

# The True Compass: No Federal Question in a State Law Claim

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## I. INTRODUCTION

The allocation of jurisdiction between state and federal courts is a core concern of our American federal system. Article III of the Constitution grants federal jurisdiction over a specific, limited list of cases and controversies.<sup>1</sup> Reinforcing the constitutional scheme is the understanding that federal subject matter jurisdiction is not self-executing; Congress must affirmatively grant to federal courts the exercise of the categories of federal jurisdiction allowed by Article III.<sup>2</sup> All cases and controversies not brought within federal jurisdiction by the Constitution and Congress are allocated to state courts.

The question that has caused the most analytical difficulty for the allocation of jurisdiction over the past century is whether a federal court has original federal question jurisdiction when an issue of federal law is embedded in a claim created by state law. This question is relatively narrow in the field of federal jurisdiction,<sup>3</sup> yet the Supreme Court of the

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1. U.S. CONST. art. III, § 2.

2. See, e.g., 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522, at 60 n.2, § 3526 (2d ed. 1984) (discussing limits on federal jurisdiction).

3. First, this Article discusses only one type of federal jurisdiction, commonly called federal question jurisdiction, comprised of “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. CONST. art. III, § 2.

Second, this Article is not about cases that present both federal claims and state claims, or a federal claim with state law issues; in those cases, the federal court is empowered to determine state law properly included in the federal case. This federal power over the entire case was first elaborated in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824), *superseded by statute*, Act of June 25, 1948, ch. 646, § 1349, 62 Stat. 869, 934, and most recently is embodied in the doctrine of supplemental jurisdiction. 28 U.S.C. § 1367 (2000).

Third, this Article is about original federal jurisdiction. Appellate jurisdiction presents different concerns, e.g., wasted lower court litigation and exercise of discretion. See *infra* note 302 and accompanying text (discussing the scope of the Supreme Court’s appellate jurisdiction). See generally Ronald J. Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289 (1969)

United States—not to mention lower federal courts—has returned to this issue again and again, sometimes answering yes<sup>4</sup> and more often answering no.<sup>5</sup> On each return, the Court's analysis grows more complex rather than more precise.<sup>6</sup>

Some writers refer to these cases as “hybrid” or “mixed” claims of federal and state law.<sup>7</sup> This Article rejects those labels because they beg the question: of course a “hybrid” or “mixed” claim of federal law and state law includes a federal question. The better, more accurate, reference is a federal issue “embedded” within a claim created by state law.

This Article proposes that the Supreme Court apply Ockham's razor by returning to an earlier understanding of “arising under.” A claim arises under the law that creates it. A claim created by Congress is a federal question.<sup>8</sup> A claim created by state statute or state common law is not a federal question. So said the Court with power and elegant simplicity nearly a century ago,<sup>9</sup> and so it should say again. The distinction is analytically sound, and it respects the constitutional and congressional allocation of jurisdiction between state and federal courts.

Part II begins by briefly tracing federal question jurisdiction from its first conferral in 1875 to the present. The early cases converge into the rule of *American Well Works Co. v. Layne & Bowler Co.*: a case arises under the law that creates the claim.<sup>10</sup> As the years accumulate, the Supreme Court begins accreting layers onto the rule. In 2005, the Court

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(discussing circumstances under which there is federal original and appellate jurisdiction in cases involving hybrid state law).

4. *E.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2368 (2005); *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 202 (1921).

5. *E.g.*, *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 817 (1986); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27–28 (1983), *superseded by statute*, Judicial Improvements Act of 1985, Pub. L. No. 99-336, 100 Stat. 633; *Gully v. First Nat'l Bank*, 299 U.S. 109, 116–18 (1936); *Moore v. Chesapeake & Ohio Ry.*, 291 U.S. 205, 214–15 (1934); *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 257 (1916); *Louisville & Nashville R.R. Co. v. W. Union Tel. Co.*, 237 U.S. 300, 303 (1915); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); *Miller's Ex'rs v. Swann*, 150 U.S. 132, 136–37 (1893).

6. *See infra* Part II.D–E (discussing the history and development of the Supreme Court's analysis).

7. *See, e.g.*, William Cohen, *The Broken Compass: The Requirement that a Case Arise “Directly” Under Federal Law*, 115 U. PA. L. REV. 890, 897 (1967) (“mixed” claim); Greene, *supra* note 3, at 289 (“hybrid” claim); 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, 17 (1985) (using both terms); Kenneth Lee Marshall, Note, *Understanding Merrell Dow: Federal Question Jurisdiction for State-Federal Hybrid Cases*, 77 WASH. U. L.Q. 219, 219 (1999) (“hybrid” cases).

8. *See infra* notes 28–30 and accompanying text.

9. *Am. Well Works Co.*, 241 U.S. at 260.

10. *Id.*

announces in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*<sup>11</sup> that a federal court must work through a multifactor test to decide whether a federal issue embedded in a state law claim constitutes a case “arising under.”<sup>12</sup>

Part III argues that the accumulated analysis in this area by the Supreme Court is problematical for many reasons, including disrespecting the constitutional language,<sup>13</sup> usurping authority from Congress over federal jurisdiction,<sup>14</sup> running contrary to its other decisions on federal jurisdiction,<sup>15</sup> and creating a malleable equity guide instead of a jurisdictional rule.<sup>16</sup> *Grable & Sons* produces and promotes an inappropriate allocation of jurisdiction between state and federal courts.<sup>17</sup>

Part IV argues the Court should clarify jurisdiction law by readopting the *American Well Works* rule that a case arises under the law that creates the claim.<sup>18</sup> This Part also responds to arguments that may be made against the rule.<sup>19</sup>

## II. HISTORY AND DEVELOPMENT OF LAW

### A. 1875 Act and Early Interpretations

The early history of federal question jurisdiction has been much traced.<sup>20</sup> While Article III of the Constitution grants authority to extend federal jurisdiction over cases “arising under” federal law, Congress did not exercise that authority in the Judiciary Act of 1789.<sup>21</sup> This decision

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11. 125 S. Ct. 2363 (2005).

12. *Id.* at 2368.

13. *See infra* Part III.A.

14. *See infra* Part III.B.

15. *See infra* Part III.C.

16. *See infra* Part III.D.

17. *See infra* Part III.A.3.

18. *See infra* Part IV.A.

19. *See infra* Part IV.B.

20. *See, e.g.,* Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After Merrell Dow*, 52 OHIO ST. L.J. 1477, 1490 n.40 (1991) (outlining Congress’s “curious” history); G. Merle Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17, 27–33 (1947) (discussing Reconstruction and the 1875 Act); James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 639–45 (1942) (discussing the history of the Judiciary Act and the 1875 Act); 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, 601–07 (1987) (discussing the history surrounding the 1875 Act).

21. Chadbourn & Levin, *supra* note 20, at 640.

may well have been a reasoned compromise between proponents and opponents of federal courts.<sup>22</sup> The Federalists, on the way out of office, included the jurisdiction in the Midnight Judges' Act of 1801,<sup>23</sup> but the Jeffersonians repealed it a year later.<sup>24</sup> Not until 1875, ten years after the Civil War, did Congress act again to exercise that authority.<sup>25</sup>

Even then, the jurisdictional grant may have been "sneak" legislation.<sup>26</sup> For whatever reason, the legislative history of the 1875 Act is sadly short and sketchy.<sup>27</sup> Consequently, the Supreme Court has interpreted the "arising under" language of the statute with little or no assistance from legislative history.

One area of interpretation of the statute that is not the subject of this Article is whether a claim created by federal law always presents a case "arising under." To this question, the Supreme Court wavered. Faced with a flood of new cases in federal courts,<sup>28</sup> the Court quickly decided not to follow the welcoming interpretation of the nearly identical constitutional language.<sup>29</sup> Far from holding that whenever federal law provides an ingredient the case is one "arising under," the Court decided that even when federal law creates the claim, it does not necessarily arise under unless a substantial question of construction of federal law is presented.<sup>30</sup>

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22. *Id.* at 641; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 53, 131 (1923).

23. Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

24. Act of Mar. 8, 1802, § 1, 2 Stat. at 132.

25. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 ("That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made . . ."). The operative "arising under" language was taken from U.S. CONST. art. III, § 2, and has endured through the years to the present day in 28 U.S.C. § 1331 (2000).

26. Bergman, *supra* note 20, at 27; Chadbourn & Levin, *supra* note 20, at 643.

27. *See infra* note 132 (noting that the only history is a statement by Senator Matthew H. Carpenter that the Act was intended to grant full constitutional authority).

28. This new federal question jurisdiction, plus growth in the diversity caseload, "opened wide a flood of totally new business for the federal courts." FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 65 (1928).

29. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819–28 (1824), *superseded by statute*, Act of June 25, 1948, ch. 646, § 1349, 62 Stat. 869, 934.

30. *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 203 (1877). Only two years after passage of the 1875 Act, the Supreme Court decided *Gold-Washing*. While the holding of the case was grounded in fine nuances of code fact pleading, the Court did discuss at length the necessity that a federal question case present a controversy "which depends upon the construction or effect of [federal law]." *Id.* at 203–04.

Cases a decade later went both ways. *Compare* *Pac. R.R. Removal Cases*, 115 U.S. 1, 11 (1885) (tort action against federally chartered railroads a federal question), *and* *Feibelman v.*

*B. The Rule that a Case Arises Under the Law that Creates the Claim Is Formed over Years and Repeated in American Well Works*

The second area of interpretation is a seeming mirror image of the first.<sup>31</sup> Can a case ever arise under federal law when state law creates the claim? To this question, the Supreme Court gave a firm and clear answer: no.<sup>32</sup>

The case typically cited for this proposition is *American Well Works*. The plaintiff and defendant manufactured and marketed competing pumps.<sup>33</sup> The plaintiff alleged in its complaint that the defendant had taken three actions against users of the plaintiff's pump: told them it infringed the defendant's patent, sued some of them for infringement, and threatened to sue others.<sup>34</sup> The plaintiff sued the defendant in tort for slander of title; the allegations also appeared to give rise to unfair competition, another tort.<sup>35</sup>

The opinion of the Court, authored by Justice Oliver Wendell Holmes, began by pointing out the standard rule that a plaintiff was the master of its own complaint.<sup>36</sup> The plaintiff's declaration was in state

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Packard, 109 U.S. 421, 423–24 (1883) (suit to collect on marshal's bond required by federal statute a federal question), *with* *Metcalf v. Watertown*, 128 U.S. 586, 588 (1888) (suit on federal judgment ordinary property rights action), *and* *Starin v. New York*, 115 U.S. 248, 259 (1885) (injunction against ferries did not depend on construction of federal charter). Not long after, the Court announced that even a congressionally created action to determine adverse mining right interests was not a case "arising under" because the decision turned on local rules and mining customs. *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 508, 513 (1900). By 1912, the Court had settled on the following rule:

A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.

*Shulthis v. McDougal*, 225 U.S. 561, 569 (1912). The Court's underlying concern was clear when it added "[t]his is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise . . ." *Id.*

31. One might think that because a case created by federal law sometimes does not present a federal question, *see supra* note 30, a case created by state law might sometimes present a federal question. The parallel does not follow, however, because of the limited nature of the jurisdiction of federal courts.

32. *See Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 ("A suit arises under the law that creates the cause of action.").

33. *Id.* at 258–59.

34. *Id.*

35. *Id.* at 258.

36. "Of course the question depends upon the plaintiff's declaration." *Id.* For this proposition, the opinion cited the three-year-old decision in *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1913). *Am. Well Works Co.*, 241 U.S. at 258.

tort law, not for infringement of patent. “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,” said the Court.<sup>37</sup> At that point, Justice Holmes could have wrapped up the opinion by applying the familiar rule that a federal question cannot arise in defense.<sup>38</sup> Instead, he added an additional section to the opinion that included the famous words “[a] suit arises under the law that creates the cause of action.”<sup>39</sup>

While the famous sentence may thus appear to have been an ill-considered, casual dictum, it was not. First, the opinion hinted at application of the rule that a federal question cannot arise in defense, but it did not follow the path to that result; instead, it followed a different path to conclude that “[t]he state is master of the whole matter.”<sup>40</sup> Second, five years later, Justice Holmes—albeit in dissent—quoted the sentence as “the ratio decidendi” of the case.<sup>41</sup> Third, and most importantly, Justice Holmes was not making law, but instead was repeating well-settled law. Likely, that is the reason he wrote so cryptically.

The rule of *American Well Works* had been emerging for at least three decades. Even to say the rule was emerging understates its clarity and force, for it sprang full-grown twenty-three years earlier in *Miller’s Executors v. Swann*.<sup>42</sup> The state of Alabama received lands from Congress for the construction of railroads and passed the lands on to the railroad companies. Following bankruptcy of one of the railroads, the

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37. *Id.* at 259. The plaintiff alleged it had, or had applied for, a patent on its pump. *Id.* at 258. Probably not wishing to wait until the patent was issued so it could sue for patent infringement, it sued in tort.

38. The Court had decided *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908), less than a decade earlier, although the rule can be traced back much earlier. *Tennessee v. Union & Planters’ Bank*, 152 U.S. 454, 461 (1894), identified the rule as well-settled.

39. *Am. Well Works Co.*, 241 U.S. at 260. The use of the phrase “cause of action,” now obsolete in federal practice, is jarring to modern ears. One leading hornbook even misquotes the sentence as “a suit arises under the law that creates the action.” CHARLES A. WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 17, at 105–06 (6th ed. 2002). Yet substitution of the modern equivalent “claim” does not damage the meaning of the sentence. *See infra* Part III.A.2.

40. The concluding sentence of the opinion is “[t]he state is master of the whole matter, and if it saw fit to do away with actions of this type altogether, no one, we imagine, would suppose that they still could be maintained under the patent laws of the United States.” *Am. Well Works Co.*, 241 U.S. at 260.

41. *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 215 (1921) (Holmes, J., dissenting).

42. 150 U.S. 132, 136–37 (1893). This decision had been foreshadowed by paired decisions rendered ten years earlier—and only eight years after congressional grant of federal question jurisdiction in 1875. In *Feibelman v. Packard*, 109 U.S. 421, 423–24 (1883), the Court found federal question jurisdiction in a suit to enforce a marshal’s bond because the bond was required by federal statute; in *Albright v. Teas*, 106 U.S. 613 (1883), the Court found no federal question jurisdiction in an action for breach of a contract for payment of royalties on patented products.

state attempted to reconvey the land to another.<sup>43</sup> The validity of the conveyance depended on interpretation of the original act of Congress.<sup>44</sup> The Supreme Court, in an opinion authored by Justice David Brewer, announced that the case presented “nothing of a Federal character.” Justice Brewer explained as follows:<sup>45</sup>

The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question. A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin.<sup>46</sup>

In a large sense, therefore, the *American Well Works* rule, so often called the Holmes rule, could instead be called the Brewer rule.

This rule of *Miller’s Executors* was applied in three more cases, all authored by Justice Holmes, over the following three decades.<sup>47</sup> The clearest statement was in *Louisville & Nashville Railroad*. A New York telegraph company attempted to exercise eminent domain under a Louisiana state statute.<sup>48</sup> The defendant argued the foreign corporation was prohibited from operating in Louisiana; the telegraph company

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43. *Miller’s Ex’rs*, 150 U.S. at 133.

44. *Id.*

45. *Id.* at 136.

46. *Id.* at 136–37.

47. *Louisville & Nashville Railroad v. Western Union Telegraph Co.*, 237 U.S. 300, 301–03 (1915) was the last of these three cases. In *Interstate Consolidated Street Railway Co. v. Commonwealth*, 207 U.S. 79, 84–85 (1907), Justice Holmes opined as follows:

If the [state] charter, instead of writing out the requirements of [the act of Congress], referred specifically to another document expressing them, and purported to incorporate it, of course the charter would have the same effect as if it itself contained the words. If the document was identified, it would not matter what its own nature or effect might be, as the force given to it by reference and incorporation would be derived wholly from the charter.

*Cf.* *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (“[T]he party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a ‘suit arising under’ the patent or other law of the United States by his declaration or bill.”).

48. *Louisville & Nashville R.R.*, 237 U.S. at 301.

pleaded an act of Congress in support of its argument that the state could not exclude it.<sup>49</sup> Justice Holmes wrote for the Court:

[W]hen, as here, the foundation of the right claimed is a state law, the suit to assert it arises under the state law none the less that the state law has attached a condition that only alien legislation can fulfil. The state law is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfilment is like the reference to a document that it adopts and makes part of itself. The suit is not maintained by virtue of the Act of Congress but by virtue of the Louisiana statute that allows itself to be satisfied by that Act.<sup>50</sup>

Little wonder that, in the next year, Justice Holmes could confidently write—for a unanimous Court—that “[a] suit arises under the law that creates the cause of action.”<sup>51</sup> This law did not spring unexpectedly from Justice Holmes’s brow; it was a summary, stated more sparsely, of settled law that had formed over three decades.

### C. *After a Hard Case Intervenes, the Court Returns to the Rule*

Only five years after *American Well Works*, the Court decided *Smith v. Kansas City Title & Trust Co.*<sup>52</sup> *Smith* was a hard case.<sup>53</sup>

A shareholder of the corporate defendant sued under state corporation law to enjoin the corporation’s directors from breaching their fiduciary duty by investing in federal farm loan bonds.<sup>54</sup> This would be a breach of fiduciary duty, the shareholder alleged, because the act of Congress authorizing the bonds was unconstitutional.<sup>55</sup> Since state corporation law created the claim, *American Well Works* dictated the Court refuse federal jurisdiction.<sup>56</sup>

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49. *Id.* at 302.

50. *Id.* at 303.

51. *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

52. 255 U.S. 180 (1921).

53. One commentator described the circumstances surrounding the case as follows:

[T]he stakes were high, the issue urgent, and the case of national importance: the marketability of a bond program for the relief of farmers was impaired until the Supreme Court resolved the constitutionality of enabling legislation. The parties did not challenge either the jurisdiction of the district court or the resulting jurisdiction of the Supreme Court to grant direct review and thus to issue an expeditious judgment.

John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What “Arise Under” Federal Law?*, 76 TEX. L. REV. 1829, 1838 (1998); see also *infra* Part III.D.2 (discussing how hard cases lead to bad law in this area).

54. *Smith*, 255 U.S. at 195.

55. *Id.*

56. See *supra* text accompanying note 39 (stating “a suit arises under the law that creates the

The long opinion of the Court in *Smith* did not cite or discuss either *American Well Works* or any of the cases leading up to it. The *Smith* opinion ignored a heated dissent by Justice Holmes arguing both for the correctness of existing law<sup>57</sup> and for the doctrine of precedent.<sup>58</sup> The *Smith* Court did not appear to recognize it was interpreting the jurisdictional statute; instead, it leaped backwards a century to the expansive interpretation of the similar constitutional language.<sup>59</sup>

The key reasoning of *Smith* was that “the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue.”<sup>60</sup> In other words, the constitutionality of the act of Congress authorizing farm loan bonds was *the* issue in the case. Of course, that reasoning was not particularly powerful because the same thing could be said about many cases in which a federal issue was raised for the first time in defense. In the end, *Smith* appeared to be a one-time-only hard case.

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cause of action”).

57. Despite recognizing the desirability of the decision in the case, Justice Holmes dissented, arguing as follows in support of existing law:

It is evident that the cause of action arises not under any law of the United States but wholly under Missouri law. The defendant is a Missouri corporation and the right claimed is that of a stockholder to prevent the directors from doing an act, that is, making an investment, alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri. . . . If the Missouri law authorizes or forbids the investment according to the determination of this Court upon a point under the Constitution or acts of Congress, still that point is material only because the Missouri law saw fit to make it so. The whole foundation of the duty is Missouri law, which at its sole will incorporate[] the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up . . . .

But the law must create at least a part of the cause of action by its own force, for it 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, and so it has been decided by this Court again and again.

*Smith*, 255 U.S. at 214–15 (Holmes, J., dissenting) (citations omitted). The above language is the fuller statement of the rule Justice Holmes states so cryptically in *American Well Works*. It clearly draws on the language and reasoning of *Louisville & Nashville Railroad* and *Interstate Consolidated Street Railway*. See *supra* notes 47–50 and accompanying text (discussing these two cases); cf. *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897) (stating that federal courts have exclusive jurisdiction over cases arising under patent law, but state courts can decide questions regarding patent law).

58. “[*American Well Works*] is a decision, reached not without discussion and with but a single dissent . . . . I know of no decisions to the contrary and see no reason for overruling it now.” *Smith*, 255 U.S. at 215 (Holmes, J., dissenting).

59. The Court relied on *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821) and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824), *superseded by statute*, Act of June 25, 1948, ch. 646, § 1349, 62 Stat. 869, 934. *Smith*, 255 U.S. at 199.

60. *Smith*, 255 U.S. at 201.

Indeed, a decade later, the Court rendered three decisions in three years consistent with *American Well Works*, but not with *Smith*. Amazingly, the Court failed to cast even a nod of recognition to either of these precedents.

The first of the three cases was *Puerto Rico v. Russell & Co.*<sup>61</sup> The unanimous decision, while deciding the citizenship status of an unincorporated *sociedad en comandita* for diversity jurisdiction purposes, also rejected an alternative argument for federal question jurisdiction, holding as follows: “Federal jurisdiction . . . may not be invoked where the right asserted is non-federal, merely because the plaintiff’s right to sue is derived from federal law . . . .”<sup>62</sup>

The next year, the Court approached federal jurisdiction indirectly in *Moore v. Chesapeake & Ohio Railway*.<sup>63</sup> The plaintiff sued in two counts and obtained a verdict, but the verdict could not stand if venue had been improperly laid. The second count was pursuant to a Kentucky statute that “reproduced in substance, and with almost literal exactness, the corresponding provisions” of a federal statute.<sup>64</sup> A decision that the second count arose under the federal statute would mean reversal because of that statute’s venue provision.

The Court decided that the state had incorporated into its own statute the duty prescribed by the federal statute. As such, the second count arose entirely under the Kentucky statute, not the embedded federal

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61. 288 U.S. 476 (1933).

62. *Id.* at 483. The Court rationalized as follows:

The federal nature of the right to be established is decisive—not the source of the authority to establish it. The case is analogous to those involving rights to land granted under laws or treaties of the United States. Where the complaint shows only that such was the source of the plaintiff’s title, the case is not one within the jurisdiction of the federal courts.

*Id.* at 483–84 (citations omitted).

Here, the Court said that a state law right to sue “derived from federal law” did not create federal jurisdiction. A state law right to sue sounding in breach of fiduciary duty, with the reason for that breach of duty derived from federal law, seems another step removed from federal jurisdiction—yet that was the situation in *Smith*. *See supra* notes 54–55 and accompanying text (discussing *Smith*).

The *Russell & Co.* result was entirely consistent with *American Well Works* and the dissent in *Smith*. This observation was previously made by Ernest J. London, “Federal Question” Jurisdiction—*A Snare and a Delusion*, 57 MICH. L. REV. 835, 852 (1959).

63. 291 U.S. 205 (1934).

64. *Id.* at 212.

statute.<sup>65</sup> State law incorporating the duty standard of a federal statute did not raise a federal question.

The third decision achieved great acclaim. The opinion in *Gully v. First National Bank in Meridian*,<sup>66</sup> authored by Justice Benjamin N. Cardozo, has been celebrated for its striking prose.<sup>67</sup> What has not commonly been recognized is that the result and the opinion in *Gully* were entirely consistent with *American Well Works* and constituted a clear, albeit implicit, rejection of *Smith*.

The plaintiff, a state tax collector, sued in state court to collect a money judgment based on the defendant national bank's undertaking to assume the tax liabilities of a predecessor national bank. The defendant removed to federal court on the ground that "the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute, and that by necessary implication a plaintiff counts upon the statute in suing for the tax."<sup>68</sup>

The Court, after rummaging through earlier tests for federal question jurisdiction, concluded as follows:

We recur to the test announced in *Puerto Rico v. Russell & Co.*, *supra*: "The federal nature of the right to be established is decisive—not the source of the authority to establish it." Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority.<sup>69</sup>

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65. *Id.* at 216–17. Since the second count arose under state law, the federal venue statute did not apply, and the verdict for the injured railroad worker stood. A critic of the decision might point out that this—like *Smith*—presented something of a hard case. See *infra* Part III.D.2 (discussing the effect of hard cases in this area).

66. 299 U.S. 109 (1936).

67. Justice Cardozo wrote of the need for a "common-sense accommodation of judgment to kaleidoscopic situations," and concluded as follows:

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

*Id.* at 117–18. As one commentator wrote of this language, "[n]o other jurist in American history has delivered himself with the clarity of thought and beauty of expression which habitually characterized the opinions of Justice Cardozo." Bergman, *supra* note 20, at 40. Others rightfully noted "[t]his is prose so beautiful that it seems almost profane to analyze it" before they proceeded to point out that a court cannot determine what is necessary and what is collateral when it is not allowed to look at the defense. Chadbourn & Levin, *supra* note 20, at 671.

68. *Gully*, 299 U.S. at 112 (citation omitted).

69. *Id.* at 116.

The link from *American Well Works* through *Puerto Rico* and *Moore* is clear. Because the plaintiff's claim arose from state contract law, *Gully* presented no federal question.

The opinion could have concluded, yet Justice Cardozo wrote further, explaining "[a]nother line of reasoning will lead us to the same conclusion."<sup>70</sup> After this introduction, he wrote the famous words of kaleidoscopic situations, collateral controversies, and compasses.<sup>71</sup> The *Gully* opinion has often been thought to reject federal jurisdiction based on a balancing, careful weighing of what is basic and what is collateral, but the introductory language to this section of the opinion makes clear that such a weighing was at best an alternative holding, if not outright dictum. The primary holding was that federal question jurisdiction did not exist because the claim arose under state contract law.

Following *Puerto Rico*, *Moore*, and *Gully*, the law was clear: a claim arises under the law that creates it; a federal issue embedded in a claim created by state law does not establish federal question jurisdiction.<sup>72</sup> The law was *American Well Works*. *Smith* stood alone.

The Supreme Court did not issue another decision in the area for nearly fifty years.<sup>73</sup> Unfortunately, this left both the lower federal courts and the commentators on their own to struggle to make sense of *Smith*. Their work during that half-century appears to have misdirected the Supreme Court onto a more complicated path.<sup>74</sup>

#### D. *The More Complicated Path to Pragmatism*

The Supreme Court next directly addressed original jurisdiction over a federal issue embedded in a state law claim in *Franchise Tax Board v. Construction Laborers Vacation Trust*.<sup>75</sup> A state tax board sued to collect unpaid state income taxes from a trust formed by construction

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70. *Id.*

71. *Id.* at 117–18; see also *supra* note 67 (quoting and discussing the passage).

72. See *supra* Part II.B (discussing the law's formation); see also Hirshman, *supra* note 7, at 31 (“[D]ecisions . . . adhered to the more restrictive standard of *American Well Works*.”); London, *supra* note 62, at 853 (arguing that the “dominant trend” of cases through *Gully* makes clear that “incidental” federal questions are insufficient to obtain federal jurisdiction if the “cause of action itself was not created by federal law”).

73. In the area of appellate jurisdiction, the Court decided *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942), and *Flournoy v. Wiener*, 321 U.S. 253 (1944), two cases involving state tax law. Neither case relied on, or even cited, *Smith*, although Justice Felix Frankfurter, dissenting in *Flournoy*, lamented that the Court was applying *Smith*. *Id.* at 265–66, 270–72.

74. See *infra* Part II.D (describing the Court's more complicated path to pragmatism).

75. 463 U.S. 1, 13 (1983), *superseded by statute*, Judicial Improvements Act of 1985, Pub. L. No. 99-336, 100 Stat. 633.

industry employer associations and a union.<sup>76</sup> Count one of the state court complaint sought unpaid state tax levies, and count two asked for a declaration that future levies would be honored.<sup>77</sup> The defendant trust fund removed and alleged federal preemption.<sup>78</sup> The Court concluded the case “was not within the removal jurisdiction conferred by 28 U.S.C. § 1441” and did not reach the preemption question.<sup>79</sup>

This result could have been reached by a straightforward application of the *American Well Works* rule that the claim arose under state law. Instead, the opinion of the Court, authored by Justice William J. Brennan, eschewed that workable rule and turned the Court onto a path of ever-more-complicated analysis. That is notable; even more notable is that the opinion did so in a single paragraph that misused precedents and other authorities in support of reasoning that, in the end, was mere *ipse dixit*. The key paragraph of *Franchise Tax Board*, with commentary inserted by way of footnotes, reads as follows:

The most familiar definition of the statutory “arising under” limitation is Justice Holmes’ statement, “A suit arises under the law that creates the cause of action.” However, it is well settled that Justice 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.<sup>80</sup> We have often held that a case “arose under” federal law where the vindication of a right under state law necessarily turned on some construction of federal

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76. *Id.* at 4–7.

77. *Id.* at 5–7.

78. *Id.* at 7.

79. *Id.*

80. This assertion was taken, without attribution, from *T. B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964), in which Judge Henry Friendly wrote “[i]t has come to be realized that Mr. Justice Holmes’ formula is more useful for inclusion than for the exclusion for which it was intended.” In *T. B. Harms*, the plaintiff patent holder had contracted away the rights to its patents in exchange for contract royalties, and sued for the royalties. *Id.* at 824–25. Even though eighty-one years earlier the Supreme Court had decided, in *Albright v. Teas*, 106 U.S. 613, 618 (1883), that this very situation was a garden-variety contract action, Judge Friendly did not cite the precedent. Instead, he began a long, speculative discussion of how a federal court might “realize” a state-created claim could produce a federal question. *T. B. Harms*, 339 F.2d at 827–28. The problem was that the sole authorities he could point to for this “realization” were the “path-breaking opinion” in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and the “recent application” of *De Sylva v. Ballentine*, 351 U.S. 570 (1956). *T. B. Harms*, 339 F.2d at 827. The isolation of *Smith* has already been discussed. See *supra* Part II.C. *De Sylva* provided no support at all. The case involved the issue of who could renew a copyright. *De Sylva*, 351 U.S. at 572. In answering the question, the Court looked in part to state law for guidance. *Id.* at 580–82. This was not a situation of federal law embedded in a state claim; state law was embedded in a federal claim.

Unfortunately, this casual, assertive dismissal of the *American Well Works* rule has been uncritically repeated as accepted law. E.g., 13B WRIGHT, MILLER & COOPER, *supra* note 2, § 3562, at 25 n.23.

law,<sup>81</sup> and even the most ardent proponent of the Holmes test has admitted that it has been rejected as an exclusionary principle.<sup>82</sup> Leading commentators have suggested that for purposes of § 1331 an action “arises under” federal law “if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law.”<sup>83</sup>

*Franchise Tax Board* has faded from importance today, except as the Supreme Court’s first word on a federal issue embedded in a state law claim in fifty years. That first word was to abandon the settled law of *American Well Works*<sup>84</sup> in the cause of expanding federal jurisdiction.<sup>85</sup>

Only two years later, the Court reconsidered this area of the law in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*.<sup>86</sup> Two separate, “virtually identical” actions—one by plaintiffs residing in Scotland and

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81. The opinion asserts “often” but cites only two cases: *Smith* and *Hopkins v. Walker*, 244 U.S. 486 (1917). *Smith* is already familiar. See *supra* Part II.C. *Hopkins* is more intriguing. The plaintiff sued to remove a cloud on title to land obtained through a federal land grant. *Hopkins*, 244 U.S. at 489. One view is that the case does offer support for federal jurisdiction because an action to remove a cloud on title is created by state law. RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 881 (5th ed. 2003). The opposing view is that *Hopkins* offers little or no support because the plaintiff was suing to clear title to land obtained through federal land grants. This view makes the case more akin to suits arising out of federal land grants that plagued the federal courts after *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885). See *supra* notes 28–30 and accompanying text. Certainly Justice Holmes did not see *Hopkins* as any threat to *American Well Works*. *Hopkins* was a unanimous decision issued only a year after *American Well Works*. Another four years later, Holmes dissented vigorously in *Smith*. 255 U.S. at 214 (Holmes, J., dissenting).

82. The citation was to a dissent by Justice Felix Frankfurter in *Flournoy v. Wiener*, 321 U.S. 253, 270–72 (1944) (Frankfurter, J., dissenting). After hinting that *Smith* should be overruled, and stating “[m]uch is to be said for the reasoning of Mr. Justice Holmes in [his dissent in *Smith*],” Frankfurter noted “his view was rejected.” *Id.* at 265–66, 270–71. One thus cannot say that Justice Brennan’s reference to the Frankfurter dissent was wrong. This prop is gossamer thin, however. Justice Frankfurter was referring to *Standard Oil Co. v. Johnson*, 316 U.S. 481, 483 (1942), which, like *Flournoy*, involved appellate jurisdiction, not original jurisdiction. See *infra* note 302 (explaining the Court’s hospitality to original federal jurisdiction over a case with a federal issue embedded in a state law claim as concern for its appellate jurisdiction).

83. *Franchise Tax Bd.*, 463 U.S. at 8–9 (footnotes added) (citations omitted). The primary citation for the last sentence of the paragraph was to PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 889 (2d ed. 1973). Far from being the positive support that Justice Brennan represented, the authors were actually challenging law students to consider “[w]ould it be sound to conclude” a federal question arises under the quoted circumstances! *Id.* The opinion added a signal to instruct the reader to compare Hart & Wechsler’s book to *T. B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964). *Franchise Tax Bd.*, 463 U.S. at 9; see also *supra* note 80 (explaining the *T. B. Harms Co.* case involved a situation of federal law embedded in a state claim, rather than state law embedded in a federal claim).

84. See *supra* Part II.B–C (discussing *American Well Works* at length).

85. See *supra* notes 75–83 and accompanying text (analyzing *Franchise Tax Board*’s impact on federal jurisdiction).

86. 478 U.S. 804 (1986).

the other by plaintiffs residing in Canada—were filed against the defendant, the manufacturer of the drug Bendectin, in state court in Ohio.<sup>87</sup> Each complaint contained six counts. Five of the counts were agreed by all to be purely state common law: negligence, breach of warranty, strict liability, fraud, and gross negligence.<sup>88</sup> In Count IV, the plaintiffs alleged that the drug was “misbranded” in violation of federal law because the label failed to give adequate warning and that this misbranding “constitute[d] a rebuttable presumption of negligence.”<sup>89</sup> Arguing that these identical Count IVs pleaded federal questions, the defendant removed the cases to federal court where the two cases were consolidated.<sup>90</sup> Arguing that the federal statute merely provided the standard of care of a state negligence tort, plaintiffs moved to remand.<sup>91</sup> Relying on *Smith*, the district court denied remand.<sup>92</sup> The district court then granted defendant’s motion to dismiss on the ground of forum non conveniens.<sup>93</sup> The Sixth Circuit reversed and ordered the case remanded to state court.<sup>94</sup>

The opinion of the Court, authored by Justice John Paul Stevens, began by recognizing that the “vast majority” of federal question cases “are covered by Justice Holmes’ statement that a ‘suit arises under the law that creates the cause of action.’”<sup>95</sup> The opinion then strode along the path of *Smith* and *Franchise Tax Board* toward the “need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction.”<sup>96</sup> The Court then went off in a surprising new

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87. *Id.* at 805.

88. *Id.*

89. *Id.* at 805–06.

90. *Id.* at 806.

91. *Id.*

92. *Id.*

93. *Id.* *Merrell Dow* was another hard case. Both sides were engaged in obvious forum shopping. In this case, however, the hard equities did not all point in one direction. See *infra* notes 218–21 and accompanying text (discussing the forum-shopping in *Merrell Dow*).

94. *Merrell Dow*, 478 U.S. at 806–07. Relying on the requirement of *Franchise Tax Board* that the plaintiff’s “right to relief depended necessarily on a substantial question of federal law,” the Sixth Circuit reasoned the jury could find negligence on the part of defendant with or without finding a violation of the federal statute. *Id.* at 807 (quoting *Thompson v. Merrell Dow Pharms., Inc.*, 766 F.2d 1005, 1006 (6th Cir. 1985)). Therefore, the result did not necessarily depend on a question of federal law. *Id.*

95. *Id.* at 808 (quoting *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)).

96. *Id.* at 814. Here, the Court seemed to be following two law review articles that proposed a federal court should take into account pragmatic considerations such as importance of the federal issue, need for federal court expertise, and potential increase in the federal caseload in deciding whether to assert federal question jurisdiction in an individual case. *Id.* at 814 n.12; see also Cohen, *supra* note 7, at 905–08 (advocating a pragmatic approach to jurisdictional questions); David L.

direction: it announced that when Congress had not supplied a private, implied remedy for violation of a federal statute, that decision also carried with it the conclusion that the federal issue was “insufficiently ‘substantial’ to confer federal-question jurisdiction.”<sup>97</sup> The dissent argued that Congress’s decision not to provide a private, implied right of action spoke not at all to the question of jurisdiction,<sup>98</sup> and the commentators agreed.<sup>99</sup>

*Merrell Dow* should have been a relatively easy case. The result was correct.<sup>100</sup> The analysis was flawed. Several alternative analyses would have been simpler and superior.<sup>101</sup> Perhaps the clearest evidence of the

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Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 568 (1985) (discussing what courts should consider in determining jurisdiction).

97. *Merrell Dow*, 478 U.S. at 814.

98. *Id.* at 825 (Brennan, J., dissenting).

99. Citations to the many commentaries on *Merrell Dow* are collected in Alleva, *supra* note 20, at 1484 n.21 and Marshall, *supra* note 7, at 225 n.33, 227 n.44. One critic charged the Court with confusing apples and oranges. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles”*, 78 VA. L. REV. 1769, 1790 (1992). A better analogy might have been the closer cousins oranges and tangerines. In both *Merrell Dow* and the implied remedies cases of the day (*Thompson v. Thompson*, 484 U.S. 174 (1988); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979)), the Court was concerned with the intent of Congress and the question of where power should reside. See *infra* Part IV.A.3 (arguing the pragmatic approach to jurisdiction damages both state and congressional authority).

100. Even the author of the influential article first proposing the consideration of pragmatic standards in a decision on federal question jurisdiction stated flatly, that when federal law merely provided the standard of conduct in a state tort action, the case did not arise under federal law. Cohen, *supra* note 7, at 911. Another leading commentator wrote of cases in which state law incorporated a federal standard, stating “I see no federal interest in hearing such controversies, and the statute could profitably and clearly be made to exclude them by requiring that federal law operate of its own force in order to support jurisdiction.” David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. CHI. L. REV. 268, 277 (1969) (citation omitted).

101. First and foremost, the Court could have followed the *American Well Works* rule that the claim arose under state law. As Justice Holmes wrote, “[t]he State is master of the whole matter.” *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). He later expanded on this thought, stating “[t]he whole foundation of the duty is [state] law, which at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up . . . .” *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 214 (1921) (Holmes, J., dissenting).

Second, and as a corollary, all six counts of the complaints were pure state tort law. See *Merrell Dow*, 478 U.S. at 805 (basing recovery on theories of “negligence, breach of warranty, strict liability, fraud, and gross negligence”). Even Count IV pleaded the federal statute only because it supplied the duty element of the tort. *Id.* at 805–07; see also W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 36 (5th ed. 1984) (stating “[w]hen a statute provides that . . . acts shall or shall not be done,” it is negligent to deviate from this standard). State negligence law was the entire substance of the count. This analysis would have followed *Moore v. Chesapeake & Ohio Railway*, 291 U.S. 205, 216–17 (1934), and the reasoning of Justice Holmes in both *American Well Works* and *Smith*.

Third, the basic controversy sounded in state tort law, and the need to consider federal law was only “lurking in the background,” “collateral,” or “merely possible.” This reasoning would have followed Justice Cardozo’s alternative analysis in *Gully v. First National Bank*, 299 U.S. 109, 117–

flawed analysis of *Merrell Dow* was that it produced a three-way circuit conflict as the lower federal courts attempted to interpret and apply it.<sup>102</sup> The plurality of lower courts thought *Merrell Dow* meant a return to the rule of *American Well Works*: to say that no federal jurisdiction existed when Congress had not supplied a private, implied remedy was not far from saying that the claim arose under state law.<sup>103</sup> To the extent that view was accurate, the question became why the Court did not return to the Holmes rule instead of continuing to plod along the complicated path to pragmatism.

*E. The Complicated Path Reaches Its Destination?*

In 2005, the Court decided *Grable & Sons*. This decision is certainly the Court's most recent word on jurisdiction over federal issues embedded in state law claims, and may also be the destination of the path

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18 (1936). See *supra* notes 67, 70–71 and accompanying text (quoting Cardozo).

Fourth, the Court could have pointed out that a federal statute supplying the negligence duty in one count of a six-count complaint is not a substantial federal question. See 13B WRIGHT, MILLER & COOPER, *supra* note 2, § 3564, at 66 (stating “[n]ot every case ‘arising under’ federal law—is within federal question jurisdiction” because the federal claim must be substantial).

Fifth, the Court could have looked to its recent declaration that a case can arise under federal law only “where the vindication of a right under state law necessarily turned on some construction of federal law.” *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983), *superseded by statute*, Judicial Improvements Act of 1985, Pub. L. No. 99-336, 100 Stat. 633. *Merrell Dow* presented no occasion for “construction” of federal law; at the most, it called for an “application.” Justice Brennan, in dissent, leaped past his own two-year-old opinion in *Franchise Tax Board* (“construction”) to reach back sixty-five years to “construction or application” found in *Smith*, 255 U.S. at 199. See *infra* Part III.D.1 (discussing the manipulation of language to extend federal jurisdiction).

Sixth, the Court could have employed the reasoning of the Sixth Circuit that a claim supported by alternative theories did not support federal question jurisdiction unless federal law was essential to each of the theories. See *supra* note 94 (discussing the Sixth Circuit’s reasoning in *Merrell Dow*). The Court later adopted this reasoning in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 810 (1988). See *infra* note 145 (quoting *Christianson*).

Seventh, the Court could have discussed the plenary power of Congress over federal jurisdiction and recognized that the assertion of jurisdiction by a federal court over a state law claim usurped that power. See *infra* Part III.B (discussing the problems resulting from the Court’s usurpation of congressional authority to define federal jurisdiction). It also stripped the state courts of authority to decide state law. See *infra* Part IV.A.3 (discussing the advantages of a rule that respects state court authority).

102. Circuit conflicts are common. A three-way conflict is rare indeed. Decisions are collected in Alleva, *supra* note 20, at 1532–38; Elizabeth Klein Frumkin, *A Proposal for Resolving Lower-Court Conflicts over Federal Question Jurisdiction*, 85 ILL. B.J. 548, 550–53 (1997); and Brianna Fuller, Note, *Federal Question Jurisdiction*, 37 LOY. L.A. L. REV. 1443, 1455–59 (2004). The same type of fracturing can be seen in district court decisions. See Marshall, *supra* note 7, at 231 n.60 (citing several district court cases upholding federal jurisdiction and several remanding back to state court).

103. See Alleva, *supra* note 20, at 1531–32 n.195 (citing lower court cases where a lack of private federal action precluded federal jurisdiction).

the Court has been following away from a simple, elegant, and powerful rule toward a complicated, clumsy, and ad hoc rule.

In 1994, the Internal Revenue Service seized real property belonging to Grable & Sons for failure to pay taxes.<sup>104</sup> The seizure was pursuant to a federal statute, which required notice “to the owner of the property [or] left at his usual place of abode or business.”<sup>105</sup> The IRS served Grable & Sons by certified mail.<sup>106</sup> Grable & Sons did not respond, and the IRS sold the property at a tax sale to the defendant, Darue.<sup>107</sup> Five years passed before Grable & Sons sued Darue in Michigan state court to quiet title, claiming the IRS sale was invalid because the statute required personal service.<sup>108</sup> Darue removed to federal court on the ground that the case required interpretation of the federal tax statute, and the court denied remand.<sup>109</sup> The district court granted summary judgment to Darue, holding that service by certified mail satisfied the statute.<sup>110</sup> The Sixth Circuit affirmed.<sup>111</sup> The Supreme Court granted certiorari on the issue of federal question jurisdiction alone.<sup>112</sup>

The opinion of the Court, written by Justice David Souter, is broken into three parts. The first part creates a new, even more complicated, test for federal question jurisdiction in a state-created claim.<sup>113</sup> The second part applies the facts of the case to the new test.<sup>114</sup> The third part rejects arguments that the reasoning of *Merrell Dow* was tantamount to a return to the *American Well Works* rule.<sup>115</sup>

The first part of *Grable & Sons* opens with the assertion that federal courts “ought” to be able to hear cases that include federal questions in

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104. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2366 (2005).

105. 26 U.S.C. § 6335(a) (2000).

106. *Grable & Sons*, 125 S. Ct. at 2366.

107. *Id.*

108. *Id.*

109. *Id.*

110. *See id.* (holding “substantial compliance with the statute was enough”).

111. *Id.*

112. *Id.* The Supreme Court faced another hard case. A decision that federal question jurisdiction did not exist would have rewarded the deadbeat corporation with the opportunity to begin anew in state court. *See infra* Part III.D.2 (highlighting that development through hard cases leads to bad law in this area).

113. *Grable & Sons*, 125 S. Ct. at 2368; *see also infra* notes 116–123 and accompanying text (discussing the first part of *Grable & Sons*’ analysis and the new rule created therein).

114. *Grable & Sons*, 125 S. Ct. at 2368–69; *see also infra* note 124 and accompanying text (discussing the second part of *Grable & Sons*’ analysis).

115. *See Grable & Sons*, 125 S. Ct. at 2369–71 (distinguishing *Merrell Dow* from the Holmes rule in *Smith*); *see also infra* notes 125–28 and accompanying text (discussing the third part of *Grable & Sons*’ analysis).

state law claims.<sup>116</sup> The part posits eight Court precedents in support of its assertion; of those eight cases, five are of little value as they reject federal jurisdiction,<sup>117</sup> and two are distinguishable on the facts.<sup>118</sup> That leaves one precedent. Once again, the trail leads back to *Smith*, and only to *Smith*. The opinion fails to consider, or even mention, a half-dozen Court precedents directly on point and opposed to its finding of jurisdiction.<sup>119</sup>

The first part of *Grable & Sons* culminates in the announcement of a pragmatic, four-prong test to be used in deciding whether a federal issue embedded in a state law claim can support “arising under”—federal question—jurisdiction. “[T]he question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial

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116. *Grable & Sons*, 125 S. Ct. at 2367. The opinion relies on AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164–66 (1969). The discussion there is of federal question jurisdiction in general. The Court’s assertion forms an odd couple with the Court’s statement less than a page later that federal jurisdiction is subject to “congressional judgment about the sound division of labor between state and federal courts.” *Grable & Sons*, 125 S. Ct. at 2367; see also *infra* Part IV.A.3 (discussing the effect of the *American Well Works* rule on the authority of state courts as compared to the pragmatic weighing test of *Grable & Sons*).

117. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988); *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 817 (1986); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27–28 (1983), *superseded by statute*, Judicial Improvements Act of 1985, Pub. L. No. 99-336, 100 Stat. 633; *Gully v. First Nat’l Bank*, 299 U.S. 109, 117–18 (1936); *Shulthis v. McDougal*, 225 U.S. 561, 571–72 (1912).

118. See *City of Chi. v. Int’l Coll. of Surgeons*, 522 U.S. 156, 164 (1997) (plaintiff’s claim was created by federal law even though it was raised pursuant to state administrative procedure); *Hopkins v. Walker*, 244 U.S. 486, 487 (1917) (plaintiff sued to quiet title to land obtained through federal grant); see also *supra* note 81 (discussing *Hopkins*).

119. See *Moore v. Chesapeake & Ohio Ry.*, 291 U.S. 205, 210 (1934) (“The jurisdiction of the District Court is to be determined by the allegations of the complaint.”); *People v. Russell & Co.*, 288 U.S. 476, 483 (1933) (“[Federal jurisdiction] may not be invoked where the right asserted is non-Federal merely because the right to sue is derived from Federal law, or because the property involved was obtained under Federal statute.”); *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 259–60 (1916) (“A suit for damages to business caused by a threat to sue under the patent law is not in itself a suit under the patent law.”); *Louisville & Nashville R.R. v. W. Union Tel. Co.*, 237 U.S. 300, 302–03 (1915) (stating jurisdiction does not depend entirely on diversity because the “suit arises under the laws of the United States”); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25–26 (1913) (“[I]f the plaintiff really makes a substantial claim under an act of Congress, there is jurisdiction . . . .”); *Interstate Consol. St. Ry. v. Commonwealth*, 207 U.S. 79, 86–88 (1907) (discussing constitutionality of a state statute); *Miller’s Ex’rs v. Swann*, 150 U.S. 132, 136–37 (1893) (holding construction of a state statute presented no federal question); cf. *Louisville & Nashville R.R. v. Rice*, 247 U.S. 201, 203 (1918) (“Cases arising under the laws of the United States are such that grow out of the legislation of Congress.” (quoting *Tennessee v. Davis*, 100 U.S. 257, 264 (1880))); see also *supra* Part II.B–C (discussing the jurisdiction rule in *American Well Works* and cases both preceding and following); *infra* notes 328–29 and accompanying text (discussing precedent that would or would not support a return to the *American Well Works* rule).

responsibilities.”<sup>120</sup> While the first three elements, or at least the Court’s statement of the first three elements, of the test are each subject to criticism,<sup>121</sup> the fourth element is the most remarkable.

The Court here mandates that every time a federal court considers federal question jurisdiction over a federal issue embedded in a state claim, it must work through pragmatic considerations, such as a need for federal court expertise in the area of law, federal court solicitude for the federal interest, a need for uniformity in the law, and potential disruption of the division of jurisdiction between federal and state courts (which, apparently, equals too large an increase in the federal caseload).<sup>122</sup> This four- or seven-element test is troubling for a host of reasons.<sup>123</sup>

The second part of *Grable & Sons* applies the facts of the case to the test established in the first part. Discussion here is minimal and hustles through the elements of the test. Once quickly through the test, the application portion claims the applied result places *Grable & Sons* “in venerable company” with three prior quiet-title decisions—all of which are distinguishable.<sup>124</sup>

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120. *Grable & Sons*, 125 S. Ct. at 2368.

121. First, the state claim must “necessarily” raise a federal issue. None of the discussion in *Grable & Sons* supports this requirement. *Id.* at 2368–71. Justice Souter is apparently thinking back to language that first appeared in *Franchise Tax Board*. See 463 U.S. at 9 (“We have often held that a case ‘arose under’ federal law where the vindication of a right under state law necessarily turned on some construction of federal law.”).

Second, the federal issue must be “actually disputed.” Justice Souter appears to be borrowing from *Gully v. First National Bank*. See 299 U.S. at 112–13 (stating “a genuine and present controversy” regarding a federal issue must exist). The problem is that this requirement highlights the collision of *Gully* with the well-pleaded complaint rule. See *supra* note 67 (discussing *Gully*).

Third, the federal issue must be “substantial.” This requirement is neither new nor objectionable, but the citation to *Shultis v. McDougal*, 225 U.S. 561 (1912), is odd because there the Court refused jurisdiction over a claim that was created under federal law. *Id.* at 571–72.

122. See *Grable & Sons*, 125 S. Ct. at 2370–71 (discussing the “careful consideration” called for by *Merrell Dow*). The use of pragmatic considerations, such as impact on federal caseload, traces back to hints in *Merrell Dow*. See *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 814–17 (1986) (referencing “careful judgments” regarding jurisdiction and “management of the federal judicial system”); Cohen, *supra* note 7, at 905–08 (discussing “pragmatic standards” for the “pragmatic problem” of federal question jurisdiction); Shapiro, *supra* note 96, at 568–70 (stating any explanation of the variety of outcomes on federal question jurisdiction would need to accord “sufficient room for the federal courts to make a range of choices based on consideration of judicial administration and the degree of federal concern” (footnote omitted)); see also RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 103 (5th ed. Supp. 2006) (suggesting the analysis in *Grable & Sons* “track[s] the approach advocated by Professor Shapiro”).

123. See *infra* Part III (discussing problems with the court’s new tests in *Grable & Sons* and cases leading up to it after *American Well Works*).

124. *Grable & Sons*, 125 S. Ct. at 2368–69. The prior decisions were all quiet-title cases, but the key difference is that in all three the source of plaintiff’s title was a federal grant. See *Hopkins v. Walker*, 244 U.S. 486, 487 (1917) (stating that plaintiffs were owners of a placer mining claim for which a United States patent was issued); *Wilson Cypress Co. v. Del Pozo Y Marcos*, 236 U.S. 635,

The third part of *Grable & Sons*, which is larger than the rest of the opinion combined, explains at length why *Merrell Dow* is not inconsistent with the result and did not represent a return to the *American Well Works* rule.<sup>125</sup> Actually, this part never mentions *American Well Works*, the cases leading up to it, or the cases following it; instead, it seeks to diminish the so-called Holmes rule by recognizing only his dissent in *Smith*.<sup>126</sup> *Grable & Sons* concludes that even after *Merrell Dow*, “Justice Holmes [is] still dissenting.”<sup>127</sup> The part also raises the spectre of “overturning decades of precedent” by adopting the Holmes rule.<sup>128</sup> Most of the discussion is a hindsight analysis showing why the result in *Merrell Dow* fits within the pragmatic test of *Grable & Sons*.

Only Justice Clarence Thomas writes separately.<sup>129</sup> He hints at a willingness to return to the *American Well Works* rule because jurisdictional rules should be clear, the rule covers the “vast majority” of cases, and the small *Smith* category may not be worth the effort.<sup>130</sup> In the end, he decides to await “better evidence as to the original meaning of § 1331’s text.”<sup>131</sup> That better evidence is not likely to be forthcoming.<sup>132</sup>

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644 (1915) (discussing character of land grant as based on a treaty between Spain and the United States); *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 528–29 (1903) (discussing mineral rights on land granted to railroad); see also *supra* note 81 and accompanying text (discussing “construction of federal law” when federal land grants and quiet-title actions are involved). Plaintiff’s title in *Grable & Sons* came from state property law. 125 S. Ct. at 2366.

125. *Grable & Sons*, 125 S. Ct. at 2369–71.

126. See *id.* at 2369 (“*Merrell Dow* cannot be read whole as overturning decades of precedent, as it would have done by effectively adopting the Holmes dissent in *Smith* . . .”).

127. *Id.* at 2370.

128. *Id.* at 2369. These decades of precedent amount to one case: *Smith*. All of the cases preceding and succeeding *Smith* refused federal jurisdiction. See *supra* Part II.C–D (discussing cases prior and subsequent to *Smith*). The opinion does not show similar solicitude for the decades of precedent it ignored. See *supra* note 119 (citing a multitude of case law ignored by the Court in *Smith*).

129. *Grable & Sons*, 125 S. Ct. at 2371–72 (Thomas, J., concurring). The near unanimity of the Court should not be interpreted to mean that the law in the area is becoming settled. Two examples suffice. First, *American Well Works* (rejecting jurisdiction) was decided eight-to-one; five years later, *Smith* (upholding jurisdiction) was decided six-to-two; thirteen years after *Smith*, *Moore v. Chesapeake & Ohio Railway*, 291 U.S. 205, 216 (1934) (rejecting jurisdiction) was unanimous. Second, *Franchise Tax Board* was unanimous; two years later, in *Merrell Dow*, the Court split five-to-four. Both rejected jurisdiction, but on completely different rationales.

130. *Grable & Sons*, 125 S. Ct. at 2371–72 (Thomas, J., concurring) (quoting *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986)); see also *infra* Part IV.A.1, .5 (arguing that the *American Well Works* rule works and draws a bright jurisdictional line).

131. *Grable & Sons*, 125 S. Ct. at 2371 (Thomas, J., concurring).

132. Justice Felix Frankfurter has observed “[t]he history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment.” *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 370 (1959). The succeeding half-century has not damaged that observation.

Such is the current state of the law in the area of federal question jurisdiction. The next Part discusses problems in the Court's work culminating in *Grable & Sons*. Then, this Article weighs the arguments for and against a return to the *American Well Works* rule.<sup>133</sup>

### III. PROBLEMS WITH THE COURT'S WORK CULMINATING IN *GRABLE & SONS*

Early in the twentieth century, the Supreme Court held that a case arises under the law that creates the claim.<sup>134</sup> Late in the century, through dicta, the Court moved away from the rule.<sup>135</sup> Now, early in the twenty-first century, the Court has determined a federal court must work through a four- or seven-element test on a case-by-case basis to determine whether federal question jurisdiction exists over a federal issue embedded in a state law claim.<sup>136</sup>

This Part identifies four major problems with this development of the law. The result misallocates jurisdiction between state and federal courts, seizes power over federal jurisdiction at the expense of Congress,

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Commentators have found little, if any, guidance in the legislative history of the 1875 Act. Perhaps the fullest discussion of the history of the statute is found in an earlier book by the Justice himself. FRANKFURTER & LANDIS, *supra* note 28, at 65–68. Additional attempts have been made. Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 723 (1986); Doernberg, *supra* note 20, at 603–04; Ray Forrester, *The Nature of a "Federal Question"*, 16 TUL. L. REV. 362, 374–75 (1942); George B. Fraser, Jr., *Some Problems in Federal Question Jurisdiction*, 49 MICH. L. REV. 73, 74–75 (1950). Some commentators take the position that no history exists because the act is “sneak legislation,” intentionally passed with no discussion so potential opponents would not realize what was in the bill. Bergman, *supra* note 20, at 27 (quoting Chadbourne & Levin, *supra* note 20, at 642–45).

Apparently the only snippet of history is the following statement of Senator Matthew H. Carpenter, on behalf of the Senate Judiciary Committee, to the effect that the act is intended to confer full constitutional authority: “This bill gives precisely the power which the Constitution confers—nothing more, nothing less.” 2 CONG. REC. 4977, 4987 (1874). Yet this isolated statement has been challenged as not referring to the grant of federal question jurisdiction, but instead referring to the 1875 Act as a whole, Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 160 n.22 (1953), or referring to service of process, Alleva, *supra* note 20, at 1493 n.46.

A look backwards to the origins of federal question jurisdiction in the Constitution, and in the decision of the first Congress not to grant such jurisdiction to the federal courts, also sheds no light on the decision of Congress in 1875. See generally James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998).

133. See *infra* Part IV.

134. *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

135. *Merrell Dow*, 478 U.S. at 808–09; *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9–12 (1983), *superseded by statute*, Judicial Improvements Act of 1985, Pub. L. No. 99-336, 100 Stat. 633.

136. See *Grable & Sons*, 125 S. Ct. at 2368.

runs counter to the overwhelming trend of federal jurisdiction, and amounts to no more than formless equity.<sup>137</sup>

*A. Cases After American Well Works Leading to the Misallocation of Jurisdiction Between State and Federal Courts in Grable & Sons*

1. Federal Question Jurisdiction Exists over Cases, Not Issues

Article III extends federal jurisdiction to “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>138</sup> “Cases” appears to refer to an entire case, not a single or isolated issue. “Arising under” appears to refer to a case that arises initially under federal authority, not one that arises initially under state authority. The drafting history in the Constitutional Convention supports those meanings.<sup>139</sup>

These carefully chosen words and their intended meanings should not be ignored. The assumption has always been “that, in dealing with a subject as technical as the jurisdiction of the courts, the Framers, predominantly lawyers, used precise, differentiating and not redundant language.”<sup>140</sup>

137. See *infra* Part III.A–D.

138. U.S. CONST. art. III, § 2.

139. See generally Liebman & Ryan, *supra* note 132. Liebman and Ryan also discuss “all Cases.” See *id.* at 736 (Supreme Court to “decide whole disputes, not abstract issues”); *id.* at 742 (“[The case includes the] whole such dispute rather than just the part of it involving the ‘federal’ (or equivalent) question.”); *id.* at 746 n.244 (addition of “in Law and Equity” meant to exclude idea that “abstract legal issues could generate federally cognizable ‘arising under’ cases”); *id.* at 771 (“By ‘case,’ we mean a court action that can be resolved on the basis of enforceable law.”).

The prior drafts of the provision that in the end became the famous “arising under” language are instructive. An early draft extended jurisdiction to “collection of the National revenue . . . and questions which may involve the national peace and harmony.” *Id.* at 712 (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand ed., 1911) [hereinafter Farrand]). A later draft replaced “National revenue” cases with “cases arising under laws passed by the general Legislature.” *Id.* at 732 (quoting Farrand, *supra*, at 39). This language evolved into “all Cases arising under Laws passed by the Legislature of the United States.” *Id.* at 740 (quoting Farrand, *supra*, at 172–73). Drafters later added cases arising under “this Constitution,” “in Law and Equity,” and provisions regarding treaties, and deleted “passed by the Legislature.” *Id.* at 746–47 (quoting same). The purpose was to conform the language of the Jurisdiction Clause to the language of the Supremacy Clause. *Id.* The editing out of the specific reference to laws passed by the national legislature does not seem to change the transparent intent to refer to national laws.

140. *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 364 (1959) *superseded by statute on other grounds*, Jones Act, ch. 143, § 2, 36 Stat. 291, *as recognized in Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); see also Liebman & Ryan, *supra* note 132, at 722 n.129 (quoting Representative Stone’s discussion of the Framers’ intent with the language used in describing the courts’ jurisdiction).

The drafters understood “[c]ases . . . arising under” jurisdiction to encompass a discrete and clearly identifiable class of cases: cases actually created by federal law, whether through Constitution, statute, or treaty. The same understanding almost certainly carried through to the “actions . . . arising under” language employed in drafting the 1875 Act.<sup>141</sup> That understanding was shared by all of the decisions of the Supreme Court culminating in *American Well Works*.<sup>142</sup> It was stated most forcefully in the following words:

[A] suit cannot be said to arise under any other law than that which creates the cause of action. It may be enough that the law relied upon creates a part of the cause of action although not the whole, as held in *Osborn* . . . . I am content to assume this to be so, although the *Osborn Case* has been criticized and regretted. But the law must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States.<sup>143</sup>

Disappearance of the understanding that federal question jurisdiction applies to cases, not to issues, provides much of the explanation for the confusion created by the two most recent Supreme Court decisions in this area of the law.

The plaintiffs in *Merrell Dow* pleaded six counts in their complaint. Count IV pleaded that a federal statute supplied the duty element of the

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141. “Certainly the accomplished lawyers who drafted the Act of 1875 drew on the language of the constitutional grant on the assumption that they were dealing with a distinct class of cases . . . .” *Romero*, 358 U.S. at 366–67.

142. See *supra* text accompanying note 39 (stating “[a] suit arises under the law that creates the cause of action”). One of the clearest statements is found in *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897), in which the Court was dealing with the related question of whether exclusive federal jurisdiction over patent cases had deprived the state court of jurisdiction. The Court rationalized as follows:

Section 711 does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of “cases” arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading . . . sets up a right under the patent laws as a ground for a recovery.

*Id.*

143. *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 214–15 (1921) (Holmes, J., dissenting) (citation omitted). One commentator noted as follows:

The dominant trend of the cases through *Gully v. First National Bank* . . . makes clear that it is never enough, for purposes of the jurisdictional statute (as contrasted with Article III of the Constitution), that a case involves one or more incidental questions arising under the Constitution or laws of the United States, if the plaintiff’s cause of action itself was not created by federal law.

London, *supra* note 62, at 853.

tort of negligence.<sup>144</sup> At most, that is a federal issue; it is not a “case” or “action” that arises under federal law.<sup>145</sup>

The Court’s most recent word is *Grable & Sons*. To quiet title, the plaintiff pleaded both the source of its title and the source of defendant’s title.<sup>146</sup> Going another step, plaintiff pleaded that its title was superior to the defendant’s, namely because the defendant’s title was obtained through a federal tax sale based on improper service under the federal statute.<sup>147</sup> Finally, the complaint reached the federal issue.<sup>148</sup> The aroma was clearly like that of a federal issue arising in defense, but, even granting that the federal statute was properly part of the well-pleaded complaint, we certainly had the pleading of a federal issue, not a federal “case” or “action.”

## 2. Misunderstanding of “Cause of Action” and “Claim”

Part of the difficulty in recognizing that “arising under” jurisdiction applies to cases, not to issues, is caused by the misunderstanding and misuse of “cause of action” and “claim.” The history of pleading in state and federal courts, to the extent necessary to recognize this difficulty, will be recounted here in summary fashion.

At common law, the right/duty relationship between the wronged person and the wrongdoer created a “right of action.”<sup>149</sup> The claimant

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144. See *supra* notes 89–90 and accompanying text (discussing the allegation in Count IV).

145. A variant of the same analysis could have been that the “case” or “action” did not encompass a federal question, because the plaintiff could well have prevailed on one of the other five counts. This analysis traces back to *Gully v. First National Bank*, 299 U.S. 109 (1936). Recently, the Court applied this type of analysis. Rejecting exclusive appeal to the Federal Circuit in a patent case, the Court wrote as follows:

Nor is it necessarily sufficient that a well-pleaded claim alleges a single theory under which resolution of a patent-law question is essential. If “on the face of a well-pleaded complaint there are . . . reasons completely unrelated to the provisions and purposes of [the patent laws] why the [plaintiff] may or may not be entitled to the relief it seeks,” then the claim does not “arise under” those laws. Thus, a claim supported by alternative theories in the complaint may not form the basis for § 1338(a) jurisdiction unless patent law is essential to each of those theories.

*Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 810 (1988) (citations omitted). This analysis brings to mind the proper understanding of pleading a “claim.” See *infra* Part III.A.2 (discussing the confusion between a “cause of action” and a “claim”).

146. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 125 S. Ct. 2363, 2366, 2368 (2005).

147. *Id.* at 2368.

148. *Id.*

149. “[W]hen a legal right is wrongfully infringed, there accrues to the injured party a right to obtain a legal remedy, by action against the wrongdoer. This secondary or remedial right is called a right of action.” GEORGE L. PHILLIPS, AN EXPOSITION OF THE PRINCIPLES OF CODE PLEADING § 186, at 168 (Percival W. Viesselman ed., Callaghan & Company 1932) (1896); see also Charles E.

pleaded this right of action in a “form of action.”<sup>150</sup> A form of action, as well as other aspects of common-law pleading, became increasingly complex, creating calls for reform.

That reform came in code pleading. Common-law pleading of a form of action was replaced by the simplified code pleading of a “cause of action.”<sup>151</sup> The cause of action, in turn, created unexpected pleading complexities. One was that courts and commentators were unable to agree on the definition of a cause of action.<sup>152</sup> Some equated the cause of action to the right of action, a single intersection of right/duty, i.e., a single legal theory of recovery.<sup>153</sup> Others maintained the cause of action was something new: a single grouping of facts that a lay observer would expect to be tried together without regard to any number of legal theories of recovery that might be chunked into those facts.<sup>154</sup>

To illustrate the relevance of the problem of defining a cause of action, we can consider the facts of *Merrell Dow*. Each plaintiff, injured by ingestion of defendant’s drug Bendectin, sued in state court on six theories of recovery: negligence, breach of warranty, strict liability, fraud, negligence of misbranding in violation of federal statute, and gross negligence.<sup>155</sup> How many causes of action did each plaintiff plead? Six,

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Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 823–24 (1933) (describing the difference between cause of action and right of action); O. L. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 617 (1925) (stating “[t]he unstated facts give a ‘right of action,’ but the stated facts give a ‘cause of action.’”).

150. The common forms of action were trespass, (trespass on the) case, debt, detinue, replevin, trover, ejectment, covenant, account, and assumpsit. ALLAN IDES & CHRISTOPHER N. MAY, *CIVIL PROCEDURE: CASES AND PROBLEMS* 526–29 (2003).

151. See Clark, *supra* note 149, at 820 (“The phrase ‘cause of action’ did not become a term of art in the law of pleading until the adoption of the code.”).

152. See *id.* at 823 (stating “[t]he definitions of the term by text writers and courts have been numerous and discordant”).

153. “[T]he primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several states.” JOHN N. POMEROY, *CODE REMEDIES* § 347 (4th ed. 1904). “It is that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded.” McCaskill, *supra* note 149, at 638.

154. The cause of action was “such a group of facts . . . limited as a lay onlooker would to a single occurrence or affair, without particular reference to the resulting legal right or rights.” CHARLES E. CLARK, *CLARK ON CODE PLEADING* § 19, at 130 (2d ed. 1947). The same author also gave the following definition:

The cause of action under the code should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons. The size of such aggregate should be worked out in each case pragmatically with an idea of securing convenient and efficient dispatch of trial business.

Clark, *supra* note 149, at 837.

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

say those who define cause of action in terms of legal theory. One, say those who define cause of action in terms of an aggregate of facts.

In part because of difficulty in defining cause of action, another wave of procedural reform swept the country. When the Supreme Court appointed an advisory committee to draft the Federal Rules of Civil Procedure, the reporter was Dean, later Judge, Charles E. Clark. As the leading proponent of the fact-aggregate school of thought on cause of action, he made sure that the Federal Rules embodied his view by omitting “cause of action” entirely from the rules.<sup>156</sup> Instead, a claimant under the rules was to plead a “short and plain statement of the claim,” commonly known as a “claim.”<sup>157</sup> The cause of action thus became obsolete—or should have become obsolete—in the federal courts and the majority of states that became rules states. The “claim” embodied Clark’s understanding of a set of facts that formed a convenient litigation unit.<sup>158</sup>

Understanding this history and the philosophy of the Federal Rules makes the answer to the earlier question quite clear. Each plaintiff in *Merrell Dow* had one claim: all theories of recovery coalesced around the single fact that the person had ingested Bendectin.<sup>159</sup>

In sum, a plaintiff in federal court or a rules state pleads a claim for relief, which is a transactional grouping of facts that may give rise to one or more legal theories of recovery. No matter how many theories of recovery, a plaintiff has one claim on one related, aggregate set of facts.<sup>160</sup> Today, in code states, a plaintiff still pleads a cause of action;

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156. CHARLES E. CLARK, *CASES ON PLEADING AND PROCEDURE* 658 (1940) (citing *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 83, 86 (2d Cir. 1939) (Clark, J., concurring)); Arthur J. Keefe et al., *Venue and Removal Jokers in the New Federal Judicial Code*, 38 VA. L. REV. 569, 610 (1952).

157. FED. R. CIV. P. 8(a)(2).

158. Clark commented as follows on the new “claim”:

These rules make the extent of the claim involved depend not upon legal rights, but upon the facts, that is, upon a lay view of the past events which have given rise to the litigation. Such lay view of a transaction or occurrence, the subject matter of a claim, is not a precise concept; its outer limits should depend to a considerable extent upon the purpose for which the concept is being immediately used.

CLARK, *supra* note 156, at 659.

159. 478 U.S. at 804.

160. Understanding the fact-based, transactional nature of a claim is important throughout the federal rules and federal jurisdictional statutes. Kinship of the “claim” to the commonly encountered “transaction or occurrence” is apparent. *Cf. supra* note 154 (describing a single occurrence). Some examples are 28 U.S.C. § 1367(a) (2000) (supplemental jurisdiction extends over entire constitutional “case”); 28 U.S.C. § 1441(c) (2000) (removal of separate and independent claim); FED. R. CIV. P. 13(a) (counterclaim arising out of the same transaction or occurrence is compulsory); FED. R. CIV. P. 54(b) (district court allowed to certify appeal only in case of multiple, i.e., factually discrete, claims).

yet, also in those states, the better understanding remains the Clark view of the grouping of facts that form a convenient litigation unit, not each legal theory of recovery.

To the extent that terminology is necessary for a separate legal theory of recovery in either rules states or code states, the historically correct reference is right of action. Alternatively, a pleader can be said to state a single claim—or single cause of action—containing multiple theories of recovery, or counts.

Why this excursion into the history of pleading? The reason is that the Supreme Court, in its recent decisions in the area of a federal issue embedded in a state law claim, has not taken account of the development of pleading law. In *Franchise Tax Board*, the plaintiff pleaded one claim—one cause of action—since both counts arose out of the same set of facts, yet the Court discussed two causes of action.<sup>161</sup> Perhaps the Court's language was somewhat understandable because the case was removed from California, a code-pleading state. Much less understandable was *Merrell Dow*, in which each plaintiff pleaded one claim (a single injury), yet the district court approved the removal from state court because "Count IV of the complaint alleged a cause of action arising under federal law," and the Court ultimately concluded "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.'"<sup>162</sup>

The upshot is that reference to multiple causes of action makes the federal aspect of the case appear far more weighty than it is. Consideration of Count IV as a separate "cause of action arising under federal law" makes the federal interest appear substantial.<sup>163</sup> Proper reference to Count IV as one of six theories of recovery on a single claim makes clear the federal tail is attempting to wag the state dog, and recognition that all six counts of the claim are created by state law diminishes the federal interest to the vanishing point. The same type of tail wagging is likely to occur in the future as lower courts attempt to weigh the strength of the federal interest against the strength of the state interest pursuant to the test announced in *Grable & Sons*.

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161. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983), *superseded by statute*, Judicial Improvements Act of 1985, Pub. L. No. 99-336, 100 Stat. 633.

162. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 806, 817 (1986) (emphasis added).

163. *Id.* at 806.

### 3. Resulting Misallocation of Jurisdiction Between State and Federal Courts

Overvaluation of the federal interest in a case occurs because a court does not look at the case as a whole and does not recognize a single claim encompasses multiple legal theories of recovery.<sup>164</sup> Recognition of this overvaluation leads to the further recognition that *Grable & Sons* will inevitably result in misallocation of jurisdiction between state and federal courts.

The drafters of the Constitution intended for state courts to be not only the sole authority over state law but also primary protectors of federal rights under the compulsion of the Supremacy Clause and the correcting power of the Supreme Court.<sup>165</sup> *Grable & Sons* invites federal courts to take cases created by state law based on an amorphous weighing of any federal interest that might be lurking somewhere in the crevices of the complaint. In effect, the invitation is to “cut into” the jurisdiction of the state courts.<sup>166</sup>

This approach fails to take into account the state’s interest in its own law. Instead of following traditional doctrine that allows and encourages the state to determine its own law, the test of *Grable & Sons*, by allowing—encouraging—federal courts to assert jurisdiction, means that all aspects of the case will be decided by a federal court even though a lone federal issue may be nestled amongst many state law issues.<sup>167</sup>

Federal courts deciding state law is worse than state courts deciding federal law. One prominent reason is the federal court prediction of state law is not authoritative and may result in embarrassment should the state

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164. See *supra* Part III.A.1–2 (discussing jurisdiction and the difference between a “cause of action” and a “claim”).

165. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401–02 (1953) (stating state courts protect constitutional rights and limit the Supreme Court’s power); see also Liebman & Ryan, *supra* note 132, at 747 (“The Framers thus self-consciously and irrevocably forged the constitutional structural link between the front-line decisionmaking of ‘the Judges in every State’ under the supremacy clause and the supervisory decisionmaking of the federal judiciary when called upon to exercise the ‘arising under’ jurisdiction permitted by the judiciary article.”); *id.* at 767, 778–79 n.375, 883 (discussing the Framers’ jurisdictional choices).

166. *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 380 (1959); see also *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897) (state courts would be “ousted” of jurisdiction).

167. The authority of a federal court to determine all aspects of a case over which it has taken jurisdiction traces back to *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). The actual case, however, may be much weightier with state ingredients, which should be determined by the state courts. Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 218 (1948).

court ignore the prediction.<sup>168</sup> A second prominent reason is federal courts are much more concerned with erroneously exercising jurisdiction than with erroneously declining jurisdiction.<sup>169</sup>

The end result of *Grable & Sons* is that the federal court is now instructed to look for federal issues, not federal “cases” or federal “claims.” This overweening concern for any glimmer of federal interest can only result in more state law cases commenced in, or removed to, federal courts. That is a misallocation of jurisdiction between state and federal courts.

### *B. Usurping Congressional Power over Federal Jurisdiction*

Federal courts have limited jurisdiction. They can adjudicate only cases and controversies within the jurisdiction extended by Article III and granted by Congress.<sup>170</sup> Such propositions are basic and noncontroversial.

A slightly different way of saying the same thing is to point out “the Constitution assigns to Congress primary authority for control of federal jurisdiction.”<sup>171</sup> Congress exercises this authority when it passes jurisdictional statutes. While courts must interpret these jurisdictional statutes, a federal court must not create jurisdiction for itself under the guise of interpretation.<sup>172</sup> Jurisdictional statutes are limited extensions of the jurisdiction the Constitution allows. They are not springboards for extending jurisdiction. Indeed, the Court invariably interprets

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168. See, e.g., *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950) (stating that erroneously deciding a doubtful local law could embarrass a federal court).

169. Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 323 (1993). See *id.* at 323 nn.282–83 (listing examples supporting this generally accepted proposition); see also 28 U.S.C. § 1359 (2000) (prohibiting collusive joinder to establish federal jurisdiction but silent on collusive joinder to defeat federal jurisdiction).

170. See *supra* notes 1–2 and accompanying text.

171. Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 1 n.4 (1990) (collecting sources supporting this proposition).

172. One way of stating this proposition is to recognize “nothing in our history or traditions permits a court to interpret a normal grant of jurisdiction as conferring unbridled authority to hear cases simply at its pleasure.” Shapiro, *supra* note 96, at 575.

A few commentators have argued the Supreme Court should share in defining federal jurisdiction. One writes of a “dialogic process of congressional enactment and judicial response.” Friedman, *supra* note 171, at 2. Another writes of the “jurisdictional collaboration” between Congress and Court, complains of the Court’s “troublesome abdication,” and argues to preserve “the judiciary’s front-line prerogative in hybrid claim determinations.” Allea, *supra* note 20, at 1525, 1559. These commentators’ views are contrary to accepted understanding, however. The former admits the “congressional control approach” has widespread acceptance. Friedman, *supra* note 171, at 2. In addition, even these two commentators do not go so far as to assert that the Court should take the initiative in creating jurisdiction for itself.

jurisdictional statutes narrowly both in deference to Congress and in recognition of the limited jurisdiction conferred by the Constitution.<sup>173</sup>

A third way of approaching the same subject is to ask this question: Where does jurisdictional power reside? The answer is Congress.<sup>174</sup> Power over federal jurisdiction is finite. Like a zero-sum game, when one player gains power, another must lose it. To the extent the Supreme Court—or any lower federal court—intrudes upon congressional authority to grant federal jurisdiction, it usurps the power of Congress.

That seems to be the understanding the Court's opinion in *Merrell Dow* was groping towards. The opinion infelicitously theorized that, because Congress had not intended to create a private remedy for the federal regulatory statute, it must also have intended that no federal jurisdiction should exist.<sup>175</sup> That link was hard to forge. The Court would have done better to point out that, because Congress had not seen fit to extend federal jurisdiction to a case with a federal issue embedded in a state law claim, it would not intrude upon the plenary power of Congress over federal jurisdiction.

The *Merrell Dow* Court did hint that pragmatic factors such as the “nature of the federal issue” and judicial economy might be considered in defining federal question jurisdiction, but carefully placed that suggestion into a footnote, not the text.<sup>176</sup> More than hint would have been inappropriate, for such considerations “have much more to do with judicial administration than with any congressional command concerning when to exercise federal question jurisdiction.”<sup>177</sup>

The Court was not so reticent in *Grable & Sons*. Moving from footnote to text, and from hint to holding, the Court announced federal question jurisdiction over a case presenting a federal issue embedded in a state law claim is to be determined by a multifactor test of pragmatic considerations.<sup>178</sup> The Court cast this pragmatic, weighing test as a rule of law.<sup>179</sup> It is not. It is a self-grant of discretion—discretion to

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173. See *infra* Part III.C (explaining that expansive interpretation is contrary to jurisdictional decisions).

174. See *supra* notes 1–2, 172–73 and accompanying text.

175. *Merrell Dow Pharms., Inc. v. Thompson* 478 U.S. 804, 810–17 (1986); see also *supra* notes 97–99 and accompanying text.

176. 478 U.S. at 814 n.12.

177. Friedman, *supra* note 171, at 23.

178. “[D]oes a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2368 (2005).

179. A commentator who writes in the area of rules and norms identifies the following technique:

determine whether the federal issue is “necessarily raise[d],” “substantial,” and not “disturbing any congressionally approved balance.”<sup>180</sup> The more discretion in the test, the more power that is vested in the federal court; the more power in the court, the less in Congress. Consequently, the Court is usurping jurisdictional power from Congress.

*C. Expansive Interpretation Is Contrary to the Trend of Jurisdictional Decisions*

Federal question jurisdiction was first extended to the federal courts in 1875.<sup>181</sup> From 1875 to the present day, the overwhelming general trend of federal jurisdiction—federal question and diversity, original, and removal—has been contraction through the efforts of both Congress and the Supreme Court.<sup>182</sup>

Specifically with regard to cases embedding a federal issue in a state law claim, the early cases coalescing in *American Well Works* were in line with this trend. *Smith* was contrary, but it stood alone.<sup>183</sup> After *American Well Works* and *Smith*, the Court’s opinions expressed a willingness to expand federal jurisdiction in this area, but only in dictum as it decided against expansion in the actual case.<sup>184</sup>

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[T]here will often be a great tactical advantage, for a court which wants to expand its power at the expense of another institution, in casting the norms it wants to impose in the rule form. . . . There are two different ways in which the rule form shores up the legitimacy of judicial action. First, the discretionary elements in the choice of a norm to impose are obscured by the process of justification that pops a rule out of the hat of policy, precedent, the text of the Constitution, or some other source of law. Second, once the norm has been chosen, the rule form disguises the discretionary element involved in applying it to cases.

Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1708 (1976); see also *infra* Part IV.B.4 (arguing jurisdictional decisions should be based on straight-forward rules rather than overly complex standards).

180. *Grable & Sons*, 125 S. Ct. at 2368. One way of looking at the test of *Grable & Sons* is to identify it as a norm instead of a rule of law. See *infra* Part IV.B.4 (discussing the relationship between norms, rules, and standards). Another way of looking at the test is to identify it as formless equity. See *infra* Part III.D (arguing the test in *Grable & Sons* is “pure equity” and allows decision based on “a personal sense of fairness”).

181. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, 470; see also *supra* Part II.A (explaining the history of the 1875 Act).

182. *E.g.*, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673–74 (1950); FRANKFURTER & LANDIS, *supra* note 28, at 69–145, 187–216, 255–94.

183. See *supra* Part II.C.

184. See *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 817 (1986) (acknowledging that federal issues may arise in state law claims but finding no federal issue at the core of the case); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 28 (1983), *superseded by statute*, *Judicial Improvements Act of 1985*, Pub. L. No. 99-336, 100 Stat. 633 (acknowledging federal jurisdiction over state law claims exists if “plaintiff’s right to relief necessarily depends on resolution

Only in *Grable & Sons* has the Court, for a second time, upheld federal question jurisdiction over a claim created by state law.<sup>185</sup> Because the holding is contrary to the trend narrowing federal jurisdiction, one would think some strong policy must support the decision; yet, the Court relies only on “the commonsense notion that a federal court ought to be able to hear [such] claims” because of the generic justifications for federal question jurisdiction—experience, sympathetic treatment, and uniformity.<sup>186</sup> These generic justifications have little application in the situation of a federal issue embedded in a state law claim.<sup>187</sup> One is left wondering why the Court is working so hard to mine the ounce of federal-question pure metal from the ton of state-law ore, especially given the fact that the overwhelming trend of statutes and cases narrows federal jurisdiction.

*D. The Cases Result in Formless Equity, Not a Rule of Law*

Both because jurisdiction equals power and because of the limited nature of that federal power, the federal judiciary has always been scrupulously careful to respect precise constitutional and statutory grants of—and limits on—its power.<sup>188</sup> These provisions have produced understandable, uniform, precise, certain, and stable jurisdictional rules.

This is not so in *Grable & Sons*. In deciding whether federal jurisdiction exists, lower federal courts must now use four pragmatic

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of a substantial question of federal law”); *Gully v. First Nat’l Bank*, 299 U.S. 109, 116 (1936) (requiring that an issue of federal law actually be contested within a state law claim for federal jurisdiction to exist); *cf. Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (holding that, as relief could foreseeably be granted on nonfederal law grounds, the Federal Circuit did not have jurisdiction).

185. *Grable & Sons*, 125 S. Ct. at 2363. Compare *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), another recent case approving federal question jurisdiction in the context of a state administrative appeal proceeding.

186. *Grable & Sons*, 125 S. Ct. at 2367.

187. See *infra* Part IV.B.2–3 (discussing two of the original justifications for federal jurisdiction, state hostility to federal laws and the expertise of federal judges on federal law issues, as they apply to state law claims).

188. Several examples come quickly to mind. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2641 (2005) (holding that plain language of supplemental jurisdiction statute overrules earlier cases requiring every member of a diversity class to satisfy amount in controversy requirement); *Carden v. Arkoma Assocs.*, 494 U.S. 185, 207 (1990) (stating that limited partners’ citizenship must be considered for diversity); *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 9 (1951) (stating that removal statute requires “separate and independent” claim); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106–07 (1941) (discussing statute allowing only a “defendant” to remove); *Tennessee v. Union & Planters’ Bank*, 152 U.S. 454, 464 (1894) (holding the federal question must appear in a well-pleaded complaint); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (finding the allegation of citizenship of parties defective); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (holding federal jurisdiction requires complete diversity).

considerations: necessity, actual dispute, substantiality, and federal caseload impact.<sup>189</sup> Even four considerations are not enough. In assessing these four factors, the court is also told to consider need for federal expertise over the subject, need for sympathetic treatment of the federal issue, and need for uniformity of federal law in the individual case.<sup>190</sup>

Any weighing test, whether seven- or four-factor, is an aberration amongst federal jurisdictional decisions.<sup>191</sup> It is inappropriate for jurisdictional decisions.<sup>192</sup> It is at best a standard instead of a rule of law.<sup>193</sup> It is in reality no more than pure equity, with the federal chancellor standing at the gate to decide based on a personal sense of fairness whether a case shall enter.

### 1. Manipulation of Language to Extend Federal Jurisdiction

The equitable nature of the cases culminating in *Grable & Sons* can also be seen by examining the opinions. What becomes apparent is that the Justices manipulate language to achieve results they find equitable.

The first interpretations of the “arising under” language of Article III established that a federal question case must require “construction” of the federal provision.<sup>194</sup> The first interpretations of the nearly identical “arising under” language of the federal question statute largely relied on

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189. *Grable & Sons*, 125 S. Ct. at 2368; *see also supra* notes 120–23 and accompanying text (discussing the inefficiency of the four-part test in *Grable & Sons*).

190. *Id.* at 2367.

191. *See supra* note 188 (referring to cases limiting federal jurisdiction); *infra* Part IV.A.5 (discussing the advantages of a “bright-line rule” in jurisdictional determinations).

192. “Delicate questions which turn on a large cluster of factors are unsuited to be questions of power.” ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 314 (1950). “A vague, intuitive ‘federal interests’ test is an escape, not an answer. The jurisdictional grants do not invite ad hoc assessments of ‘pragmatic need.’ Rather, they condition federal jurisdiction on objective circumstances.” Note, *The Outer Limits of “Arising Under”*, 54 N.Y.U. L. REV. 978, 980–81 (1979); *see also infra* notes 224–26 and accompanying text (discussing the benefits of simple rules for determining federal jurisdiction); *infra* Part IV.A.5 (discussing the advantages of a “bright-line rule” in jurisdictional determinations).

193. The test arising from *Grable & Sons* shares none of the favorable characteristics of rules of law, such as neutrality, uniformity, precision, certainty, efficiency, exactingness, or stability. Instead, the positives of the test could be said to be flexibility, individualization, creativity, and equity, which are the favorable characteristics of standards. Kennedy, *supra* note 179, at 1710; *see also infra* Part IV.B.4.

194. *See Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 822 (1824), *superseded by statute*, Act of June 25, 1948, ch. 646, § 1349, 62 Stat. 869, 934 (“[T]he title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction . . . .”); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821) (“A case in law or equity . . . may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.”).

the same requirement of “construction,” although some referred to “construction or effect” of the federal law.<sup>195</sup> This slightly looser language was an expansion without a difference, as the cases using it did not rely on the addition to support jurisdiction.

The next version of the test for federal question jurisdiction was “validity, construction or effect.”<sup>196</sup> This also was more likely loose writing than intentional broadening, as the decision was against jurisdiction.

Accordingly, at the time of *American Well Works*, the law required that a case present a question of “construction,” or perhaps “validity, construction or effect,” of a federal provision in order to support federal question jurisdiction. This limitation both assured the centrality of the federal question in the case and called upon all the traditional justifications for a federal court decision: expertise, sympathetic hearing, and uniformity.<sup>197</sup>

The first sleight of hand trick was performed, not surprisingly, in *Smith*. The opinion stated the “general rule” as “the right to relief depends upon the *construction or application*” of federal law.<sup>198</sup> The plaintiff brought a shareholders’ derivative suit to enjoin the directors of the company from breaching their state corporation law fiduciary duty to the corporation by investing in federal farm bonds.<sup>199</sup> No “construction” of federal law yet. The only federal issue entered the case upon following the plaintiff’s argument to the next step—that the reason the investment would breach the fiduciary duty was because the federal statute authorizing the bonds was unconstitutional.<sup>200</sup> Critics might have questioned a rationale that the case therefore depended on “construction” of the Constitution. No one could question that the case involved an “application” of federal law by state corporation law.<sup>201</sup>

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195. The first interpretation in *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 203–04 (1877) mentioned “construction” several times before concluding that the suit was not one that depended on “construction or effect” of federal law. Some cases followed this “construction or effect” language. *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 528 (1903); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 509 (1900); *Shreveport v. Cole*, 129 U.S. 36, 37 (1889); *R.R. Co. v. Mississippi*, 102 U.S. 135, 140 (1880). Others held fast to “construction.” *E.g.*, *Tennessee v. Union & Planters’ Bank*, 152 U.S. 454, 460 (1894); *Starin v. New York*, 115 U.S. 248, 257 (1885).

196. *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912). The Court used the same test five years later in *Hopkins v. Walker*, 244 U.S. 486, 489 (1917), but the reference was dictum contained in a general statement of federal question law.

197. *See infra* note 284 and accompanying text.

198. *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 199 (1921) (emphasis added).

199. *Id.* at 195.

200. *Id.* at 198.

201. One might question whether a case calling for application, instead of construction, of federal law calls upon the same traditional justifications for federal question jurisdiction of federal

Even though later cases returned to the narrower, earlier test,<sup>202</sup> this expanded criterion of “construction or application” asserted its influence over the decades. It was accepted by the Supreme Court itself,<sup>203</sup> and necessarily by lower federal courts.<sup>204</sup>

This development leads to the first of the “modern” cases, *Franchise Tax Board*. The opinion of the Court, written by Justice William J. Brennan, rules against jurisdiction, yet looks to future cases with a great deal of expansionary language. The first pass at the test mentions only “construction.”<sup>205</sup> The second pass suggests “correctness and the applicability,” or “meaning or application.”<sup>206</sup> The third and final effort settles on the test that the “plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.”<sup>207</sup> *Franchise Tax Board* thus provides opportunities for manipulation of language in the next case.

That decision is *Merrell Dow*. One of the plaintiffs’ six theories of recovery is the tort of negligence, with a federal statute supplying the duty element.<sup>208</sup> Clearly, this usage can be characterized as an “application” of federal law by state tort law, but the usage in no sense requires “construction” of federal law.

The opinion of the Court, rejecting jurisdiction, written by Justice John Paul Stevens, states the test is satisfied if “vindication of a right under state law necessarily turn[s] on some construction of federal law.”<sup>209</sup> That is not remarkable. What is remarkable is that Justice

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expertise, uniformity, and sympathetic treatment.

202. See *Gully v. First Nat’l Bank*, 299 U.S. 109, 112 (1936) (“construction or effect”); *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 213 (1934) (“scope or construction”).

203. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 470 (1957) (“interpretation or application”); *Flourmoy v. Wiener*, 321 U.S. 253, 272–73 (1944) (“[W]e unanimously applied the reasoning of the Kansas City Title case that where a decision under state law necessarily involves the construction or validity of federal law the determination of such federal law in the application of state law gives rise to a federal question for review here.”).

204. Some of the lower courts added their own embroidery to the test. For example, Judge Henry Friendly, after recognizing the “meaning or application” test, proceeded to state a claim “arises under” when it requires “construction . . . or . . . perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.” *T. B. Harms Co. v. Eliscu*, 339 F.2d 823, 827–28 (2d Cir. 1964); see also *supra* note 80.

205. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983), *superseded by statute*, Judicial Improvements Act of 1985, Pub. L. No. 99-336, 100 Stat. 633. Oddly, the opinion cites *Smith*, the case that had expanded the test, for this earlier, narrower test.

206. *Id.* For these broader tests, the opinion cites only a casebook for the first and a lower court opinion, *T. B. Harms Co.*, for the second. Oddly again, this is where the opinion could well have cited *Smith*.

207. *Id.* at 28. The third oddity is the opinion cites no authority at all for this test.

208. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 805 (1986).

209. *Id.* at 808.

Stevens quotes the first pass at the test from *Franchise Tax Board*.<sup>210</sup> The opinion notes, in a lengthy footnote, that the test comes from *Smith*, but ignores the fact that *Franchise Tax Board* had quoted the *Smith* test badly in the first pass, leaving out the crucial words “or application.”<sup>211</sup> The opinion also ignores the fact that later, in the *Franchise Tax Board* opinion, the Court had expanded the test greatly.<sup>212</sup> Of course, the first-pass language quoted is the most convenient for rejecting jurisdiction.

In the same fashion, the dissent by Justice Brennan leaps past his own three-year-old *Franchise Tax Board* opinion to quote the test directly from *Smith*: the plaintiffs’ “right to relief depend[ed] upon the construction or application.”<sup>213</sup> In doing so, the dissent not only invokes the more helpful, broader test of “construction or application,” but also omits the less helpful, troublesome word “necessarily” that Justice Brennan himself had inserted into the third-pass test in *Franchise Tax Board*.<sup>214</sup>

After *Merrell Dow*, the Court continues to massage the test. It relies entirely on the third-pass test from *Franchise Tax Board* when it concludes that a plaintiff’s claim requires “resolution of a substantial question of federal law.”<sup>215</sup> Finally, in *Grable & Sons*, the Court casts all of this language aside in favor of a multifactor, pragmatic test for federal question jurisdiction.<sup>216</sup>

Recent cases loosen language and add pragmatic considerations, either through sloppy writing or stealthy manipulation. One does not

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210. *Id.*

211. *See id.* at 809 n.9 (discussing the origin of the test and the effects of the view points expressed in *Smith*).

212. *See id.* at 808–09, 813–14 (discussing the application of the test in *Franchise Tax Board*).

213. *Id.* at 823 (Brennan, J., dissenting) (quoting *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 199 (1921)). The opinion references *Franchise Tax Board* after a “see also” citation; the reference, however, is not to the *Smith* discussion there, but instead to the third test proposed. *See supra* note 207 and accompanying text (noting that the *Franchise Tax Board* opinion gives no authority for this test). Later in the same paragraph, the dissent also raises the “meaning or application” language, but, rather than citing *Franchise Tax Board* or *Smith*, it cites instead *T. B. Harms Co. Merrell Dow*, 478 U.S. at 824 (Brennan, J., dissenting).

214. *See supra* note 207 and accompanying text (stating “plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law”).

215. *City of Chi. v. Int’l Coll. of Surgeons*, 522 U.S. 156, 164 (1997). The opinion also cites *Gully v. First National Bank*, 299 U.S. 109, 112 (1936), but that reference is better understood as a requirement that the federal issue be directly raised.

216. After impliedly criticizing the *Smith* “construction or application” test as “somewhat generous” and “subject to some trimming,” the Court mentions “validity, construction or effect” as an ancestor of the idea that the case must present “a serious federal interest in claiming the advantages thought to be inherent in a federal forum.” *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 125 S. Ct. 2363, 2367 (2005). The advantages of a federal forum apparently are the traditional justifications for a federal court decision. *See infra* note 284 and accompanying text (referencing the traditional rationales for federal question jurisdiction).

have to be highly insightful to see that the looser the language and the more pragmatic the considerations, the greater the ability of the federal court to reach a result it deems equitable in the individual case.

## 2. Development Through Hard Cases Leads to Bad Law

The trite bromide is hard cases make bad law. It holds true here. After *American Well Works* confirmed the rule that a case arises under the law that creates the claim, the Court has decided a handful of cases that refuse to accept that rule. Every one was a hard case.

The fountainhead case holding that a federal question can be found in a claim created by state law was *Smith*. The plaintiff challenged the validity of a major federal loan program and the nation needed a prompt ruling.<sup>217</sup> *Smith* was a hard case.

While *Merrell Dow* did not uphold federal jurisdiction, it did confuse this area of law for twenty years to the extent it produced a three-way circuit conflict.<sup>218</sup> Plaintiffs from Canada and Scotland sued in Ohio.<sup>219</sup> The defendant first removed the case to federal court and only then moved for dismissal on forum non conveniens.<sup>220</sup> Both sides were obviously engaged in forum shopping.<sup>221</sup> *Merrell Dow* was a hard case.

*Grable & Sons* announced a multifactor, pragmatic test to use when a federal issue is embedded in a state law claim.<sup>222</sup> The plaintiff had lost its property for failure to pay federal taxes, failed to redeem, and then waited five years before challenging the tax sale.<sup>223</sup> *Grable & Sons* was a hard case.

The fact that the cases diverging from the *American Well Works* rule are all hard cases should cast doubt on their analytical bases.

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217. See *supra* note 53 and accompanying text (discussing the national importance of *Smith* and the need for a timely ruling). Some have claimed the difference between the seemingly irreconcilable decisions in *Smith* and *Moore v. Chesapeake & Ohio Railway Co.*, 291 U.S. 205 (1934), is the strength of the federal interest involved. See, e.g., *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 814 n.12 (1986) (discussing the difference in results in relation to the nature of the federal issues at stake). A more powerful, simpler, explanation is *Smith* was a hard case.

218. See *supra* note 102 and accompanying text (discussing the rarity of three-way circuit conflicts).

219. *Merrell Dow*, 478 U.S. at 805.

220. *Id.* at 806.

221. See *supra* notes 86–94 and accompanying text (discussing the forum changes in *Merrell Dow*).

222. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2368 (2005).

223. See *supra* notes 104–12 and accompanying text (discussing the procedural history of *Grable & Sons*).

Considerations of equity, rather than sound legal analysis, produced *Grable & Sons*. Certainly no other area of federal jurisdiction has developed through one hard case after another.

### 3. The Inevitable Result Is Litigation and Circuit Conflicts

A jurisdictional rule should be understandable, predictable, and easy to apply.<sup>224</sup> Litigation over jurisdiction wastes the resources of both courts and litigants. This is especially so in the case of federal subject matter jurisdiction because objection is never waived, and an appellate court can wipe out all proceedings below it by concluding no federal jurisdiction ever existed.<sup>225</sup> Lack of predictability promotes litigation.<sup>226</sup> These commonplace observations are writ large in the procedural histories of the more recent decisions of the Court: all of the federal court

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224. Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 683–84 (1981) says this:

One of the first things we teach entering law students is the importance of clarity in rules governing courts' jurisdiction. One reason for jurisdictional rules to be clear and simple is that litigating at length over the proper forum in which to litigate is a poor use of limited judicial resources, expensive to the parties and to the public. . . . Another reason simplicity is desirable in jurisdictional rules is that jurisdictional objections can be raised for the first time quite late in the proceedings . . . rendering meaningless all the litigation on the merits that has occurred in the lower courts.

*See infra* notes 225–29 and accompanying text (noting that rules regarding jurisdiction should be bright-line rules). Even the author of the article that may have started the Court on the path to pragmatism said “[i]t goes without saying that it is undesirable for jurisdictional rules to be uncertain.” Cohen, *supra* note 7, at 908. He was unconcerned that a pragmatic test for jurisdiction would cause uncertainty because he predicted “recognition of pragmatic factors and decisions based on them will lead to predictable jurisdictional standards.” *Id.* That was an exceedingly poor prediction. *See infra* notes 230–32 and accompanying text; *see also infra* Part IV.A.5 (discussing the bright line drawn by the *American Well Works* rule and the desirability of bright-line rules).

225. *See* CHAFEE, *supra* note 192, at 312 (“[A]n enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases.”); Field, *supra* note 224, at 683 (“[L]itigating at length over the proper forum in which to litigate is a poor use of limited judicial resources . . . .”); London, *supra* note 62, at 835 (“Poorly defined criteria in the area of jurisdiction are especially wasteful, generating as they often do expensive and protracted litigation over threshold issues, rather than . . . merits.”); Shapiro, *supra* note 96, at 567 (“[O]riginal jurisdiction is best determined at the outset of the case . . . .”); Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction over Claims Post-Merrell Dow*, 115 HARV. L. REV. 2272, 2278 (2002) [hereinafter *Mr. Smith*] (“[T]here is a particularly great need for clarity in articulating jurisdictional principles . . . .”).

226. Even before the complications of *Franchise Tax Board*, *Merrell Dow*, and *Grable & Sons*, Justice Felix Frankfurter called the question of a federal issue embedded in a state law claim the “litigation-provoking problem.” *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting). More recently, an appellate court complained “this is a remarkably tangled corner of the law.” *Almond v. Capital Props., Inc.*, 212 F.3d 20, 22 (1st Cir. 2000).

proceedings were for naught in both *Franchise Tax Board*<sup>227</sup> and *Merrell Dow*.<sup>228</sup>

The cases after *American Well Works* have stepped farther and farther away from the basic principle of certainty in jurisdictional doctrine. They have replaced an understandable and certain jurisdictional rule with a pragmatic, weighing test that is so malleable it amounts to no more than an equitable decision on whether federal jurisdiction “ought” to exist in the individual case.<sup>229</sup> The result has been, and will continue to be, uncertainty and litigation instead of guidance.

Empirical proof of that proposition is found in the fact that lower federal courts were not able to find rhyme or reason in *Merrell Dow*, splitting three ways on its proper interpretation.<sup>230</sup> One commentary counted sixty-nine appeals involving a federal issue embedded in a state law claim in the years from 1994 to 2002; the circuit courts of appeals reversed forty-five of the sixty-nine district court decisions.<sup>231</sup> Another author undertook to read these sixty-nine appellate opinions and concluded they failed to “establish a coherent framework” for federal jurisdiction in the area.<sup>232</sup>

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227. The plaintiff sued in California state court. The defendant removed to federal court. That court denied remand, and later decided the case for the plaintiff on the merits. The Ninth Circuit reversed and denied rehearing. The Supreme Court postponed consideration of jurisdiction pending argument on the merits. Following that argument, the Court finally held no federal jurisdiction, which sent the plaintiff back to state court to begin anew. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 5–7 (1983), *superseded by statute*, Judicial Improvements Act of 1985, Pub. L. No. 99-336, 100 Stat. 633.

228. The plaintiffs filed separate actions against defendant in Ohio state court. The defendant removed to federal court, and the cases were consolidated. Plaintiffs moved to remand, which the court denied. The district court granted the defendant’s motion to dismiss on *forum non conveniens*. The Sixth Circuit reversed and ordered the case remanded to state court. The plaintiffs obtained a writ of certiorari; the Supreme Court affirmed, which sent plaintiffs back to state court to begin anew. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 805–07 (1986).

229. See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 125 S. Ct. 2362, 2368 (2005) (rejecting a “single, precise, all-embracing” test for federal jurisdiction in favor of a balancing test).

230. See *supra* note 102 and accompanying text (recognizing the three-way split caused by *Merrell Dow*).

231. *Mr. Smith*, *supra* note 225, at 2280.

232. The author wrote as follows:

I have had occasion to read a fair number of those sixty-nine decisions, and I think it is fair to say that one finds some surprising statements in them. Overall, the decisions leave me, at least, doubtful whether federal judges, as intelligent and dedicated as most of them are, can in fact establish a coherent framework for the boundaries of subject matter jurisdiction predicated not upon a federal claim for relief but instead upon a federal ingredient in a state law claim for relief.

Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1913 (2004).

The lower federal courts certainly will not find firmer guidance in *Grable & Sons*. The opinion's test of pragmatic considerations guarantees litigation and circuit conflicts. The Court assumes judges can coherently and consistently apply a weighing test of broad discretion, but the results show otherwise.<sup>233</sup>

The reason is that the test emerging from the cases leading up to and including *Grable & Sons* is no more than formless equity.<sup>234</sup> The results in equity follow the chancellor's individual sense of fairness. The results in this area of federal question jurisdiction will follow the judge's individual sense of proper allocation of jurisdiction between federal and state courts.

This Part explored the problems with the Court's work in this area of federal jurisdiction. The next Part of this Article argues the Court should return to the workable and predictable rule of *American Well Works* that federal question jurisdiction is determined by the law that creates the claim.<sup>235</sup> It then responds to arguments that might be raised against the *American Well Works* rule.<sup>236</sup>

#### IV. A SENSIBLE RULE: A CASE ARISES UNDER THE LAW THAT CREATES THE CLAIM

The Supreme Court should decide that for purposes of federal question jurisdiction a case arises under the law that creates the claim. That, of course, is the well-known rule of *American Well Works*.<sup>237</sup>

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233. See *supra* notes 230–32 and accompanying text (discussing the three-way split caused by *Merrell Dow* and rates of reversal of district court decisions on jurisdiction); *infra* Part IV.A.5 (discussing the bright jurisdictional line drawn by *American Well Works* and its advantages). The Court buys in to the poor prediction that accumulation of decisions based on pragmatic factors will eventually lead to certainty of decision. See *supra* note 224 (recognizing the prediction and its failure to come true).

234. Even an author who celebrates federal courts recognized the *Merrell Dow* test to be “free-standing, subjective, and individualized.” Redish, *supra* note 99, at 1794. Certainly, the test of *Grable & Sons* is no more solid.

235. See *infra* Part IV.A.

236. See *infra* Part IV.B.

237. The suggestion to return to the *American Well Works* rule is not original. It was made twenty years ago in Hirshman, *supra* note 7, at 63. The plea becomes even more pointed after the ensuing decisions in *Merrell Dow* and *Grable & Sons*.

### A. Arguments in Favor of the Rule

#### 1. The Rule Works

The number of cases in which a federal issue is embedded in a claim created by state law is a minuscule slice of federal question cases.<sup>238</sup> Unless some portion of that six-hundredths of one percent of cases is likely to include cases that necessarily must be heard originally in a federal court, which cannot be so,<sup>239</sup> then the efforts expended in identifying those few cases far exceed any possible benefits.<sup>240</sup> In other words, the game is not worth the candle.<sup>241</sup>

The *American Well Works* rule that a case arises under the law that creates the claim is a powerful and predictable separator in 99.94% of cases presenting an issue of federal question jurisdiction. The rule works.

#### 2. The Rule Respects “Arising Under” Language of Constitution and Statute

Article III extends federal jurisdiction to “[c]ases . . . arising under,” and § 1331 of the 1875 Act grants jurisdiction to “actions arising under.”<sup>242</sup> The considered choices of “cases” and “actions” are intended to refer broadly to a case in the sense of an entire bundle of facts,<sup>243</sup>

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238. One commentator found that in the year 1986, federal dockets included nearly 100,000 federal question cases; 76 (.076%) resulted in a reported decision discussing a federal issue in a state law claim. For the year 1994, 136,000 federal question cases on the dockets resulted in 81 (.06%) reported decisions discussing the issue. *Mr. Smith, supra* note 225, at 2286. Of course, this underestimates the number of cases somewhat because it counts only reported decisions.

The opinion of the Court in *Merrell Dow* mirrored that in *Franchise Tax Board* in the understated admission that the “vast majority” of federal question cases are covered by the *American Well Works* rule. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (quoting *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)). The dissent was even more grudging, admitting only the “majority” of cases are explained by the “adage.” *Merrell Dow*, 478 U.S. at 819 (Brennan, J., dissenting).

239. See *supra* Part III.A.1 (stating federal question jurisdiction exists over cases, not issues).

240. Cf. *supra* notes 230–32 and accompanying text (discussing that, from 1994 to 2002, federal appellate courts reversed forty-five of sixty-nine district court decisions, and suggesting that the cases have provided no framework for federal jurisdiction).

241. See FALLON, MELTZER & SHAPIRO, *supra* note 122, at 105–06 (suggesting the test of *American Well Works* avoids the need for “refined and uncertain analysis—an analysis that some courts may not handle successfully”); Meltzer, *supra* note 232, at 1915 (“[I]f the costs of a more complex approach are realized in a relatively small fraction of cases, so, too, are the benefits.”).

242. U.S. CONST. art. III, § 2; 28 U.S.C. § 1331 (2000); see also *supra* notes 1–2 and accompanying text (discussing the scope of federal jurisdiction).

243. See *supra* Part III.A.1 (discussing how federal question jurisdiction exists over cases, not

which today is essentially synonymous with a “transaction or occurrence,” or a “claim.”<sup>244</sup>

Recent cases have abandoned the understanding that federal question jurisdiction applies to cases and instead apply it to individual issues within cases. The most obvious example of this is *Merrell Dow*, in which the only federal issue was found in one of four tort elements in one of six theories of recovery.<sup>245</sup> That is truly a federal issue embedded within a state law claim. It is not a “case,” and it is not an “action.”

The rule of *American Well Works* respects the understanding that the jurisdictional grant is for cases, not for single issues. By ruling that a case arises under the law that creates the claim, the rule operates case-wide, which in turn ensures that the federal interest in the case is substantial.<sup>246</sup> This results in proper allocation of jurisdiction between state and federal courts.

### 3. The Rule Respects Both State Court and Congressional Authority

A pragmatic, weighing test both intrudes upon the authority of state courts as primary givers of state law<sup>247</sup> and usurps the authority of Congress to control federal jurisdiction.<sup>248</sup> The rule of *American Well Works*, that a case arises under the law that creates the claim, does neither.

The rule respects the authority of state courts to declare state law in state law claims. A case containing a federal issue embedded in a state law claim will commence and remain in state court. The state court will be able to declare its own law, which will almost always comprise nearly the entire case. Additionally, the federal court will not be subject to potential embarrassment by making a nonbinding prediction of state law.<sup>249</sup>

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issues).

244. See *supra* Part III.A.2 (discussing the misunderstanding regarding “cause of action” and “claim”).

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

246. Cf. *Alleva*, *supra* note 20, at 1508 (“It certainly helps to ensure that federal law will govern disposition and define the contours of the claim, thus providing strong justification for section 1331 jurisdiction.”); *Redish*, *supra* note 99, at 1793 (“[O]ne could reasonably conclude that federal interests are not sufficiently implicated to justify the assertion of federal jurisdiction unless the actual cause of action is federal . . .”).

247. See *supra* Part III.A.3 (discussing the resulting misallocation of jurisdiction between state and federal courts).

248. See *supra* Part III.B (discussing the usurping of congressional power over federal jurisdiction).

249. See *supra* note 168 and accompanying text (citing a case where the Court stated that deciding state law can result in embarrassment for federal courts).

The rule respects the authority of Congress to grant or deny federal jurisdiction. Indeed, one writer has said “[t]he *American Well Works* test is also the purest reflection of Congress’s plenary power to define the scope of federal jurisdiction.”<sup>250</sup> The rule stops usurpation of congressional authority and the creeping expansion of federal jurisdiction by the courts in this area.<sup>251</sup>

#### 4. The Rule Respects the Limited Nature of Federal Jurisdiction, and Is Consistent with Other Jurisdictional Decisions

Federal subject matter jurisdiction is not Janus-faced. It faces in one direction only, and that direction is limitation.<sup>252</sup> The *American Well Works* rule limits federal jurisdiction to cases created by federal law. A test—such as *Grable & Sons*—that searches a state law case for a single issue of federal law is not limited.

The Justices should never forget it is a statute they are expounding.<sup>253</sup> Even granting the “arising under” language of the Constitution extends to cases with a federal issue embedded in a state law claim,<sup>254</sup> they recognize the statutory grant is narrower than the constitutional grant.<sup>255</sup> Cases construing § 1331 since 1875 have consistently interpreted the statute narrowly.<sup>256</sup> The rule of *American Well Works* fits snugly. A test that allows a federal court to prospect for a federal issue in a state law claim stands almost alone in the realm of federal subject matter jurisdiction.<sup>257</sup>

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250. Fuller, *supra* note 102, at 1452.

251. “If federalism and comity are values that are still important, then the judicial expansion of federal jurisdiction in the ad hoc manner that an unfettered substantial-federal-question doctrine allows should be troubling.” Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1820 (1998).

252. See *supra* notes 1–2 and accompanying text (discussing the scope of federal jurisdiction as provided by the Constitution and Congress).

253. “[W]e must never forget, that it is a constitution we are expounding.” *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

254. The seminal case construing the constitutional language is of course *Osborn v. Bank of the United States*, which read the language broadly. 22 U.S. (9 Wheat.) 738, 819–23 (1824), *superseded by statute*, Act of June 25, 1948, ch. 646, § 1349, 62 Stat. 869, 934. *Osborn* was decided in an era of nation building, and its expansionary attitude may not do today. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 481 (1957) (“*Osborn* . . . appears to have been based on premises that today . . . are subject to criticism.”); *Gully v. First Nat’l Bank*, 299 U.S. 109, 113 (1936) (“[E]arly cases were less exacting than the recent ones.”); *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 214–15 (1921) (Holmes, J., dissenting) (“[T]he *Osborn* Case has been criticized and regretted.”).

255. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 494–95 (1983); see also WRIGHT & KANE, *supra* note 39, § 17, at 105 (discussing how the statutory language has been construed).

256. See *supra* Part III.C (showing a general trend toward narrow interpretation since 1875).

257. The only other expansionary jurisdictional doctrine that comes to mind is supplemental

More specifically, other well-known and well-accepted jurisdictional doctrines limit federal jurisdiction by looking to the complaint and the plaintiff's intention in pleading. The rule of *American Well Works* is consistent with all of these doctrines; a test that searches a state law complaint for a single, perhaps unintended, federal issue is not. The well-pleaded complaint rule encourages a plaintiff to plead the basic elements of a claim;<sup>258</sup> *Grable & Sons* encourages a plaintiff seeking federal jurisdiction to include excess allegations to convince the court the federal issue is necessary, substantial, and disputed.<sup>259</sup> The rule that a federal question cannot arise in defense requires the federal question to arise in the complaint;<sup>260</sup> *Grable & Sons* requires the court to find that the federal issue is "actually disputed."<sup>261</sup> The rule that the plaintiff is master of the complaint allows the plaintiff to choose the law and the jurisdiction to which he appeals;<sup>262</sup> *Grable & Sons* makes the judge the master of the complaint.<sup>263</sup>

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jurisdiction under 28 U.S.C. § 1367 (2000), which is based on *United Mine Workers v. Gibbs*, 383 U.S. 715, 725–29 (1966). That doctrine is not analogous, however, as it allows the federal court to bring in state law questions only after a finding of a federal jurisdictional basis.

258. The case usually cited is *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894). See 13B WRIGHT, MILLER & COOPER, *supra* note 2, § 3566, at 83–88 (explaining the implications of the well-pleaded complaint rule).

259. One commentator complained that *Merrell Dow* would induce "litigants to suggest that a particular combination of these factors and rationales for extending jurisdiction either cuts in favor of or against federal question jurisdiction." Fuller, *supra* note 102, at 1459. *Grable & Sons* elevates this suggestion to a requirement.

260. The case usually cited is *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149, 152 (1908). See 13B WRIGHT, MILLER & COOPER, *supra* note 2, § 3566, at 84 (explaining that a federal question may not be raised in a defense).

261. Actual dispute cannot be determined without examining the answer. Cf. *supra* note 67 (calling for courts to distinguish between "basic" and "collateral" controversies).

262. The case usually cited is *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). See *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("The [well-pleaded complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law."); *Great N. Ry. v. Alexander*, 246 U.S. 276, 282 (1918) (explaining how a plaintiff can affect the removability of his or her case); 14B WRIGHT, MILLER & COOPER, *supra* note 2, § 3722, at 453 n.97 (listing cases discussing plaintiff as master of the complaint).

263. The following scenario, similar to the facts of *Merrell Dow*, provides a good example. The plaintiff pleads a state law claim in a state court, and the defendant removes. The federal court searches the complaint and finds a federal issue embedded in the state law claim. The plaintiff, who likely believed she was relying entirely on state law and state court jurisdiction, is no longer the master of her own complaint and jurisdictional choice.

This is different from other removal situations. When diversity exists, or when the plaintiff pleads a claim based at least in part on federal law, removal is within the choice the plaintiff makes in pleading. When the plaintiff pleads a state law claim in the complaint, and the defendant successfully removes because the court discovers a federal issue embedded in the state law, that result is not within the choice the plaintiff makes in pleading.

## 5. The Rule Draws a Bright Jurisdictional Line

The *American Well Works* rule draws a bright line between federal cases and state cases. Rules of subject matter jurisdiction, and most particularly those governing federal subject matter jurisdiction, should be bright-line rules.<sup>264</sup> A bright jurisdictional line allows predictability, stability, and efficiency.<sup>265</sup> Indeed, nearly all rules governing federal jurisdiction, with the exception of this narrow area of federal questions, are bright-line rules.<sup>266</sup>

Critics complain that the *American Well Works* rule is wooden and inflexible,<sup>267</sup> but that is desirable in jurisdictional rules. Two that apply directly to federal question jurisdiction cases are the well-pleaded complaint rule and its companion rule that no federal question can arise in defense. Both rules have been followed without deviation since creation. These are both bright-line rules that are applied “woodenly,” even though they could easily be made more nuanced and hospitable toward federal jurisdiction.<sup>268</sup> These rigid rules should be even more objectionable than the *American Well Works* rule because, in cases rejected by those two rules, the federal issue may often control the case,

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264. See CHAFEE, *supra* note 192, at 312 (“In short, a trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there.”); David P. Currie, *The Federal Courts and the American Law Institute* (pt. 1), 36 U. CHI. L. REV. 1, 1 (1968) (“Jurisdiction should be as self-regulated as breathing; the principal job of the courts is to decide whether the plaintiff gets his money, and litigation over whether the case is in the right court is essentially a waste of time and resources.”); see also *supra* notes 192, 224–26 and accompanying text; cf. AM. LAW INST., *supra* note 116, at 171–72 (stating a “sophisticated analysis” for removal jurisdiction is undesirable); John Donofrio & Edward C. Donovan, *Christianson v. Colt Industries Operating Corp.: The Application of Federal Question Precedent to Federal Circuit Jurisdiction Decisions*, 45 AM. U. L. REV. 1835, 1867 (1996) (“Courts and litigants will benefit most if a bright line can be drawn to insure predictability of the appellate forum, even if the bright line permits some patent issues to go to regional circuits and some non-patent issues to be appealed to the Federal Circuit.”).

265. See *supra* notes 224–26 and accompanying text.

266. See *supra* note 191 and accompanying text (noting the advantage of using bright-line jurisdictional rules).

267. See *infra* note 275 and accompanying text.

268. The well-pleaded complaint rule could be expanded to allow plaintiffs to add special jurisdictional allegations in federal question cases in the same fashion as plaintiffs are required to plead jurisdiction in diversity cases. See Chadbourne & Levin, *supra* note 20, at 665 (stating a complaint alleging a federal question should proceed until the court determines that no federal question arises); Cohen, *supra* note 7, at 894 n.25 (stating allegations of federal questions could be permitted as are “special allegations of diversity jurisdiction”); Mishkin, *supra* note 132, at 164 (stating “special jurisdictional allegations” could be permitted).

A “rational jurisdictional system” could consider the defenses raised in the answer in deciding whether a federal question is presented. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10–11 n.9 (1983), *superseded by statute*, Judicial Improvements Act of 1985, Pub. L. No. 99-336, 100 Stat. 633.

whereas in a situation of a federal issue embedded in a state law claim, the federal issue is far more likely to be isolated, remote, and collateral.

What response would judges and commentators make to a rule that states diversity of citizenship jurisdiction will be left to a case-by-case decision based on the court's assessment of the strength of federal interests in the individual case? That is exactly what *Grable & Sons* requires in federal question cases.

The *American Well Works* rule draws a bright line that is easy to apply. *Grable & Sons* is little more than an ad hoc weighing of federal interests; it traces hardly any line at all.<sup>269</sup> Courts need lines for jurisdictional rules.

## B. Arguments Against the Rule

### 1. Minor Arguments

Critics have made several arguments against the rule of *American Well Works* that can be characterized as minor. This subpart clears away these minor arguments.

First, say the critics, the rule that “[a] suit arises under the law that creates the cause of action” is no more than dictum in *American Well Works*.<sup>270</sup> This argument is based on the structure of the opinion, but it fails to recognize Justice Holmes was stating accepted law; the famous rule was not gratuitous, ill-considered dictum.<sup>271</sup>

Second, the rule is cast in the obsolete language of “cause of action.” When Justice Holmes wrote the opinion in *American Well Works*, the cause of action was a centerpiece of code pleading; it has since been replaced by “claim for relief” in federal courts and a majority of states.<sup>272</sup> The obsolete phrase has caused confusion and difficulty over the years.<sup>273</sup> The proper and easy response is that substitution of “claim” for

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269. “Jurisdictional rules should be clear. Whatever the virtues of the *Smith* standard, it is anything but clear.” *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 125 S. Ct. 2363, 2372 (2005) (Thomas, J., dissenting). The absence of any understandable line, even prior to *Grable & Sons*, is clearly demonstrated in the failed efforts of the lower federal courts to draw a line. See *supra* notes 230–32 and accompanying text (noting that lower federal courts did not consistently interpret the *Merrell Dow* decision).

270. See Doernberg, *supra* note 20, at 630 (“Holmes’ test from *American Well Works* is dictum.”); Hirshman, *supra* note 7, at 27 (noting the actual ruling of *American Well Works* is quite narrow, but the opinion is much broader).

271. See *supra* Part II.B (discussing that a case arises under the law that creates the claim).

272. See *supra* Part III.A.2 (discussing the difference between a “cause of action” and a “claim”).

273. “In *Merrell Dow*, Justice Brennan and every other Justice subscribed to undifferentiated use

the obsolete “cause of action” avoids this confusion, although courts will still need to be vigilant to understand “claim” in its proper transactional sense.<sup>274</sup>

Third, the rule is wooden and inflexible.<sup>275</sup> That, of course, is the point of a bright-line jurisdictional rule, and jurisdictional rules should draw clear and understandable lines.<sup>276</sup> Critics sometimes add that the rule is dysfunctional because an important federal interest may be in the case, and the rule prevents the federal court from using its discretion based on the prominence of the federal interest.<sup>277</sup> The problem with that view is that the possibility of an important federal interest in a case has never been sufficient to raise federal jurisdiction when the federal interest arises outside the well-pleaded complaint or in defense.<sup>278</sup> No reason exists why the rule for a federal issue embedded in a state law claim should be different.

Fourth, the *American Well Works* rule makes little analytical sense because it is a but-for test that can be approached from either the state law or the federal law end: beginning at the state law end, state law “is master of the whole matter”; beginning at the federal law end, federal law “is master of the whole matter.”<sup>279</sup> While this argument is opaque, it

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of the terms ‘count,’ ‘cause of action,’ ‘claim,’ and ‘theory’ to reject the conclusion of the court of appeals that unless every count . . . arose under federal law, none did.” Oakley, *supra* note 53, at 1853. Even today, the Court bounces from term to term: “For 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.” *Grable & Sons*, 125 S. Ct. at 2370. One leading hornbook avoids the problem by misquoting the Holmes test as “a suit arises under the law that creates the action.” WRIGHT & KANE, *supra* note 39, § 17, at 105–06.

274. See *supra* Part III.A.2 (discussing the misunderstanding between the term “cause of action” and “claim”).

275. See, e.g., Alleva, *supra* note 20, at 1511 (noting “*American Well*’s harsh exclusive effect of precluding state-sanctioned claims with federal elements from federal court”); Marshall, *supra* note 7, at 237 (stating the Holmes formulation is “restrictive and inflexible”).

276. See Part IV.A.5 (discussing that the *American Well Works* rule draws a bright line between state and federal jurisdiction).

277. See, e.g., Alleva, *supra* note 20, at 1500 (“[I]t hampered a trial court’s discretion to assess the prominence or dispositive nature of the federal issue embedded within the hybrid claim . . . .”); Doernberg, *supra* note 20, at 661–62 n.279 (“The *American Well Works* test produces results that are intolerable in light of the purposes of federal question jurisdiction. It simply cannot be demonstrated that important federal issues arise only as parts of federally created causes of action. *Mottley* and *Franchise Tax* demonstrate the flaws of such a limitation, and show why the Holmes test is dysfunctional.”) Both of these critics have a definite point of view. See *infra* note 292 and accompanying text (discussing how *American Well Works* opponents hold federal courts in a higher regard).

278. See *supra* notes 258–61 and accompanying text (discussing the well-pleaded complaint rule and noting the federal question must arise in the complaint).

279. The following argument was made in an influential article, which may have prompted the Court onto its path to pragmatism:

Holmes’ reasoning in *American Well Works* was that the plaintiff’s cause of action arose under state law because he could not recover unless he could demonstrate that state law

seems to be saying that the court could interchangeably approach a case containing elements of both state law and federal law from either perspective. That is not accurate. The court looks to the choice made by the plaintiff as master of the complaint.<sup>280</sup> The plaintiff in *American Well Works* did not sue for infringement of patent; it sued for the state law tort of trade defamation. One cannot choose to begin analysis at either end because the plaintiff plainly sued in tort. In fact, federal law entered the case only as a defense of truth to the plaintiff's claim.

Finally, critics say the *American Well Works* rule must fall because it cannot explain all the decisions. This is often expressed in the well-known phrase “[i]t has come to be realized that Mr. Justice Holmes’ formula is more useful for inclusion than for the exclusion for which it was intended.”<sup>281</sup> This observation is true only to the extent that two problematical Supreme Court decisions over the span of a century hold contrary to the rule.<sup>282</sup> The Court would do far better to reject two rogue decisions than a rule of law of great explanatory power. While the Court is most reluctant to overrule or criticize earlier decisions, return to the *American Well Works* rule would be far more consistent with far more of its precedent.<sup>283</sup>

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gave him a right of action for trade libel—“the state is master of the whole matter.” The difficulty is that this brand of “but-for” reasoning could easily have led to the opposite conclusion if approached from the other end. In other words, plaintiff could not recover unless he could demonstrate the invalidity or limited scope of the defendant’s patent—issues as to which federal law “is master of the whole matter.”

Cohen, *supra* note 7, at 898; *see also supra* Part II.D (discussing the complicated path to pragmatism).

280. *See supra* note 262 and accompanying text (noting plaintiff is master of the complaint). The first substantive sentence of the opinion states “[o]f course the question depends upon the plaintiff’s declaration.” *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 258 (1916).

281. *T. B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964). This statement has often been repeated uncritically. *See supra* note 80 (stating this dismissal of *American Well Works* has been repeated as accepted law).

282. *See Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 125 S. Ct. 2363, 2367–68 (2005) (finding federal jurisdiction existed in a state action); *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 200–01 (1921) (deciding federal question jurisdiction can arise out of a state claim). Once again, all goes back to *Smith*. *See supra* Part II.C–E (discussing the impact of *Smith* on the evolution of case law regarding federal question jurisdiction).

Many lower federal court decisions are inconsistent with *American Well Works*, although these must be discounted because they are only attempted applications of the Supreme Court’s *Smith* decision.

283. *See supra* note 119 and accompanying text (collecting Court precedents consistent with the *American Well Works* rule); *infra* notes 328–29 and accompanying text (highlighting that the weight of precedent supports the *American Well Works* rule).

## 2. State Courts May Be Hostile to Federal Rights

The traditional reasons supporting federal question jurisdiction are that state courts may be hostile to federal rights, federal courts have expertise in federal law, and federal hearing is necessary for federal-law uniformity.<sup>284</sup> Perhaps the most compelling of these reasons is that state courts may be unsympathetic to federal rights.

This view begins with the recognition that, through congressional conferring of federal question jurisdiction in 1875, the federal courts “became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.”<sup>285</sup> The unspoken premise is that the rule of *American Well Works* will not suffice because it will leave federal law at the mercy of hostile state courts.

This argument must be rejected. The drafters of the Constitution fully intended that state courts should be the primary decision makers on questions of federal law within the bounds of the Supremacy Clause.<sup>286</sup> Congress ratified this decision by declining to grant federal question jurisdiction for nearly 100 years.<sup>287</sup>

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284. See, e.g., AM. LAW INST., *supra* note 116, at 164–68 (discussing the tactical advantages in choosing between forums as well as the benefits and pitfalls of general diversity jurisdiction); Currie, *supra* note 100, at 268 (“Federal judges have . . . expertise in dealing with federal law; uniform interpretation is promoted . . . [and] state courts may be hostile to federal law.”); cf. Doernberg, *supra* note 20, at 647 n.220 (stating that, although state courts traditionally did not enforce federal law, modern state courts can be trusted to enforce federal law).

285. FRANKFURTER & LANDIS, *supra* note 28, at 65. This statement from the pen of Justice Felix Frankfurter is ironic because he believed state courts were competent to decide federal questions, and he later authored many opinions narrowing or denying federal jurisdiction. See, e.g., *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (discussing the Court’s reluctance to “expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes”), *superseded by statute on other grounds*, Jones Act, ch. 143, § 2, 36 Stat. 291, *as recognized in Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950) (discussing the Court’s caution in finding broad federal question jurisdiction).

286. Two commentators reached this conclusion:

[The Framers’] Judiciary Article matched a presumption favoring state court original jurisdiction with one favoring federal court appellate jurisdiction in “arising under” cases, and permitted the use of lower federal courts when necessary to lighten the Supreme Court’s appellate load. These presumptions emerged, to begin with, from Article III’s (1) baseline assumption of no federal inferior courts, (2) rejection of the Virginia and Randolph-Rutledge proposals to confine lower federal courts to original tasks, and (3) assignment to the Supreme Court of significant original jurisdiction . . . . All three factors encouraged the assignment of original tasks to state courts.

Liebman & Ryan, *supra* note 132, at 767–68.

287. “[T]he jurisdictional choices the first Congress made conform to a presumption of federal appellate (and also state court original) jurisdiction and strongly imply a spot-checking and supremacy-maintaining understanding of the federal courts’ role in reviewing state decisional and

The rejoinder might be that the nation transformed during and after the Civil War so that, by 1875, Congress saw the need to move initial decisions on federal law from hostile state courts to sympathetic federal courts.<sup>288</sup> That rejoinder fails, however, for two reasons: (1) Congress apparently had no intent to assert federal dominance through the 1875 Act;<sup>289</sup> and (2) Congress placed a jurisdictional amount requirement on federal question cases.<sup>290</sup>

A large difference exists between recognizing federal courts as powerful protectors of federal rights and recognizing them as the sole protectors of federal rights. Consequently, at the last, we cycle around again to the familiar debate between those who believe state courts are trustworthy to decide federal law and those who believe an original federal court hearing is necessary to vindicate federal rights fully and sympathetically.<sup>291</sup> Many opponents of the *American Well Works* rule

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other law.” *Id.* at 778. Another author asserts “[t]his was not an oversight but reflected a compromise made necessary by the determined opposition of the antifederalists to a national judiciary.” London, *supra* note 62, at 836; *see also supra* notes 20–25 and accompanying text (discussing the early history of federal question jurisdiction).

288. *See, e.g.,* Alleva, *supra* note 20, at 1498 (“[A] post-Civil War Congress apparently distrustful of the state courts as the primary vindicators of federal rights.”); Bergman, *supra* note 20, at 29–30 (discussing the hostility state courts once displayed towards federal law); Doernberg, *supra* note 20, at 603 nn.27–28 (collecting citations).

289. Legislative history for the 1875 Act is almost nonexistent. The provision was added as a substitution in the Senate for a bill from the House making only minor adjustments in removal procedure. *See* FRANKFURTER & LANDIS, *supra* note 28, at 68 (“The bill left the House merely as minor amendments to the procedure governing removal proceedings.”); Chadbourn & Levin, *supra* note 20, at 643 (“The Act was ] originally introduced in the House . . . in the form of a bill to amend the removal statute.”). Only one Senator spoke to intent, and he said nothing about hostile states or state courts. *See supra* note 132 (discussing Senator Matthew H. Carpenter’s comments regarding Congress’s grant of federal question jurisdiction). A Congress powerfully asserting the dominance of the federal government and the federal courts over balky southern states would almost certainly have shouted its intent in the legislative history, yet a leading article concluded that the act was “sneak legislation.” Chadbourn & Levin, *supra* note 20, at 642–43. No one has seriously disagreed with this declaration since it was made. *Cf.* Bergman, *supra* note 20, at 27–28 (discussing whether the grant of federal question jurisdiction was a “sneak measure” or merely a quiet grant because of the tension between federal and state law).

290. A plaintiff had to assert damages exceeding \$500 to support federal question jurisdiction. *See* 13B WRIGHT, MILLER & COOPER, *supra* note 2, § 3561.1. A Congress eager to assert dominance over states would hardly have added—or increased from time to time over the years—a jurisdictional amount requirement. The requirement was not eliminated for federal question cases until 1976. *Id.*

Another provision of the 1875 Act allowed a federal court to dismiss a federal question case that did “not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court.” Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472; *see also* Chadbourn & Levin, *supra* note 20, at 649–63 (discussing the concept of “really and substantially”). Again, a Congress asserting federal authority would not likely have included such a provision.

291. *See, e.g.,* Alleva, *supra* note 20, at 1495 n.52 (collecting citations).

seem to fear state court hostility, celebrate federal courts, and believe federal law belongs only in federal courts.<sup>292</sup>

The *American Well Works* rule is neutral. It allocates original jurisdiction over cases arising under federal law to federal courts and original jurisdiction over cases arising under state law to state courts. The rule is consistent with the intent of the Constitution and Congress to trust state courts to make initial decisions on issues of federal law that may be encountered in a state law case. The rule is also consistent with Supreme Court expressions of comity and respect for state courts.<sup>293</sup>

A critic might argue the rule tilts in favor of state court jurisdiction. That is not true. The rule is neutral. Even were that so, the tilt would be consistent with the limited jurisdiction of the federal courts found in the Constitution, congressional enactments, and consistent decisions of the Supreme Court.<sup>294</sup>

### 3. Federal Hearings Are Necessary for Uniformity

The other traditional justifications for federal question jurisdiction are federal judges have expertise in federal law and thus will produce more uniform interpretations of federal law. The conclusion follows that a federal issue should be drawn into federal court whenever possible. That conclusion, however, turns on its head in a case where a federal issue is embedded within a state law claim.

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292. See *id.* at 1495, 1500–01, 1524–26 (stating federal courts are “institutionally distinctive,” and their “discretion,” “control,” and “judicial prerogative” over jurisdiction should not be fettered); Doernberg, *supra* note 20, at 654 (discussing the “possibility of state court errors with respect to important matters of federal law”); Mishkin, *supra* note 132, at 173 (“[T]he ‘power to make ‘findings of fact’ and make them *binding* is the power to rule the world.’” (quoting R. Carter Pittman, *The Emancipated Judiciary in America: Its Colonial and Constitutional History*, 37 A.B.A. J. 485, 487 (1951))); Redish, *supra* note 99, at 1770 (listing a seven-factor test for allocation of jurisdiction between state and federal courts that omits the limited nature of federal jurisdiction); *The Outer Limits of “Arising Under”*, *supra* note 192, at 1012 (“Many cases presenting mixed state-federal claims seem to ‘belong’ in federal court.”); cf. Hirshman, *supra* note 7, at 32 (“Cohen’s ultimate solution is a real tribute to the federal judiciary. . . . [H]e proposed what he calls a ‘pragmatic’ solution to allow the exercise of jurisdiction over cases lawyers feel intuitively to be federal . . .”). See also Cohen, *supra* note 7, at 906, for Cohen’s pragmatic, weighing test.

293. The Supreme Court has come down explicitly on the side of trust in state courts. See *Moore v. Sims*, 442 U.S. 415, 435 (1979) (“We are unwilling to conclude that state processes are unequal to the task of . . . deciding constitutional questions that may arise in child-welfare litigation.”). Comity and respect for state courts is also implicit in the Court’s recent jurisprudence in many areas, including standing and abstention. See WRIGHT & KANE, *supra* note 39, § 13, at 69, § 52, at 325 (noting that recent cases have been more restrictive when deciding standing in federal courts and that, since 1941, federal courts have recognized a variety of circumstances when a federal court may decline to proceed although jurisdiction exists).

294. See *supra* Part III.B–C.

The drafters of both Article III and the 1875 Act contemplated that federal issues would be determined in state courts.<sup>295</sup> Indeed, cases involving a federal issue embedded in a state law claim could be heard only in state courts from the beginning of our nation in 1789 until the 1921 decision in *Smith*.<sup>296</sup> The drafters of Article III and the 1875 Act were not worried about the occasional morsel of federal law that might appear in a state law case, and they certainly could not have foreseen—nor would have approved—a ravenous federal judiciary gobbling up state law cases.

Given that, by definition, the case raises a federal issue within the body of a state law claim, state law is far more likely than federal law to dominate the decision. That strongly suggests the state court should be given the first opportunity to decide the case because it is more likely to be sympathetic to state law, will have expertise in its own law, and will be able to establish uniformity in its law. The case stays with the primary source of its decisional law.<sup>297</sup>

Even should we grant, *arguendo*, that the *American Well Works* rule has a price of some loss of uniformity in federal law, the question is, what price is being paid? The answer is negligible. First, in a general sense, the notion of uniformity among ninety-four federal district courts and thirteen courts of appeals, with circuit conflicts being the primary portion of the Supreme Court's docket, is largely a pipe dream. In more specificity, studies prove that federal courts have not achieved uniformity in jurisdictional law in this area.<sup>298</sup> Second, any theoretical loss of uniformity in federal law will be tiny because so few cases actually present a federal issue embedded within a state law claim.<sup>299</sup> Third, no strong federal interest cries out for uniformity and vindication in these cases.<sup>300</sup> Fourth, we are considering only the general federal question

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295. See *supra* notes 286–87 and accompanying text (noting three factors from Article III encouraging the assignment of original tasks to state courts and stating the jurisdictional choices made by the first Congress “strongly imply a spot-checking and supremacy-maintaining understanding of the federal courts’ role in reviewing state decisional and other law”).

296. See *supra* Part II.A–C.

297. See *supra* Part IV.A.3.

298. The most telling studies are *Mr. Smith*, *supra* note 225, at 2280, noting the courts of appeals reversed the district courts’ decisions in forty-five of the sixty-nine cases during the study period, and Frumkin, *supra* note 102, at 550–53, noting the three-way circuit conflict created by *Merrell Dow*.

299. See *supra* Part IV.A.1.

300. Surely a strong federal interest would have manifested itself during the 132 years before *Smith*. Likely, the proper time span is longer. *Smith* stood isolated from 1789 until *Grable & Sons* in 2005. As one commentator stated, “I see no federal interest in hearing such controversies.” Currie, *supra* note 100, at 277.

One area of federal law most requiring uniformity is patent law; that is a major reason for the

statute, § 1331; Congress can be expected to act in any individual area with a strong need for federal expertise and uniformity.<sup>301</sup> Fifth, even though appeal from state court to the Supreme Court is largely chimerical, it is available for cases actually demonstrating a need for uniformity.<sup>302</sup>

#### 4. The Rule Does Not Satisfy the Need for Complexity

No one has previously brought the debate over rules versus standards in law into a discussion of federal question jurisdiction. Consideration together is instructive. The debate over rules versus standards can be summarized as follows:

A “rule” is a norm whose application turns on the presence of relatively noncontentious facts, and turns on the presence of those facts regardless whether the values that the rule is designed to serve are actually served or disserved by the particular application. Rules are often described as “bright-line” (clear and easy to follow), “formal” (to be applied without

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gathering of appellate expertise over patent cases into the Federal Circuit. Yet in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), the Court unanimously rejected an argument to uniformity when it held a patent case was properly appealed to another court of appeals. *Id.* at 813–14.

301. This seems to be the real argument the Court was making in *Merrell Dow* when it tied federal jurisdiction to the decision of Congress not to imply a private remedy. *See supra* note 175 and accompanying text (questioning the Court’s theory that Congress must have intended no federal jurisdiction because Congress did not intend to create a private remedy for the federal regulatory scheme).

Congress has acted many times to provide special jurisdictional statutes allowing access to the federal courts in areas of special federal concern. *See* 13B WRIGHT, MILLER & COOPER, *supra* note 2, §§ 3568–85 (examining particular grants of jurisdiction to the federal courts).

302. Perhaps the Supreme Court has been hospitable to original federal jurisdiction over a case with a federal issue embedded in a state law claim because of concern for its appellate jurisdiction that assures the supremacy of federal law. For example, in *Moore v. Chesapeake & Ohio Railway*, 291 U.S. 205 (1934), the Court held there was no original federal jurisdiction but rushed to add “[q]uestions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this Court.” *Id.* at 214.

This concern is unfounded. Close reading of *American Well Works* shows the rule refers to the original jurisdiction statute. The opinion says “[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.” *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 259 (1916).

The “arising under” language of Article III is broader than the similar language of the statute. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 494–95 (1983); WRIGHT & KANE, *supra* note 39, § 17, at 105. The Court’s appellate jurisdiction over state court interpretations of federal issues embedded in state law claims can appropriately, and consistently with other jurisdictional doctrines, be broader than federal original jurisdiction. *See, e.g.*, Friedman, *supra* note 171, at 23 n.133 (“[W]hat is a federal question for the Supreme Court is not necessarily a federal question for the lower courts.”); Mishkin, *supra* note 132, at 163, 170–71 (discussing the Supreme Court’s need for broad appellate jurisdiction).

regard to substance of the results but only with regard to the rule's terms), and "opaque" (to the rules' background justifications).

. . . .

. . . Standards are norms that have the opposite characteristics. A standard can be applied only by engaging in evaluation. Therefore, to the extent that evaluation is contentious and uncertain, standards will be as well. Standards are thus vague, substantive (as opposed to formal), and transparent (to background values).<sup>303</sup>

*American Well Works* sets forth a rule.<sup>304</sup> *Grable & Sons* sets forth a standard.<sup>305</sup> Accordingly, the latter is preferred by people desiring complexity in law. The question is, to what extent is this dynamic behind the movement from a clear, predictable rule to a formless, malleable standard.

Justice Holmes, the author of the opinion of the Court in *American Well Works*, was a man of rules writing in an age of rules.<sup>306</sup> We are steadily sliding into an age of standards.<sup>307</sup>

This is a welcome development for people promoting and celebrating complexity in the law. "[T]he main producers, rationalizers, and administrators of law—legislators and their staff, bureaucrats, litigants, lawyers, judges, and legal scholars—generally benefit from legal complexity while bearing few of its costs."<sup>308</sup> Many judges celebrate complexity.<sup>309</sup> Most commentators celebrate complexity.<sup>310</sup>

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303. Larry Alexander, *Incomplete Theorizing: A Review Essay of Cass R. Sunstein's Legal Reasoning and Political Conflict*, 72 NOTRE DAME L. REV. 531, 541 (1997); see also, e.g., Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1191–92 nn.1–2, 1194 n.5 (1994) (collecting citations); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 n.1 (1992) (collecting citations); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 9 (1992) (explaining the differences between legal rules and norms).

304. "A suit arises under the law that creates the cause of action." *Am. Well Works Co.*, 241 U.S. at 260.

305. "[D]oes a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2368 (2005).

306. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

307. See Schuck, *supra* note 303, at 10 ("A movement from rules to more complex standards has been evident for some time.").

308. *Id.* at 26.

309. "The judge may wish to reduce her boredom, call attention to herself in order to attract support from special interests, or burnish her reputation for creativity, independence, and professional skill with lawyers, academics, journalists, and other court-watchers." *Id.* at 33–34.

One can easily recognize the rule-to-standard movement from *American Well Works to Grable & Sons* in the following statement:

Spurred on by many legal scholars, [courts] openly embraced a conception of role, a style of thought, and a rhetoric of decision that legitimated judicial policymaking in a variety of areas. . . .

....

...[C]ourts in both private and public law [adopt] certain common decision methodologies that vastly complexify the system. Important examples include interest-balancing, sequential burden-shifting, and broad but incomplete, spasmodic deference to other institutions. By requiring judges to balance numerous diverse, and inevitably conflicting, policy goals, these doctrines are bound to be both technical and indeterminate.

*Id.* at 14–15 (citations omitted).

One judge who helped initiate the movement was Justice Benjamin N. Cardozo with his beautiful prose in *Gully v. First National Bank*, 299 U.S. 109, 117–18 (1936):

What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. . . . [T]here has been a selective process which picks the substantial causes out of the web and lays the other ones aside. . . . If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

A more active participant in the movement was Justice William J. Brennan with his more pedestrian, yet harder pushing, prose in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 (1983), *superseded by statute*, Judicial Improvements Act of 1985, Pub. L. No. 99-336, 100 Stat. 633:

Since the first version of § 1331 was enacted, . . . the statutory phrase “arising under the Constitution, laws, or treaties of the United States” has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts. . . . [T]he phrase “arising under” masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.

310. As one commentator assessed his colleagues:

Scholars’ views of simplicity are, well, more complex. On the one hand, simplicity cuts across our intellectual grain. We have a strong taste for complexity; indeed complexity amounts to a craft value . . . .

....

... Perhaps because legal scholars are generally less interested than their natural and behavioral science colleagues in discovering new data and testing theories, they have been that much busier seeking to elaborate novel theories and subvert traditional paradigms.

Schuck, *supra* note 303, at 1, 35 (citation omitted); *cf.* FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991) (arguing the utility of adherence to rules in law).

The article that may have started the Supreme Court on its path to pragmatism lays out the multiple, pragmatic considerations that, it argues, a court should consider in deciding jurisdiction. Cohen, *supra* note 7, at 906–07. Reading those two pages leaves me with the definite impression that the author believes a multifaceted, pragmatic test for federal question jurisdiction in a case arising under state law is desirable for the same reason a person works the daily crossword puzzle in the newspaper: the joy of demonstrating mental gymnastics. I say the subscription price to lower

Who is to speak for simplicity and rules? People outside the legal profession.<sup>311</sup> People inside the legal profession who highly value the benefits of simplicity to be found in rules: minimized costs, equal treatment, predictable planning, and accountability.<sup>312</sup> Unfortunately, the people concerned with federal question jurisdiction have little motive to scribe for simplicity.<sup>313</sup>

One might wonder, if rules are too simpleminded for complex human activity, why should the law countenance any? Why should not equity govern all? The answer is that rules are inappropriate for some areas of human enterprise, but they are entirely appropriate for others.<sup>314</sup>

One area of particular desirability for rules is jurisdiction and procedure.<sup>315</sup> No one would suggest pure equity for *res judicata*.<sup>316</sup> Courts do not discuss filing deadlines in terms of multifaceted interests tests. In federal court, a party who fails to move for judgment as a matter of law at the close of evidence cannot make the motion after the verdict; the court does not weigh the interests.<sup>317</sup> A complaint alleging “plaintiffs

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court judges and litigants is too high.

311. “Simplicity is a compelling virtue. Poets praise it. Artists pursue it. Moralists preach it. Monastics live it. . . . [T]he principle of Ockham’s Razor asserts that simpler theories possess greater methodological, epistemological, and aesthetic elegance and value.” Schuck, *supra* note 303, at 1–2 (citations omitted).

312. *E.g.*, CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 110–15 (1996) (citing the benefits of rules); *see also supra* Part IV.A (explaining why the Supreme Court should adopt the rule that “for purposes of federal question jurisdiction a case arises under the law that created the claim”).

313. The chorus of complexity has many voices. Some appellate judges strive for complexity. *See supra* note 309 (discussing what motivates judicial complexity). Complexity is a “craft value” to most legal scholars. *See supra* note 310 (discussing what attracts legal scholars to complexity). Lawyers have little incentive for simplicity since it cuts into billable hours.

On the other hand, those favoring simplicity have no organized voice. Overworked lower-court judges cannot challenge Supreme Court doctrine. Individual litigants have no recurring interest. Federal jurisdiction is not salient to groups that lobby Congress, such as taxpayers, environmentalists, and civil libertarians. Congress as an institution might be expected to resist attempts to infringe on its jurisdictional prerogative. *See supra* Part III.B (discussing judicial usurpation of congressional authority to determine the limits of federal jurisdiction). But it responds to interest groups, not to legal theoreticians.

314. *See Kennedy, supra* note 179, at 1702–03 (comparing rules and standards in different contexts); Roscoe Pound, *The Theory of Judicial Decision: A Theory of Judicial Decision for Today* (pt. 3), 36 *HARV. L. REV.* 940, 951–52 (1923) (comparing rules, standards, and the situations for which each are distinctly suited); *cf. Alexander, supra* note 303, at 544 (“Rules make our value differences immaterial in legal reasoning. Standards make those differences pivotal.”).

315. *See Chadbourne & Levin, supra* note 20, at 671 (“[P]robably all would agree that jurisdiction and procedure (matters apart from ‘the justice of the cause’) are technical matters to be governed by technical rules which should be easy of comprehension and application.”); *see also supra* Part IV.A.5 (arguing bright-line rules should govern subject matter jurisdiction).

316. “*Res judicata* reflects the policy that sometimes it is more important that a judgment be stable than that it be correct.” JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, *CIVIL PROCEDURE* § 14.3, at 636 (3d ed. 1999) (citation omitted).

317. *FED. R. CIV. P.* 50(c).

are late of the district of Maryland, merchants” is insufficient to plead citizenship for diversity jurisdiction.<sup>318</sup> A court faced with a federal question raised for the first time in defense does not weigh the interests of having a federal court decide the issue.<sup>319</sup>

Some areas of law shout out for rules, and one of those areas is jurisdiction. That is especially important for federal courts of limited jurisdiction.<sup>320</sup> No need for complexity overcomes other clear rules of federal subject matter jurisdiction.<sup>321</sup> The Court should not allow any amorphous desire to demonstrate complex intellectual skills to overcome the sensible and certain *American Well Works* rule that a case arises under the law that creates the claim.

## V. CONCLUSION

This Article discusses federal question jurisdiction over a case presenting a federal law issue embedded within a claim created by state law. Even though these cases are few and far between,<sup>322</sup> this small area provides nearly all of the major decisions on federal question jurisdiction by the Supreme Court over the past century. The Court in *American Well Works* declares the rule that a case arises under the law that creates the claim.<sup>323</sup> Later cases lead to *Grable & Sons*, in which the Court enunciates a multifactor, weighing test.<sup>324</sup> This Article analyzes the many reasons the Court’s approach is problematic.<sup>325</sup> It then collects arguments for, and responds to arguments against, a return to the *American Well Works* rule.<sup>326</sup>

Of course, Congress could assert its dominance in the field of federal jurisdiction and amend § 1331.<sup>327</sup> After more than 130 years without

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318. *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 303 (1809).

319. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 154 (1908).

320. *See supra* notes 1–2 and accompanying text.

321. *See supra* note 179.

322. *See supra* Part IV.A.1.

323. *See supra* Part II.B–C.

324. *See supra* Part II.D–E.

325. *See supra* Part III.

326. *See supra* Part IV.

327. Redrafting should make clear that the statute grants jurisdiction to federal cases, not to federal law issues. *See supra* Part III.A.1. “The general clause should not be cast in constitutional language. Its scope should be expressly limited to cases where the plaintiff’s *claim for relief is founded* on the Constitution, laws, or treaties.” Wechsler, *supra* note 167, at 225. “[T]he statute could profitably and clearly be made to exclude [federal issues in state claim cases] by requiring that federal law operate of its own force in order to support jurisdiction.” Currie, *supra* note 100, at 277; *cf.* London, *supra* note 62, at 855 (stating the “dependence of the jurisdictional statute upon an express federal cause of action is a reciprocal one . . . in the sense that federal jurisdiction could not

substantive language change to this basic jurisdictional statute, amendment seems unlikely.

Absent congressional intervention, the Supreme Court should rethink the malleable and mushy test of *Grable & Sons* and return to the powerful and predictable rule of *American Well Works*. That course would require disapproval of two precedents,<sup>328</sup> yet be consistent with many more.<sup>329</sup> The rule would also be consistent with other related federal jurisdiction doctrines.<sup>330</sup> The Court, for federal question jurisdiction, would “set bounds to the pursuit . . . [by formulating] the distinction between controversies that are basic and those that are

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be predicated on such a right alone”).

With this redrafting would come a designation more appropriate than federal question jurisdiction: federal case jurisdiction, arising under jurisdiction, or federal claim jurisdiction. See Mishkin, *supra* note 132, at 170–71 (suggesting “federal claim” terminology for original jurisdiction).

328. See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 125 S. Ct. 2363, 2363 (2005) (holding “the national interest in providing a federal forum for federal tax litigation is sufficiently substantial to support the exercise of federal question jurisdiction”); *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 199 (1921) (stating “where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States . . . and rests upon a reasonable foundation, the District Court has jurisdiction under [Judicial Code § 24]”).

329. See *Gully v. First Nat’l Bank*, 299 U.S. 109, 117 (1936) (finding that the fact a federal statute was the source of a state’s authority was insufficient to exercise federal question jurisdiction); *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 216–17 (1934) (declining to exercise federal question jurisdiction when a railroad employee injured in intrastate commerce brought the case under a state statute patterned after the Federal Employers Liability Act and the Federal Safety Appliance Acts); *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 484 (1933) (holding “a suit does not arise under the Constitution or laws of the United States merely because a state is the plaintiff, though the State derives its authority to maintain the suit from the Federal Constitution and laws”); *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 259–60 (1916) (holding plaintiff’s suit alleging libel in relation to a patent arises under state law, not federal patent law); *Louisville & Nashville R.R. v. W. Union Tel. Co.*, 237 U.S. 300, 303 (1915) (“[W]hen . . . the foundation of the right claimed is a state law, the suit to assert it arises under the state law none the less that the state law has attached a condition that only alien legislation can fulfill.”); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (exercising federal jurisdiction when the plaintiff as master of the complaint chose to sue under federal patent laws); *Interstate Consol. St. Ry. Co. v. Commonwealth*, 207 U.S. 79, 84–85 (1907) (holding the force given to a state charter is derived “wholly from the charter” even though it may incorporate another law); *Miller’s Ex’rs v. Swann*, 150 U.S. 132, 136–37 (1893) (holding “[t]he fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question”); cf. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (holding federal law governs all interstate shipments because “[a] carrier’s claim is . . . predicated on the tariff—not an understanding with the shipper”); *Feibelman v. Packard*, 109 U.S. 421, 426 (1883) (holding “under the bankruptcy act of 1867, the District Court of the United States, sitting in bankruptcy, has jurisdiction to order the seizure and detention of goods . . . [and] the property of the bankrupt”); see also *supra* Part II.B–C.

330. See *supra* Part IV.A.4.

collateral, between disputes that are necessary and those that are merely possible.<sup>331</sup> That would be a true compass through the maze.

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331. *Gully*, 299 U.S. at 118. These bounds would allow the Court to devote itself to solving new problems rather than policing old solutions in federal question jurisdiction. *See* Mishkin, *supra* note 132, at 159 (stating “it is desirable that Congress be competent to bring to an initial forum all cases in which the vindication of federal policy may be at stake,” but there are limits such as “volume of litigation” and geographic hardships for litigants).