Court noted, *Smith* would permit federal question jurisdiction whenever it appeared on a well-pleaded complaint that a "right to relief depends upon the construction or application of [federal law]."[159] Subsequent cases trimmed this view, for instance with the substantiality requirement.[160] Beyond that, the *Grable* Court imposed a "veto":[161] "the federal issue will ultimately qualify for

153. *Id.* at 310–11.

154. *Id.*

155. *Id.* at 311. The statute relied on is 26 U.S.C. § 6335(a) (2000) (written notice shall be "given by the Secretary to the owner of the property . . . or left at his usual place of abode or business"). The Court of Appeals affirmed the district court's grant of summary judgment for Darue on the merits, holding that service by certified mail satisfied the requirements of the statute. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 377 F.3d 592, 593–94 (6th Cir. 2004). The Supreme Court granted certiorari only on the jurisdictional issue and thus did not address the claim on the merits. *Grable*, 545 U.S. at 311 n.1.

156. 207 F. Supp. 2d 694 (W.D. Mich. 2002), *aff'd* 377 F.3d 592 (6th Cir. 2004), *aff'd* 545 U.S. 308 (2005).

157. *Grable*, 545 U.S. at 312.

158. *Id.*

159. *Id.* (quoting Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1920)) (alteration in original).

160. *See supra* note 5.

161. *Grable*, 545 U.S. at 313.

a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331."[162] In other words, "there must always be an assessment of any disruptive portent in exercising federal jurisdiction."[163] Even if it is desirable to have a federal forum to address a federal issue, *Grable* requires a court to assess whether accepting jurisdiction will skew the allocation of judicial power "drawn (or at least assumed) by Congress."[164]

This is something new, at least as an express factor. In *Merrell Dow*, the Court had somewhat timidly suggested that the "nature of the federal interest" is relevant. It discussed that factor, though, in terms of the "importance" of the federal issue presented, without much explanation.[165] By injecting overt consideration of the allocation of judicial power, the Court in *Grable* opened the door to a variety of factors, including the interests of the federal and state judicial systems. The Court assessed three factors under the rubric of this possible "veto." I believe these to be the focus of *Grable*'s centrality analysis.

First, the Court considered litigation reality. Grable's claim to superior title was based on the IRS's failure to give proper notice. Thus the "meaning of the federal statute" was "an essential element" and the "meaning of the federal statute [was] actually in dispute."[166] Indeed, it "appear[ed] to be the *only* legal or factual issue contested in the case."[167]

Second, the Court declared that the meaning of the IRS provision "is an important issue of federal law that sensibly belongs in a federal court."[168] In making this point, the Court noted not only that the outcome of the litigation would hinge on the meaning of the federal statute, but that the United States—though not a party to the litigation—has a strong interest in having federal trial courts available to determine this issue. After all, the type of notice required for IRS seizures will affect the government's ability to seize property to collect taxes.

And third, because few title cases will feature a contested issue of federal law, recognition of federal question jurisdiction "will portend only a microscopic effect on the federal-state division of labor."[169]

With *Grable*, it is clear that state-law claims can invoke federal question jurisdiction. It is also clear that *Smith* is not limited to constitutional cases, but can be invoked in cases in which the embedded federal issue is statutory.[170] And it is obvious

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162. *Id.* at 313–14. As discussed in Part II, not only can overzealous invocation of federal question jurisdiction threaten inundation of the federal courts, it threatens improper invasion of state-court jurisdiction as well.

163. *Id.* at 314.

164. *Id.*

165. *See supra* notes 147–49 and accompanying text.

166. *Grable*, 545 U.S. at 315.

167. *Id.* (emphasis added).

168. *Id.*

169. *Id.* The Court contrasted the situation in *Merrell Dow*: "[f]or if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action. And that would have meant a tremendous number of cases." *Id.* at 318.

170. "[A] flat ban on statutory questions would mechanically exclude significant questions

that a court must look to litigation reality to ensure that the federal issue will actually be adjudicated when the court reaches the merits.

Grable eschews the use of a rule and prescribes a standard for assessing centrality. It provides factors to allow the lower federal judge to assess whether a state-law claim invokes federal question jurisdiction. However, because a standard "tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation," it is imperative that the judge understand *why* she is applying the factors.[171] In *Grable*, the Court finally states a theory for federal question jurisdiction over state-created claims. Specifically, it recognizes a need for "resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."[172] The *Grable* factors must be considered against this guiding principle. We turn now to consider the application of this principle, including the Court's recent effort to do so in *Empire Healthchoice Assurance, Inc. v. McVeigh*.[173]

G. Applying the Standard

Assume that a well-pleaded complaint asserts a state-law claim that raises a federal issue. How does a court apply *Grable* to determine whether the claim satisfies the centrality requirement and invokes federal question jurisdiction? Again, the overarching question is whether the case is one that justifies "resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."[174] To determine this, *Grable* counsels that courts look to three factors,[175] which I propose now to consider in detail.

Initially, as a matter of litigation reality, the federal issue must actually be in dispute.[176] In *Grable* and *Smith*, this was easy, because the *only* questions presented for adjudication required interpretation of federal law.[177] In *Merrell Dow* it was not clear that the federal issue would arise; the case could have been litigated without deciding the FDCA question. Invoking federal jurisdiction, and robbing state courts of exclusive jurisdiction, simply cannot be justified (absent diversity of citizenship) because some federal issue *might* come up. The federal issue must be unavoidable.

But does the federal issue have to be *the only* disputed question on the merits? Suppose, for instance, that adjudication will require the court to address an issue of federal law and an issue of state law. The Court has used language supporting jurisdiction when federal law is "an essential element" of the claim,[178] and upheld

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of federal law like the one this case presents." *Id.* at 320 n.7.

171. Sullivan, *supra* note 14, at 58.

172. *Grable*, 545 U.S. at 313. "The Government . . . has a direct interest in the availability of a federal forum to vindicate its own administrative action, and buyers (as well as tax delinquents) may find it valuable to come before judges used to federal tax matters." *Id.* at 315.

173. 126 S. Ct. 2121 (2006).

174. *Grable*, 545 U.S. at 313. *See supra* note 171.

175. *Grable*, 545 U.S. at 312–15.

176. *Id.* at 312–13 ("Darue was entitled to remove the . . . action if Grable could have brought it in federal district court originally . . . as a civil action 'arising under the Constitution, laws, or treaties of the United States' . . . .") (citing 28 U.S.C. § 1331 (2000)).

177. In *Smith*, the sole question was whether the federal bond issue was constitutional. *See* Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 194–95 (1921). In *Grable*, the court had to decide whether the applicable statute permitted notice by mail. *Grable*, 545 U.S. at 311–12.

178. *Grable*, 545 U.S. at 315.

jurisdiction when the federal issue was "dispositive" or "at the heart of the state-law claim."[179] On the other hand, the leading examples of federal question jurisdiction over a state-law claim (*Smith* and *Grable*) were cases in which the federal issue was the sole focus of the contest. So long as the federal issue affects the outcome on the merits, it would seem appropriate to exercise jurisdiction even if state-law issues are to be decided as well.[180]

In assessing litigation reality, should it matter whether the federal issue is one of law or of fact? In *Smith* and *Grable*, the issue presented was one of law. Again, the goal of this branch of jurisdiction is to provide "resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."[181] That goal may be implicated most directly when the task is *interpreting* federal law. While it is routinely said that federal question jurisdiction exists to provide a federal forum for "the construction or application" of federal law,[182] I am suggesting that the task of construction is more important than the task of application in cases involving state-law claims. We saw above that cases seeking vindication of federal claims invoke federal question jurisdiction even if no issue of federal law will actually be encountered in adjudication. And we noted that this was appropriate to the mission of the federal courts of vindicating federal claims.[183] So litigation of purely factual issues arising in a federal claim is appropriate in federal court. Litigation focusing purely on factual issues concerning federal law seems less compelling.

Suppose, for example, that in a case appealed from a state court, the Supreme Court had determined definitively the legal question in *Grable*. Thus, the federal law concerning notice to be given to tax delinquents was clear. Then Grable sued Darue. Would the claim invoke federal question jurisdiction? The plaintiff would be asserting a state-law claim in which the definitive outcome is governed by federal law. But the only question to be litigated would be factual—whether on the facts the now-clear federal standard is met. There may be an argument that a federal judge will apply the facts to the law with greater care or sympathy than a state judge, but (especially if the facts are determined by a jury) the case for federal question jurisdiction in the lower federal courts does not seem strong.

On the other hand, consider what will happen after *Grable*. With federal question jurisdiction, let us assume that the lower federal courts hold uniformly that the federal law permits the IRS to give notice to tax delinquents by mail. Thereafter, does every quiet title case in which the IRS gave notice by mail invoke federal question jurisdiction? Presumably the answer must be yes. Perhaps one can argue that jurisdiction does not attach because the federal issue, once clarified, does not meet the substantiality requirement. If that is so, however, we are essentially saying that a claim arises under federal law only so long as the federal law is not clearly established. That is tantamount to saying that we have federal question jurisdiction not over cases arising

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179. *Id.* at 320.

180. *See* Mikulski v. Centerior Energy Corp., 435 F.3d 666, 678 (6th Cir. 2006) (Daughtrey, J., dissenting) (criticizing majority's rejection of jurisdiction under *Grable* by noting, *inter alia*, that "determining whether the defendants complied with the [Internal Revenue] Code is essential to a resolution of the plaintiffs' claims").

181. *Grable*, 545 U.S. at 313; *see supra* note 171.

182. *Smith*, 255 U.S. at 199.

183. *See supra* notes 140–41 and accompanying text.

under federal law, but over interesting questions, and only so long as they are interesting, which cannot be right. So *Grable* apparently portends that any future quiet title suit involving a claim that the IRS failed to give proper statutory notice to a delinquent will invoke federal question jurisdiction, even if the only question to be addressed is one of fact. If that is so, courts should be especially wary of finding federal question jurisdiction over state-law claims absent a need for interpretation of federal law.

I am not suggesting that there is no federal interest in having federal courts available to *apply* federal law after the meaning of that law has been clearly established. In *Smith*, the United States had an obvious interest in having federal courts decide whether the federal bond issue was constitutional. Even after that issue was decided, the government might worry that state judges, with jaundiced views of federal power, would not *apply* the clear law with appropriate sympathy and consonance to federal goals. At worst, such state-court hostility could imperil the government's ability to finance its operations. So with *Grable*, the IRS would probably like to have access to federal court to *apply* a clear law that underlies its ability to enforce and collect judgments for tax delinquency. I simply suggest that courts, in determining whether a state-law claim should invoke federal question jurisdiction, consider that rather mundane questions of the application of federal law will now gain entry to the federal courts. Courts should assess whether the long stream of potential cases involving mere application of clear law should have access to a federal forum.

Beyond litigation reality, *Grable* counsels courts to determine the "importance" of the federal issue in question. Specifically, the Court concluded that the meaning of the IRS notice provision "is an important issue of federal law that sensibly belongs in a federal court."[184] In explaining this point, the Court combined aspects of litigation reality—noting that the outcome of the litigation would hinge on the meaning of the federal statute—with an assessment of whether the "*meaning* of the federal [law]" that is important.[185] But it is impossible to say that something is important without asking: "to whom?" Obviously, importance is not limited to litigants. Indeed, the principal significance of the federal law in *Grable* was to the federal government. Though it was not a party, the IRS had a "direct interest in the availability of a federal forum to vindicate its own administrative action."[186] The federal government was not the only one with an interest, however. The Court expressly noted that tax delinquents and those who acquire property from them "may find it valuable to come before judges used to federal tax matters."[187] *Smith* is consistent. Certainly the federal government, though not a party, would desire that the constitutionality of a federal bond issue be determined in lower federal courts instead of state fora. So too the litigants would presume that a federal judge would have greater facility with matters of federal securities issuance and constitutionality.

Finally, *Grable* requires that the exercise of jurisdiction not upset the "congressionally approved balance of federal and state judicial responsibilities."[188] On this score, of course, the Court is asking for a survey of the nonexistent. It is not clear

184. *Grable*, 545 U.S. at 315.
185. *Id.* (emphasis added).
186. *Id.*
187. *Id.*
188. *Id.* at 314.

that Congress assesses this balance when it enacts substantive provisions that are unaccompanied by federal causes of action. As discussed in Part I, the courts have always done the heavy lifting in determining which "statutory" limitations to graft onto jurisdictional enactments. And courts will surely have to make the determination of the appropriate balance of federal and state judicial responsibilities.

The Court said little about the factors to be addressed in determining this balance. Its discussion of illustrative cases and some common sense, however, suggest that a court must consider the caseload impact of recognizing federal question jurisdiction on *both* federal and state courts.[189] *Grable* will add very few cases to the federal docket and displace very few from state tribunals, because most title disputes will not involve IRS seizure. In contrast, recognizing jurisdiction in *Merrell Dow* or in *Moore* would have invited a massive influx of tort cases into federal court. A shift so potentially massive must give the federal courts pause because it raises the welter of problems seen with the *Pacific Railroad Removal Cases*.

A state's interest in developing its own state law deserves equal attention. The Court in *Grable* noted that upholding jurisdiction in *Merrell Dow* "would . . . have heralded a potentially enormous shift of traditionally state cases into federal courts."[190] But the case is even stronger than the Court suggested. *Merrell Dow* was not a run-of-the-mill tort case calling for application of well-known common-law principles. Rather, it was a product-liability action, raising cutting-edge theories generally entrusted to state-court development. Yes, permitting the claim in *Merrell Dow* to invoke jurisdiction would have flooded the federal courts. But, it would also have robbed the state courts of the ability to develop its law in this field. As discussed above, finding federal question jurisdiction in that case would have moved the entire matter (perhaps including all state-law issues, under supplemental jurisdiction) to the federal courts. This, in turn, would present plaintiffs' counsel with a difficult choice. A lawyer desiring to litigate such a case in state court could do so only by eschewing any possible federal issue. In *Merrell Dow*, that would have meant foregoing a perhaps-meritorious claim of negligence per se based upon violation of federal law. Had jurisdiction been upheld in *Merrell Dow*, the plaintiff who pursued the negligence per se claim would lose her state forum altogether when the defendant removed the case. The *Grable* instruction to consider the "congressionally approved balance" of jurisdiction between federal and state courts must include appropriate consideration of the importance of permitting state courts to maintain control of their ability to develop state law.[191] Again, as the preceding section suggests, the sorts of discretionary factors relevant to a decision to decline supplemental jurisdiction are relevant here. They are aimed at determining whether the center of gravity of the case is so overwhelmingly state oriented that state courts ought not be robbed of jurisdiction.

Grable was the Court's first serious discussion of federal question jurisdiction over a state-law claim in the nineteen years after *Merrell Dow*. Interestingly, only one year passed before the Court encountered an occasion to apply *Grable*. *Empire Healthchoice* involved the Federal Employees Health Benefits Act of 1959 ("FEHBA"), which established a health insurance program for federal employees.[192]

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189. *Id.* at 318–19.

190. *Id.* at 319.

191. *Id.* at 313–14, 319.

192. Empire Healthchoice Assurance, Inc. v. McVeigh, 126 S. Ct. 2121, 2126 (2006) (citing

Under the Act, the Office of Personnel Management contracts with private carriers to provide health-care plans to federal employees.[193] One such carrier is Empire Healthchoice ("Empire"), which was the provider for enrollee McVeigh. McVeigh was injured and received medical care for which Empire paid benefits of $157,309.[194] The FEHBA preempts state law on questions involving "coverage or benefits" but is silent on the rights of carriers to sue for reimbursement or subrogation.[195] By contract, however, Empire agreed to make reasonable efforts to recoup amounts paid for medical care, and the benefits plan was required to reimburse the carrier for benefits paid from any recoveries from third parties.[196] After McVeigh died, his widow sued third parties in state court in tort for damages for McVeigh's personal injuries; she recovered a settlement of over $3,000,000, from which Empire claimed that it was entitled to recoup the benefits it had paid. Empire sued in federal court, alleging breach of the reimbursement provision of the plan and demanding recovery of $157,309. Empire also asserted that Mrs. McVeigh was not entitled to offset costs or to attorney's fees in recovering the state-court settlement.[197]

The lower courts held that Empire's claim did not invoke federal question jurisdiction.[198] The Supreme Court affirmed in a five-to-four decision.[199] The Court considered and rejected three theories of jurisdiction, of which the third is relevant to our discussion. First, it held that there was no basis for federal common law, and thus that the claim asserted was not federal.[200] Second, it held that the preemption provision of the FEHBA did not render Empire's claim for reimbursement a claim created by federal law. Finally, it applied *Grable* to conclude that the state-law reimbursement claim for breach of contract did not invoke federal question jurisdiction.[201] Empire, and the United States as amicus curiae, argued that the claim arose under federal law pursuant to *Grable* because federal law was a necessary element to the reimbursement claim. They were short on specifics, however, of what federal law was implicated.[202]

The Court likely reached the right answer in *Empire Healthchoice*, but it did not expressly address the factors identified in this Article's preceding discussion of *Grable*. Still, the Court addressed most of the factors and validated some of the preceding observations about what those factors mean.

This Article has made two suggestions: first, as to litigation reality, a court should assess the likelihood that the federal issue will be encountered; and second, that federal question jurisdiction might be more compelling for questions of law rather than application of clearly established law to fact. The opinion in *Empire Healthchoice* bears out both aspects of litigation reality. For one, it is not at all clear that adjudication of the merits required any assessment of federal law. Mrs. McVeigh

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the Federal Employees Health Benefits Act (FEHBA) of 1959, 5 U.S.C. § 8901 (2000)).

193. *Id.*

194. *Id.* at 2129–30.

195. *Id.* at 2127–28.

196. *Id.*

197. *Id.* at 2129–30.

198. *Id.* at 2130.

199. *Id.* at 2127.

200. *Id.* at 2130–33. The dissent focuses entirely on this issue. *Id.* at 2138–44 (Breyer, J., dissenting).

201. *Id.* at 2136–37.

202. *Id.* at 2131.

apparently agreed that Empire was entitled to reimbursement from her settlement fund, but only for those payments relating to the injuries for which she had brought the state-court tort suit. In other words, the litigation would focus in significant measure on how much of the $157,309 paid by Empire was for injuries caused by the third-party tortfeasors. These are fact-based and case-specific issues. The desire for federal expertise and sympathy for federal policy are not implicated as readily as they would be in a case requiring interpretation of federal law. The Court contrasted the situation to *Grable*, which "presented a nearly 'pure issue of law,' one 'that could be settled once and for all and thereafter would govern numerous tax sale cases.'"[203] Moreover, though there was a question of law as to whether reimbursement should be offset to take account of costs and attorney's fees expended by Mrs. McVeigh in the tort case, it was a nonstatutory issue, which, the Court implied, might not be governed by federal law.[204] Thus, an assessment of litigation reality did not support federal question jurisdiction in *Empire Healthchoice*.

In discussing the "importance" of any federal issue, we noted above that *Grable* looked to whether the federal government—though not a party—would benefit from lower federal court treatment of the federal issue. In *Empire Healthchoice,* the Court goes beyond, and notes that *Grable* "centered on the action of a federal agency . . . and its compatibility with a federal statute."[205] In contrast, the reimbursement claim in *Empire Healthchoice* "was triggered, not by the action of any federal department, agency, or service, but by the settlement of a personal-injury action launched in state court."[206] Though I would not rule out the possibility that a federal provision can be "important" even if the government is not the one primarily interested in its interpretation, it is clearly appropriate to consider the government's interest. In *Smith,* as we have seen, the federal government, though not a party, was primarily interested in determination of the issue of whether its securities issuance was valid. In *Empire Healthchoice,* in contrast, the Court recognized the government's interest in attracting able workers and providing for their health care, but was not convinced that state-court jurisdiction over contract-based reimbursement claims would affect that interest.

Grable counseled that a court review the appropriate balance between federal and state judicial systems, which includes an assessment of caseload impact and federalism concerns. In *Empire Healthchoice,* the Court does not quote the relevant language from *Grable* and addresses the issue only in passing.[207] The lack of rigor in applying the factors from *Grable*—especially just one year after that decision came down—is disappointing. Still, the Court's conclusion seems unassailable and is consistent with the standard established in *Grable*. At the end of the day, we know that state-law claims can invoke federal question jurisdiction, we know why that is, and we have a workable package of discretionary factors for undertaking the assessment.

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203. *Id.* at 2137 (quoting FALLON ET AL., *supra* note 28, at 65 (2005 Supp.)).

204. *Id.* ("[I]t is hardly apparent why a proper federal-state balance would place such a nonstatutory issue under the complete governance of federal law, to be declared in a federal forum.") (citation omitted).

205. *Id.* at 2138.

206. *Id.*

207. *See id.* at 2136–37.

IV. RULES AND STANDARDS AND THE NEED FOR PREDICTABILITY

The two principal "statutory" filters for determining whether a case invokes federal question jurisdiction combine a rule with a standard. The well-pleaded complaint rule is a cut-and-dried prescription. It takes no heed of litigation reality and often channels federally focused litigation into state court. For such cases, Article III review can come only in the unlikely event that the Supreme Court agrees to hear the case after it wends its way through the state judicial system. But the rule is well established, relatively easy to use, and generally consonant with the view that federal question jurisdiction exists to vindicate federal claims.

The well-pleaded complaint rule tells the courts little, however, about the federal character of the claim asserted. That task falls to the centrality filter. Though many still clamor for application of the Holmes test for centrality, that test just does not work. It is a rule, as rough hewn as the well-pleaded complaint rule. It replicates the litigation blindness of the well-pleaded complaint rule and channels an even greater number of federally focused cases into the state courts. Together, the well-pleaded complaint rule and the Holmes test realize only the potential of federal question jurisdiction to vindicate federally protected rights. They fail to facilitate the broader vision of federal question jurisdiction to ensure a federal trial forum, with federal expertise, for the sensitive interpretation of federal law, free from state-court biases.

In fairness, perhaps in Holmes's day it was enough to funnel federally created claims into federal court. Surely then there were far fewer situations in which state-created claims contained embedded federal issues. For one thing, there were far fewer federal laws then, thus presenting fewer occasions for incorporation of federal substantive law into state causes of action. For another, in Holmes's day, the Supreme Court was better able to review state-court interpretations of federal law. Today, as Justice Brennan candidly admitted in his dissent in *Merrell Dow*, the sheer volume of litigation makes it unlikely that the Court can discharge this function.[208] Thus the need for lower federal court jurisdiction over state-law claims that implicate federal prescriptions is greater today than in Holmes's time. *Grable* expressly recognizes this need and embraces an appropriately broad view of federal question jurisdiction.

Those who counsel adoption of the Holmes test for centrality are worried, properly, about predictability. Certainly, jurisdictional prescriptions should be as clear as possible; no litigation seems as wasteful as that aimed at whether the parties are in the right court. But as Professor Shapiro demonstrated so compellingly two decades ago, many jurisdictional assessments involve the application of discretion.[209] With *Grable*, there is more certainty in the centrality assessment than we had before. Moreover, it is worth remembering that cases such as *Smith* and *Grable* are pretty rare. Indeed, application of the well-pleaded complaint rule and the *Grable* standard should result in four broad categories of cases, with any uncertainty from the *Grable* test limited to the fourth.

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208. *See* Merrell Dow Pharms. Inc. v. Thomspon, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting).

209. Shapiro, *supra* note 80, at 545–70; *see also* Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891 (2004) (discussing Professor Shapiro's article and its impact).

First, the well-pleaded complaint rule will continue to channel to state court all cases in which issues of federal law are injected by a defense (asserted or anticipated) or a counterclaim. So, for example, cases like *Mottley* cannot invoke federal question jurisdiction. Supreme Court appellate review of such cases is the only tool (and a weak one at that) permitting an Article III court to police the interpretation of federal issues injected into a case in ways other than through the plaintiff's claim.

Second, cases in which federal law creates the plaintiff's claim will almost always invoke federal question jurisdiction. If we must bow to Holmes, we can say that the Holmes test is "more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction."[210] There is nothing wrong with using the Holmes test as a presumption in such cases. Indeed, it undoubtedly accounts for the vast majority of all federal question cases.

Third, there will be a small number of cases, however, in which the plaintiff asserts a federal claim but in which no federal issue will be addressed and in which there is no federal interest in assuming jurisdiction. The leading example of this category, of course, is *Shoshone Mining*, which demonstrates that even as a principle of inclusion, the Holmes test is subject to being trumped by a subtle assessment of litigation reality and the need for lower federal fora.[211]

Finally, there are the cases in which the plaintiff asserts a state-law claim that implicates federal law. It is here that *Grable* applies. In my view, *Grable* does not countenance an indeterminate ad hoc jurisprudence. Rather, it seems likely that cases will fall into rather discernible categories. In some cases, such as those similar to *Grable* and *Smith*, there will be minimal docket impact on either federal or state-court systems, and a clear need to have lower federal courts address an issue of federal import on which the country should not await Supreme Court appellate review. In other cases, similar to *Moore* and possibly *Empire Healthchoice*, recognizing federal jurisdiction would flood the federal courts with fairly routine common-law actions presenting a federal issue on which state-court determination may be acceptable, with Supreme Court appellate review available if needed. Indeed, *American Well Works* would fall into this category; state courts already routinely address the types of federal issues that were presented in that case, demonstrating that a federal trial-court forum is not always of great importance.

Rather than throwing the centrality assessment into chaos, the *standard* set forth in *Grable* seems workable and appropriate. Again, I suggest that federal courts be sensitive to the sorts of factors relevant to the discretionary decline of supplemental jurisdiction. Doing so will help ensure that the federal tail does not wag the state-law dog.

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210. *See, e.g.*, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9 (1983) (quoting T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964)).

211. *See, e.g.*, Bell & Beckwith v. IRS, 766 F.2d 910, 916–17 (6th Cir. 1985) (denying federal question jurisdiction for a claim arising under the Internal Revenue Code, because the only issue to be litigated was a question of state lien law).

CONCLUSION

After *Grable*, the federal courts have an apt system for determining whether a case satisfies the statutory standard for "arising under" federal law. The system uses a hard-and-fast rule to do what a rule can do—that is, answer a yes-or-no question. And it uses a standard to do what rules cannot do well—that is, address a question calling for balance and nuance. At the end of the day, the statutory definition of "arising under" is in better shape now than it has been in a generation, which should put to rest any latter-day calls for a return to the Holmes test for centrality. This improved state of affairs is only possible because the Court has finally unequivocally embraced the notion that federal question jurisdiction exists for more than one purpose. In addition to providing an Article III forum for the vindication of federally created rights, it also serves to open the lower federal court doors to claims requiring application or interpretation of federal law. This function reflects the reality that the Supreme Court cannot today perform that task through its appellate review of state-court decisions. And it is discharged only with a sensitive balancing approach reflecting the delicate task at hand—that of allocating judicial power between separate sovereigns. Finally, with *Grable*, we know why we are undertaking the centrality assessment.