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In Search of the Welcome Mat: The Scope of Statutory Federal Question Jurisdiction after Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing

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For nearly eighty-five years, the Supreme Court has given federal courts express authority to exercise federal question jurisdiction[1] over state-law claims involving embedded issues of federal law.[2] Over this period, however, the Court has not articulated a single, clear test for determining when jurisdiction over such hybrid claims is proper.[3] After the Court's 1986 decision in *Merrell Dow Pharmaceuticals Inc. v. Thompson*,[4] lower courts frequently stated that federal question jurisdiction would lie over hybrid claims only where Congress intended to create a private, federal remedy under the statute or regulation at issue.[5]

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1. 28 U.S.C. § 1331 (2000) provides the authority for federal question jurisdiction in the district courts: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

2. These state-federal hybrid claims arise when a plaintiff's complaint alleges a state-law cause of action but lists as an element of that cause of action a violation of a federal statute or the U.S. Constitution. The seminal case is *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). In *Smith*, a shareholder of a state bank filed suit to prevent the bank from investing in federal farm loan bonds, alleging that the act creating the bonds was unconstitutional. *Id.* at 195. The Supreme Court found federal question jurisdiction proper, setting forth the broad rule that where a plaintiff's "right to relief depends upon the construction or application of the Constitution or laws of the United States ... the District Court has jurisdiction" over the claim. *Id.* at 199. For a discussion of the history of Supreme Court decisions in this area, see Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After* Merrell Dow, 52 OHIO ST. L.J. 1477, 1502–20 (1991).

3. *See, e.g.*, Kenneth Lee Marshall, Note, *Understanding* Merrell Dow*: Federal Question Jurisdiction for State-Federal Hybrid Cases*, 77 WASH. U. L.Q. 219, 219 (1999) (noting that "the Court has yet to agree on a unifying principle" for gauging the scope of federal question jurisdiction).

4. 478 U.S. 804 (1986).

5. *See* Rains v. Criterion Sys., 80 F.3d 339, 347 n.10 (9th Cir. 1996) (stating that *Merrell Dow* "established a bright line rule that where the federal law that serves as an element of the state law claim does *not* create a private right of action," federal question jurisdiction does not exist); Seinfeld v. Austen, 39 F.3d 761, 764 (7th Cir. 1994) ("[I]f federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question." (internal quotation marks omitted)); Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 152 (4th Cir. 1994) (stating that "under *Merrell Dow*, if a federal law does not create a private right of action, a state law action based upon its violation does not raise a 'substantial' federal question" sufficient to confer jurisdiction); Willy v. Coastal Corp., 855 F.2d 1160, 1169 (5th Cir. 1988) (holding that the "minimum requirement" of *Merrell Dow* is "that the federal statutes involved provide a private, federal remedy"); Miller v. Norfolk & W. Ry. Co., 834

The most recent Supreme Court decision in this area, *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,[6] purports to "resolve a split within the Courts of Appeals on whether *Merrell Dow* ... always requires a federal cause of action as a condition for exercising federal-question jurisdiction."[7] Holding that the district court properly exercised jurisdiction over a state-law quiet title claim where the embedded issue of federal tax law did not create a private, federal remedy, the *Grable* Court made clear that a federal cause of action is not *always* necessary for the exercise of federal question jurisdiction.[8]

Unfortunately, the scope of federal jurisdiction over hybrid claims remains uncertain, in part because the *Grable* Court added a new element—that jurisdiction over a particular claim must not disturb any congressionally intended balance of state and federal judicial power[9]—to the existing (though never clearly defined) federal interest test.[10] While the Court's decision to abandon *Merrell Dow*'s misleading remedy-focused test is a clear step forward in federal question jurisprudence, the references to congressional intent in the new two-prong *Grable* test add little to the existing inquiry and will likely only confuse lower courts if taken literally. Fortunately, however, the Court's analysis in *Grable* offers an alternative to this restrictive reading of the two-prong test. In reconciling its decision with the holding in *Merrell Dow*, the *Grable* Court actually applied a more pragmatic, two-part balancing test.[11] This balancing test, which weighs the federal interest in providing a forum in a particular case against the risk of burdening the federal docket with an enormous influx of similar cases, offers a method that lower courts can follow to produce consistent jurisdictional results in hybrid cases.

F.2d 556, 562 (6th Cir. 1987) (noting that under *Merrell Dow*, "a finding of an express or implied private right of action is a necessary but not a sufficient indication that the federal question is a substantial one"); *see also* Alleva, *supra* note 2, at 1532–38 (discussing lower court decisions applying *Merrell Dow*).

6. 125 S. Ct. 2363 (2005). Throughout the remainder of this Recent Development, the Supreme Court Reporter is used for citations to *Grable* because pinpoint citations to the United States Reports were unavailable at the time of publication.

7. *Id.* at 2366.

8. *See id.* (affirming the lower court's exercise of jurisdiction despite absence of a federal cause of action).

9. *See id.* at 2368.

10. *See infra* notes 36–38 and accompanying text (discussing federal interest test); *see also infra* notes 58–71 and accompanying text (elaborating on and applying federal interest test).

11. *See infra* notes 76–79 and accompanying text (discussing the balancing test the Court employed in reconciling *Grable* and *Merrell Dow*).

This Recent Development first examines the holdings of *Grable* and *Merrell Dow* and discusses the Court's conclusion that a federal remedy is not always necessary to justify federal question jurisdiction over hybrid claims. Next, this Recent Development examines the potential confusion caused by the two-prong test articulated by the *Grable* Court. This test separates the analysis of the significance of the federal issue raised by the plaintiff's complaint from the analysis of congressional intent regarding the scope of federal jurisdiction generally. After concluding that Congress's jurisdictional intent is best ascertained on a case-by-case basis by analyzing the federal interest in providing a forum to adjudicate the federal issue embedded in the plaintiff's complaint, the analysis turns to the Court's reliance on pragmatic factors—especially potential burdens on the federal docket—in the *Grable* decision. Ultimately, this Recent Development concludes that the balancing test the Court applied in reconciling *Grable* and *Merrell Dow*—a test that weighs the significance of the federal interest in providing a forum against the potential burden on the federal docket imposed by the exercise of jurisdiction—renders the Court's most difficult prior cases consistent with one another and should be the test applied in future cases.

At its core, *Merrell Dow* was a state-law products liability case.[12] The plaintiffs filed suit in an Ohio state court, alleging that Bendectin, a drug manufactured by Merrell Dow, had caused severe birth defects.[13] In addition to theories of negligence, breach of warranty, strict liability, fraud, and gross negligence, the *Merrell Dow* plaintiffs' complaint alleged a violation of the branding provisions of the federal Food, Drug, and Cosmetic Act ("FDCA").[14] According to the plaintiffs, a violation of the FDCA would create a "rebuttable presumption of negligence" under Ohio law.[15] Merrell Dow removed the suit to federal district court on grounds that the alleged FDCA violation constituted a cause of action "arising under the laws of the United States."[16] The district court subsequently dismissed the case

12. *See* Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 805 (1986) (noting that each plaintiff's complaint "alleged that a child was born with multiple deformities as a result of the mother's ingestion of Bendectin during pregnancy").

13. *Id.* Litigation over birth defects allegedly caused by Bendectin was widespread in the 1980s. *See generally* Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301 (1992) (discussing the history of Bendectin litigation). As of 1992, plaintiffs had filed over 2,100 Bendectin claims against Merrell Dow. *Id.* at 319.

14. *Merrell Dow*, 478 U.S. at 805–06.

15. *Id.* at 806.

16. *Id.*

on forum non conveniens grounds.[17] The Court of Appeals for the Sixth Circuit found removal improper, and the Supreme Court affirmed.[18]

Although the Supreme Court in *Merrell Dow* extolled the virtues of "sensitive judgments about congressional intent, judicial power, and the federal system" in jurisdictional decisions at "the outer reaches of § 1331,"[19] its holding was essentially mechanistic: because the FDCA did not provide a private remedy for violations of its branding requirements, federal question jurisdiction did not lie over the plaintiffs' claims that Merrell Dow violated the FDCA.[20] This holding drew significant criticism for its apparent conflation of Congress's remedial and jurisdictional intents,[21] and caused considerable confusion among lower federal courts struggling to decide whether *Merrell Dow* meant that a federal remedy is always necessary in order to sustain federal question jurisdiction.[22] This

17. *Id.* The plaintiffs in *Merrell Dow* were residents of Canada and Scotland. *Id.* at 805. The Court noted the diversity of citizenship (Merrell Dow's principal place of business was in Ohio) but correctly pointed out that because plaintiffs had filed suit in Merrell Dow's home state, removal on diversity grounds would not be proper under 28 U.S.C. § 1441(b). *See id.* at 806 n.1. Section 1441(b) provides that where jurisdiction is not grounded on a federal question, a state-court action is "removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (2000).

18. *See Merrell Dow*, 478 U.S. at 807.

19. *Id.* at 810.

20. *See id.* at 814 (holding that the absence of a federal remedy is "tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction").

21. *See, e.g.*, Alleva, *supra* note 2, at 1484–85 (arguing that the emphasis on the absence of a federal remedy in *Merrell Dow* "amounts to a virtual substitution of the remedial for the jurisdictional inquiry"); 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) (arguing that the *Merrell Dow* Court "attempted to discern congressional intent for the wrong statute or, if the right statute, the wrong question"). Justice Brennan, dissenting in *Merrell Dow*, made this same point:

> Why should the fact that Congress chose not to create a private federal *remedy* mean that Congress would not want there to be federal *jurisdiction* to adjudicate a state claim that imposes liability for violating the federal law? Clearly, the decision not to provide a private federal remedy should not affect federal jurisdiction unless the reasons Congress withholds a federal remedy are also reasons for withholding federal jurisdiction.

Merrell Dow, 478 U.S. at 825 (Brennan, J., dissenting).

22. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 125 S. Ct. 2363, 2366 (2005) (noting a split among circuits over the meaning of *Merrell Dow*); *see also* Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-*Merrell Dow, 115 HARV. L. REV. 2272, 2279–80 (2002) (noting that uncertainty among

confusion prompted the *Grable* Court to revisit the scope of § 1331 jurisdiction nearly twenty years after *Merrell Dow*.

In *Grable*, the plaintiff, Grable & Sons Metal Products, Inc., filed a state-law quiet title action, in Michigan state court seeking to recover real property sold five years earlier by the Internal Revenue Service ("IRS") to satisfy Grable's tax debt.[23] The crux of Grable's claim was that the IRS failed to provide adequate notice of seizure as required by federal law.[24] The parties agreed that Grable received actual notice by certified mail, but Grable argued that the statute required personal service.[25] The defendant removed the case to federal court, contending that the parties' dispute over the tax statute presented a federal question.[26] Both the District Court for the Western District of Michigan and the Court of Appeals for the Sixth Circuit decided the substantive issue—whether the IRS complied with the requirements of the Internal Revenue Code—against Grable, holding that "although [the Code] by its terms required personal service, substantial compliance with the statute was enough."[27] The Supreme Court, granting certiorari on the jurisdictional issue only, affirmed the lower courts' exercise of § 1331 jurisdiction.[28]

Although the statute at issue clearly imposed a duty on the IRS, federal tax law does *not* provide for quiet title actions such as that brought by Grable,[29] and thus the Court in *Grable* was forced to confront its apparently contrary holding in *Merrell Dow*. Ultimately, the Court held that *Merrell Dow*'s federal remedy requirement was no requirement at all—at least not in every case:

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circuit courts may have led to increased reversal rates on jurisdictional grounds in hybrid cases).

23. *Grable*, 125 S. Ct. at 2366.

24. *Id.* The statute at issue, 26 U.S.C. § 6335(a) (2000), requires the IRS to provide "notice in writing . . . to the owner of the property" prior to seizure.

25. *Grable*, 125 S. Ct. at 2366.

26. *Id.*

27. *Id.* The district court alluded to the jurisdictional issue only in passing, *see* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., Inc., 207 F. Supp. 2d 694, 695 (W.D. Mich. 2002) (noting that Darue removed the case to federal court by "properly contending that adjudication of [Grable's] claim necessarily turns on a proposition of federal law"), while the Sixth Circuit decided the jurisdictional question on the basis of a three-part test, *see* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., Inc., 377 F.3d 592, 595–96 (6th Cir. 2004). Under the Sixth Circuit's three-part test, federal question jurisdiction exists over hybrid claims "if the plaintiff asserts a federal right that 1) involves a substantial question of federal law; 2) is framed in terms of state law; and 3) requires interpretation of federal law to resolve the case." *Id.* at 595.

28. *Grable*, 125 S. Ct. at 2366.

29. *See id.* at 2369 (noting that "federal law provides for no quiet title action that could be brought against Darue").

> *Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the "sensitive judgments about congressional intent" that § 1331 requires .... The Court [in *Merrell Dow*] saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues.[30]

In *Grable*, then, the Court definitively held that a federal cause of action is not always required to establish federal question jurisdiction over state-law claims.[31]

The Court's unanimous decision that *Merrell Dow* does not require the existence of a federal remedy as a condition of exercising § 1331 jurisdiction may receive the bulk of attention (and praise) from practitioners and scholars, but the *Grable* decision is equally notable for the broader jurisdictional rule it sets forth. After summarizing the major cases dealing with federal question jurisdiction over hybrid claims, the Court noted that none of these prior decisions had "stat[ed] a 'single, precise, all-embracing' test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties."[32] Nevertheless, the Court formulated a two-prong test to decide the § 1331 question in hybrid cases. According to the test articulated in *Grable*, federal question jurisdiction over state-law claims incorporating federal issues is proper where (1) the claim "necessarily raise[s] a stated federal issue, actually disputed and substantial," and (2) adjudicating the claim in federal court will not "disturb[] any congressionally approved balance of federal and state judicial responsibilities."[33] Unfortunately, the second prong of this

30. *Id.* at 2370.

31. It appears, though, that district courts may be free to find the absence of a federal cause of action as dispositive in certain cases—cases in which the potential burden on the federal docket associated with exercising jurisdiction over a class of similar claims requires the "welcome mat" of a federal cause of action. *See id.*

32. *Id.* at 2368 (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 821 (1988) (Stevens, J., concurring)).

33. *Id.* The Second Circuit describes the *Grable* standard as a three-prong test. *See* Broder v. Cablevision Sys. Corp., 418 F.3d 187, 196 (2d Cir. 2005) (stating that the complaint "satisfie[d] all three prongs of the *Grable* test"). The first prong of the test as described by the Second Circuit—that "the claims 'necessarily raise [the] stated federal issue,' " *id.* at 195 (alteration in original)—is essentially the "well-pleaded complaint" rule. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) ("[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of

test, if treated as a direction to find congressional intent regarding the scope of federal question jurisdiction generally,[34] will likely confuse the lower courts. This is not the only possible reading of the *Grable* test, and the Court's reconciliation of its holdings in *Grable* and *Merrell Dow* does not demand this reading.[35] Nevertheless, this potential for confusion merits some discussion.

The difficulty with the two-part test stated in *Grable* arises from the fact that it separates the analysis of the significance of the federal issue in dispute from the analysis of congressional intent with respect to the scope of federal question jurisdiction. The *Merrell Dow* Court viewed the question of Congress's jurisdictional intent as inseparable from the question of the significance of the federal issue in dispute. In that case, the absence of a federal remedy under the FDCA was "tantamount to a *congressional conclusion* that the presence of a claimed violation of the statute as an element of a state cause of action is *insufficiently 'substantial' to confer federal-question jurisdiction.*"[36] Commentators sometimes refer to this approach—deciding the § 1331 question by reference to the significance of the

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his own cause of action shows that it is based upon those laws or that Constitution."); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 276–82 (4th ed. 2003) (discussing the well-pleaded complaint rule). For simplicity and conciseness, this Recent Development assumes satisfaction of the well-pleaded complaint rule, as the question of whether an embedded federal issue is sufficient to establish federal question jurisdiction will arise only when the federal issue appears in the plaintiff's well-pleaded complaint. *See* Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 808 (1986) ("[T]he question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint.' ").

34. *See Grable*, 125 S. Ct. at 2367 (stating that federal jurisdiction must be "consistent with congressional judgment about the sound division of labor between state and federal courts"). Notably, while the Court cited several decisions providing direct authority for the substantial federal issue prong of the test, the congressional intent prong was introduced without clear authority from the earlier cases. *See id.* In support of this second prong, the Court quoted a passage from *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983), stating that "the appropriateness of a federal forum to hear an embedded issue could be evaluated only after considering the 'welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.' " *Grable*, 125 S. Ct. at 2367 (quoting *Franchise Tax Bd.*, 463 U.S. at 8). The Court also cited the *Merrell Dow* opinion, *see id.* at 2368 (citing *Merrell Dow*, 478 U.S. at 810), where congressional intent appears as an element of a decidedly ambiguous principle governing § 1331 jurisprudence: "We have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." *Merrell Dow*, 478 U.S. at 810.

35. *See infra* notes 76–79 and accompanying text (discussing the Court's use of a balancing test in reconciling *Grable* and *Merrell Dow*).

36. *Merrell Dow*, 478 U.S. at 814 (emphasis added).

federal issue at stake—as the "federal interest test."[37] The *Grable* Court's bifurcation of the existing, though certainly contested,[38] federal interest test may result in continued confusion in the lower courts, which have received little guidance in how to ascertain this separate congressional intent.

Two instances of congressional intent have potential relevance in any decision to exercise the federal jurisdiction conferred by § 1331: (1) Congress's intent in enacting the general grant of federal question jurisdiction in § 1331 and (2) its intent in enacting the particular statute at issue in the case at bar.[39] The two-prong *Grable* test corresponds to the two relevant instances of congressional intent: the significance of the federal issue prong implicates Congress's intent in enacting the substantive statute, while the balance of state and federal judicial authority prong implicates Congress's intent in enacting § 1331.[40] Thus, the Court's decision in *Grable* to separate the significance of the embedded federal issue from the analysis of congressional intent in this manner suggests that the relevant intent in

37. *See, e.g.*, Note, *supra* note 22, at 2278 (referring to the rule of *Merrell Dow* as "the federal interest test"). Although the *Grable* Court noted that there has never been a single, universally applicable test for jurisdiction over hybrid claims, *see Grable*, 125 S. Ct. at 2368, the Court has consistently noted the importance of the significance of the federal issue at stake, *see Merrell Dow*, 478 U.S. at 814 n.12 (citing with approval the theory that the Court's "§ 1331 decisions can best be understood as an evaluation of the *nature* of the federal interest at stake"); *see also Franchise Tax Bd.*, 463 U.S. at 13 (noting that § 1331 jurisdiction over state-law claims is "unavailable unless it appears that some *substantial*, disputed question of federal law is a necessary element of one of the well-pleaded state claims" (emphasis added)); Gully v. First Nat'l Bank, 299 U.S. 109, 118 (1936) (suggesting that the jurisdictional inquiry in close cases requires "a selective process which picks the substantial causes out of the web and lays the other ones aside").

38. *See, e.g.*, Note, *supra* note 22 at 2278–80 (criticizing the federal interest test as overly subjective).

39. *Cf.* William V. Luneberg, *Nonoriginalist Interpretation—A Comment on Federal Question Jurisdiction and* Merrell Dow Pharmaceuticals Inc. v. Thompson, 48 U. PITT. L. REV. 757, 763–64 (1987) (discussing the examination of Congress's substantive and jurisdictional intentions in *Merrell Dow*). The attempt to separate Congress's jurisdictional intent in this manner arguably imposes an artificial formalism that will lead to a failure to properly ascertain congressional intent at all. Indeed, the *Grable* Court may have intended some sort of holistic interpretation of congressional intent; unfortunately, the Court gave no clear direction on how to apply this second prong of the test. This Recent Development does not advocate a particular theory of statutory interpretation. However, separating Congress's intent in this manner is a useful analytic tool for examining the implications of *Grable*'s introduction of a second prong into the § 1331 analysis. For an engaging critique of the theory that courts can ascertain a legislature's "original intent," see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13–47 (1994).

40. *See supra* note 33 and accompanying text (setting forth the two-prong *Grable* test).

the second prong of the *Grable* test is Congress's intent in enacting § 1331.

This seems to be a sound theoretical choice: the scope of jurisdiction created by statute should be determined by reference to the jurisdiction-creating statute.[41] In practice, however, this instruction will provide courts with very little guidance. As an initial matter, there is no doubt that the Congress adopting the first federal question statute[42] did not consider the specific possibility of whether federal question jurisdiction should lie over state-law claims implicating provisions of substantive federal laws that did not yet exist.[43] Furthermore, any attempt to ascertain Congress's intent in § 1331 through a "plain meaning" approach[44] is immediately stonewalled by the ambiguous "arising under" language of § 1331.[45] This ambiguity is exacerbated by the fact that the statute repeats the

41. Some commentators have noted that it is unlikely that Congress would have any intent with respect to the scope of federal question jurisdiction when enacting a statute that is silent on the matter. *See, e.g.*, Redish, *supra* note 21, at 1790–91 (arguing that the Court in *Merrell Dow* "attempted to discern congressional intent for the wrong statute").

42. The federal question statute was passed in the Judiciary Act of 1875, 18 Stat. 470 (1875). MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER, 83 n.4 (2d ed. 1990). Prior to 1875, "Congress granted original federal-question jurisdiction briefly in the Midnight Judges Act, ch. 4, § 11, 2 Stat. 92 (1801), which was repealed in 1802, Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132." *Merrell Dow*, 478 U.S. at 826 n.5 (Brennan, J., dissenting).

43. *See* Luneberg, *supra* note 39, at 763 ("[I]t is unlikely that Congress in 1875 thought in a specific or general way about the type of case presented . . . in *Thompson* and formed an intent one way or the other.").

44. *See* NORMAN J. SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:01 (6th ed. 2000) (discussing the "plain meaning" rule); *see also* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 229–33 (1975) (discussing and criticizing the "plain meaning" rule). "The plain meaning rule has many formulations, but its essential aspect is a denial of the need to 'interpret' unambiguous language." Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975).

45. *See supra* note 1 (quoting § 1331). Justice Holmes may have been attempting a "plain meaning" approach in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916), when he wrote that "[a] suit arises under the law that creates the cause of action." *Id.* at 260. As Professor Cohen points out, however, Justice Holmes's reasoning could have easily led to the opposite result in *American Well Works* itself. *See* William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 898 (1967). Although the *Grable* Court rejected the *American Well Works* test, *see* Grable Metal Prods., Inc. v. Darue Eng'g & Mfg., 125 S. Ct. 2363, 2369–70 (2005), Justice Thomas's concurrence in *Grable* suggests the possibility that the Holmes formulation has life left in it yet, *see id.* at 2372 (Thomas, J., concurring) (suggesting a willingness to overrule prior cases in favor of the "clear" *American Well Works* rule).

language of the *constitutional* grant of federal question jurisdiction,[46] which courts have consistently interpreted as providing broader jurisdiction than § 1331 itself.[47]

Reference to legislative history is also of little help. The limited record surviving from the enactment of § 1331's predecessor statute[48] suggests that the drafters of the federal question statute intended to confer the full authority of the constitutional grant of federal question jurisdiction.[49] Indeed, one of the drafters of the bill that became § 1331 said in colloquy that the federal question statute, unlike previous jurisdictional statutes, "gives precisely the power which the Constitution confers—nothing more, nothing less."[50] This conflict between the apparent intent of the Congress that passed what is now § 1331 and the courts' subsequent treatment of the statute, combined with the ambiguity of the statute's language, suggests that a traditional analysis of Congress's intent in enacting § 1331 will likely

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46. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, *arising under* this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." (emphasis added)).

47. *See, e.g.*, *Merrell Dow*, 478 U.S. at 807 ("[W]e have long construed the statutory grant of federal-question jurisdiction as conferring a more limited power [than the constitutional grant]."); *see also* Ray Forrester, *The Nature of a "Federal Question,"* 16 TUL. L. REV. 362, 364 (1942) (noting that courts have given the words "arising under" different meanings—"one for the Constitution, another for the statute"). The constitutional meaning of the "arising under" phrase can be found in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), in which Chief Justice Marshall wrote that a case arises under federal law whenever a federal question "forms an ingredient of the original cause . . . although other questions of fact or of law may be involved in it." *Id.* at 822. Even scholars advocating broad grants of federal jurisdiction find the *Osborn* rule untenable as a test for the scope of statutory federal question jurisdiction. *See* REDISH, *supra* note 42, at 94.

48. *See supra* note 42 (discussing the Judiciary Act of 1875).

49. *See* Forrester, *supra* note 47, at 374–77 (discussing congressional debates and contemporary writing on the Judiciary Act of 1875).

50. *Id.* at 375 (emphasis omitted) (quoting 2 CONG. REC. 4986–87 (1874) (statement of Sen. Carpenter)). Arguably, Congress's continued inaction—the relevant "arising under" language has not changed since the enactment of the original 1875 statute, *compare* Judiciary Act of 1875, ch. 137, § 2, 18 Stat. 470 (1875), *with* 28 U.S.C. § 1331 (2000)—in the face of decisions interpreting § 1331 more narrowly than the Article III grant of federal question jurisdiction suggests that Congress has accepted the distinction in the scope of statutory and constitutional federal question jurisdiction. *Cf.* HOWARD P. FINK ET AL., FEDERAL COURTS IN THE 21ST CENTURY: CASES AND MATERIALS 295 (1996) (suggesting that the well-pleaded complaint rule is firmly entrenched because of Congress's disinclination to change the rule by statute). Even assuming the validity of this ratification argument, the only direct evidence of congressional intent with regard to the scope of statutory federal question jurisdiction is ambiguous at best and contradictory at worst. *See* Forrester, *supra* note 47, at 374 (noting the conflict between the apparent intent of the Congress of 1875 and the courts' interpretation of the federal question statute).

do little more than frustrate lower courts faced with the question of whether to exercise federal question jurisdiction over hybrid claims.

The *Grable* opinion compounds this confusion by sending mixed messages on where courts should look for congressional intent. In discussing the role that the absence of a federal remedy under the FDCA played in the *Merrell Dow* decision, the *Grable* Court noted that the "primary importance [of the absence of a federal remedy] emerged when the Court treated the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331."[51] Thus, the *Grable* Court seems to agree with—or at least acquiesce in—the *Merrell Dow* Court's conclusion that Congress's decisions in enacting the FDCA indicated its intent with respect to a wholly different statute: § 1331.[52] This acquiescence creates some problems with the structure of the two-prong *Grable* test.

The first prong, requiring a substantial federal issue,[53] seems to be the proper home for analysis of Congress's intent with respect to the embedded federal issue. The second prong, requiring that an exercise of jurisdiction comports with Congress's intended "division of labor between state and federal courts,"[54] is styled as an examination of what Congress intended to be the general parameters of federal question jurisdiction, which should be found in § 1331.[55] Yet the Court accepts that this second half of the inquiry can proceed from an analysis of the substantive statute embedded in the plaintiff's claim.[56] A more honest articulation of the federal question test would admit that Congress has, by no means, created a bright line demarcating the "sound division of labor between state and federal

51. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 125 S. Ct. 2363, 2370 (2005).

52. The *Grable* Court's apparent acquiescence in the *Merrell Dow* theory of congressional intent—that Congress's remedial intent is a valid proxy for its jurisdictional intent—leaves open the possibility that lower courts will continue to find the absence of a federal remedy to be dispositive in the jurisdictional inquiry, in spite of the Court's instructions to the contrary. *See id.* at 2370 (describing the presence or absence of a federal remedy as "evidence relevant to, but not dispositive of" Congress's jurisdictional intent).

53. *See id.* at 2367.

54. *See id.*

55. *See id.*

56. *See id.* at 2370 (stating that the "primary importance" of the absence of a federal remedy in *Merrell Dow* was in providing a "clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331").

courts governing the application of § 1331"[57] and that jurisdictional decisions in particular cases must follow from the nature of the particular federal interest at stake.

This federal interest analysis does not require courts to assess the relative importance of federal statutes, but rather to assess the federal interest in adjudicating particular disputes in federal court. This assessment should follow from the relationship of the particular federal issue raised by the plaintiff's complaint to the potential advantages provided by a federal forum.[58] One commentator describes these advantages as including "(1) an expertise in discerning and interpreting federal interests, (2) a sympathetic, but respectful, national perspective, (3) the potential for uniform interpretation of federal law, and (4) the impartiality and confidence afforded by independence."[59] The facts of *Grable* and *Merrell Dow* show that the federal interest in providing these advantages for the disputes in each case was greater in the context of *Grable* than in *Merrell Dow*.

Interpretations of the FDCA provisions at issue in *Merrell Dow* primarily affect private parties—manufacturers and distributors of food, drugs, and cosmetics—subject to the statute's branding rules.[60] While the Food and Drug Administration ("FDA") has primary responsibility for enforcing the FDCA,[61] the parties most affected by the FDCA will always be private parties whose rights are altered by the FDCA's provisions allowing for injunctions,[62] criminal penalties

57. *Id.* at 2367. It has become a truism in federal court cases and scholarly literature that bright-line rules of general applicability cannot capably comprehend the proper scope of federal question jurisdiction. *See id.* at 2368 (noting that the Court has refrained from stating a single, all-encompassing test for jurisdiction over hybrid claims); Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 810 (1986) (stating that courts have a " 'duty to reject treating [jurisdictional] statutes as a wooden set of self-sufficient words' " (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 (1959)); Cohen, *supra* note 45, at 907 ("What is surprising is the continuing belief that there is, or should be, a single, all-purpose, neutral analytical concept which marks out federal question jurisdiction.").

58. *See Grable*, 125 S. Ct. at 2367 ("[F]ederal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.").

59. Alleva, *supra* note 2, at 1495–96; *see also Grable*, 125 S. Ct. at 2367 (describing the advantages of a federal forum as "experience, solicitude, and hope of uniformity . . . on federal issues"); AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164–68 (1969) (discussing advantages similar to those listed by Professor Alleva as justifications for federal question jurisdiction).

60. The FDCA prohibits the introduction, delivery, or receipt of "adulterated or misbranded" drugs. 21 U.S.C. § 331(a)–(c) (2000).

61. *See id.* § 393 (creating the FDA and establishing its general mission); *Merrell Dow*, 478 U.S. at 830 (Brennan, J., dissenting).

62. § 332(a).

including fines and imprisonment,[63] and seizure of goods.[64] In stark contrast, the notice of seizure requirement in the statute at issue in *Grable* directly affects the federal government's ability to collect revenue by prescribing the procedure the IRS must follow in enforcing tax liens.[65] Unlike the FDCA, which prescribes duties of private parties, the tax provision at issue in *Grable* imposes a duty on an arm of the federal government.[66] In the sense that resolution of the federal issue raised by the plaintiffs' complaint could affect federal interests, the federal issue at stake in *Grable* was much more significant than the issue at stake in *Merrell Dow*.[67]

While the potential for uniform interpretation may support the exercise of jurisdiction in both cases,[68] over-reliance on the uniformity factor would support the expansion of federal jurisdiction unnecessarily, as *any* issue of federal law, no matter how minor, might conceivably benefit from the potential for uniform interpretation in the federal courts.[69] Given the government's greater interest in the

63. *See id.* § 333(a).

64. *See id.* § 334(a)–(b).

65. *See* 26 U.S.C. § 6335(a); Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 125 S. Ct. 2363, 2368 (2005).

66. *See Grable*, 125 S. Ct. at 2368.

67. Both the tax statute at issue in *Grable* and the FDCA provisions at issue in *Merrell Dow* are, arguably, part of legislative schemes that permit the government to punish citizens for noncompliance with statutory duties. The tax code permits the government to seize citizens' property for failure to pay taxes, *see* 26 U.S.C. § 6331, and the FDCA permits the government to seize goods and impose fines for citizens' violations of branding requirements, *see* 21 U.S.C. § 334 (seizure); *id.* § 333 (fines). Nevertheless, the federal interest in the particular section of tax code at issue in *Grable* was greater than the federal interest in the FDCA misbranding provisions at issue in *Merrell Dow* because the notice of seizure requirements impose a duty on the government itself that effectively limits its ability to collect revenue. *See* 26 U.S.C. § 6335; *Grable*, 125 S. Ct. at 2368.

68. Numerous state courts adjudicating tort claims involving the FDCA provisions at issue in *Merrell Dow* could, in theory, produce conflicting precedents among the states on the meaning of manufacturers' duties under the FDCA, just as numerous state courts adjudicating quiet title claims involving the notice-of-tax-seizure provision at issue in *Grable* could produce conflicting precedents among the states on the procedure the IRS must follow in executing its right to seize property from delinquent taxpayers. Of course, the same potential for conflicting precedent exists in the federal system in the form of conflicts among the circuits, leading Professor Alleva to note that "the uniformity goal for the lower courts is often more aspirational than achievable." Alleva, *supra* note 2, at 1497 n.55.

69. *See* REDISH, *supra* note 42, at 101 (noting that "Congress may have a legitimate interest in preventing precedential confusion caused by the dramatic increase in the number of interpreting courts" if cases like *Merrell Dow* are remanded to state courts). Furthermore, the possibility of Supreme Court review of state court decisions limits the persuasiveness of this factor in the jurisdictional inquiry. *See* Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 816 (1986) (noting that concerns for uniformity of interpretation are "considerably mitigated by the fact that, even if there is no original district court

outcome of litigation involving a duty of the IRS as compared to litigation involving duties of private parties, the federal interest in providing the expertise found in a federal forum appears stronger in *Grable* than in *Merrell Dow*. The relative importance of providing a federal forum in *Grable* as opposed to *Merrell Dow* becomes even clearer when one considers the advantages of impartiality and sympathy for national issues. In cases involving provisions of the tax code, the risk arises that state-court judges brought to the bench by election and not insulated from the political process by life tenure and the insurance of a non-declining salary would decide cases such as *Grable* in favor of constituent taxpayers.[70]

It appears, then, that the outcomes of *Merrell Dow* and *Grable* can be reconciled simply by reference to the significance of the federal issues at stake in the two cases.[71] The Court in *Grable* relied in large part on the federal interest in providing a forum for adjudication of tax-related matters to justify the exercise of federal jurisdiction.[72] In reconciling its decision with the holding of *Merrell Dow*, however, the Court went one step further and noted that "exercising federal jurisdiction over a state misbranding action [in *Merrell Dow*] would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues."[73] The Court saw the exercise of jurisdiction in *Grable* as unlikely to overwhelm the federal courts because "it is the rare state quiet title action that involves contested issues of federal law."[74] The

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jurisdiction for these kinds of action, [the Supreme] Court retains power to review the decision of a federal issue in a state cause of action"). One commentator has suggested that the federal question analysis should include consideration of the relative efficiency of appellate versus original jurisdiction in achieving the desired uniformity of interpretation. *See* Marshall, *supra* note 3, at 241.

70. *Compare* U.S. CONST. art. III, § 1 (stating that federal judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"), *with* RICHARD POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM, 38–39 (1996) (noting that "in most states all or most state judges are elected rather than appointed"). Admittedly, the dispute in *Grable* was between two private parties, but the outcome of the dispute hinged on the Court's interpretation of the IRS's duty to notify taxpayers of its enforcement action, thus pitting the interests of a taxpayer against the interests of the IRS. *See Grable*, 125 S. Ct. at 2368.

71. A similar analysis is sufficient to reconcile two pre-*Merrell Dow* cases—*Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) and *Moore v. Chesapeake & Ohio Railway Co.*, 291 U.S. 205 (1934)—long thought to be irreconcilable. *See Merrell Dow*, 478 U.S. at 814 n.12 ("[T]he difference in results [in *Smith* and *Moore*] can be seen as manifestations of the differences in the nature of the federal issues at stake.").

72. *See Grable*, 125 S. Ct. at 2368.

73. *Id.* at 2370.

74. *Id.* at 2371.

Grable Court was therefore clearly concerned with how a grant of federal jurisdiction to a particular class of hybrid claims would affect the caseload of the lower federal courts.[75]

This reconciliation of *Grable* and *Merrell Dow* is best viewed as a balancing test wherein the Court weighs the federal interest in providing a forum against the competing interest in avoiding excessive burdens on the federal docket.[76] Lower courts may well see this balancing analysis as the appropriate application of *Grable*, ignoring the problematic two-prong test discussed earlier in this Recent Development.[77] One might also argue that if the Court's references to congressional intent regarding the "division of labor between state and federal courts"[78] are seen as a direction to consider the effect of a jurisdictional decision on the federal docket, then the two-prong test articulated and the balancing test applied in *Grable* are consistent.[79] Either way, the pragmatically oriented balancing test is the more useful of the two and finds strong support in the history of federal question jurisprudence, as the following discussion illustrates.

Concern for the burden on federal courts caused by an increasing caseload is by no means new. Some commentators have suggested that the Supreme Court's 1900 decision in *Shoshone Mining Co. v. Rutter*[80] was driven by "concern[s] with the volume of litigation which a contrary decision would have loosed upon federal trial courts overburdened by the expansion of jurisdiction caused by the Judiciary

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75. *See id.*

76. Professor David Shapiro suggested such a balancing test twenty years prior to *Grable*. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 570 (1985) (arguing that the outcomes in hybrid claim cases "may be better understood if viewed in terms of the federal interest at stake and the effect on the federal docket"). The relevance of the docket-load factor has been prominent in some early decisions from lower courts applying *Grable*. *Compare* Broder v. Cablevision Sys. Corp., 418 F.3d 187, 196 (2d Cir. 2005) (finding § 1331 jurisdiction over the plaintiff's hybrid claim proper under *Grable* because similar suits "are particularly unlikely to recur"), *with* Sheridan v. New Vista, L.L.C., No. 1:05-CV-428, 2005 WL 2090898, at *4 (W.D. Mich. Aug. 30, 2005) (finding § 1331 jurisdiction improper because exercising jurisdiction in the instant case would have made it possible to invoke federal question jurisdiction over "fairly routine state law malpractice claims").

77. *See supra* notes 36–57 and accompanying text (discussing the difficulties posed by the two-prong *Grable* test).

78. *Grable*, 125 S. Ct. at 2367.

79. Some of the language of *Grable* supports this conclusion. After discussing the federal interest in providing a forum for Grable's quiet title claim, the Court—presumably, but not expressly, moving on to the second prong of the test it articulated earlier in the opinion—noted that "federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor." *Id.* at 2368.

80. 177 U.S. 505 (1900).

Act of 1875."[81] *Shoshone* involved a dispute over mining rights in which the cause of action was created by a federal statute stating that disputes over mining rights could be resolved "in a court of competent jurisdiction"[82] by reference to local customs of miners.[83] In spite of the fact that federal law created the cause of action, the Court found jurisdiction lacking in part because the dispute could be resolved by reference to local standards alone, thus eliminating the need to interpret federal law.[84] Furthermore, the Court recognized that not every case involving a federally created land right could be adjudicated in the federal system.[85]

The same concerns for the federal docket that appear to have motivated the *Shoshone* decision find some empirical support in the context of modern civil litigation in the federal courts. As Judge Posner has noted, between 1960 and 1983 the number of "pure civil cases" filed in federal district courts increased "more than 330 percent."[86] The *Grable* Court's discussion of the burden on the federal courts that exercising jurisdiction would have posed in *Merrell Dow* as compared to *Grable* itself[87] was thus not a shocking—or even surprising—move.

Pragmatic judgments to exercise or refrain from exercising jurisdiction will have implications beyond the individual case.[88] As Professor Cohen pointed out in 1967, "the process is not simply case-by-case decision making, with each case standing on its own bottom, but rather a process of clarifying jurisdictional uncertainty in classes of cases before the court."[89] This view of individual jurisdictional decisions as affecting *classes* of cases provides the basis for the fear

81. Cohen, *supra* note 45, at 903; *see also* Shapiro, *supra* note 76, at 570 (noting that "[c]ases like *Shoshone* must have arisen with monotonous regularity at the turn of the century, but the degree of federal interest in an outcome dependent on local custom was marginal at best").

82. *Shoshone*, 177 U.S. at 506.

83. *Id.* at 508.

84. *See id.* at 508–09 ("The recognition by Congress of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of federal law.").

85. *Id.* at 513. The *Grable* Court pointed to *Shoshone* as "an extremely rare exception to the sufficiency of a federal right of action." Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 125 S. Ct. 2363, 2370 n.5. (2005).

86. POSNER, *supra* note 70, at 59.

87. *See supra* notes 72–75 and accompanying text.

88. *See* Cohen, *supra* note 45, at 908–09 ("[N]o matter how close the pragmatic judgment in a particular case, once made it is bound to decide more than just the case before the court.").

89. *Id.* at 908–10. For Professor Cohen, this clarifying effect was one of the great benefits of pragmatic decisionmaking. *See id.*

that exercising jurisdiction over a single plaintiff's hybrid claim could potentially overwhelm the courts with similar claims.

At least one commentator in the period between *Merrell Dow* and *Grable* suggested that the problems posed by *Merrell Dow*'s remedy-focused formulation of the test for § 1331 jurisdiction could be resolved by reference to pragmatic factors, including the potential effect on the federal docket of exercising jurisdiction in a particular case.[90] The notion that federal courts should have fairly broad discretion in the decision to exercise jurisdiction receives significant support in literature about the federal courts,[91] but it is by no means universally accepted. Professor Redish, for one, has expressly and emphatically disavowed the validity of "the interest in avoiding undue congestion of the federal court dockets" in jurisdictional decisions.[92] Given the vagueness of the language of § 1331 and the role of the district courts as front-line arbiters of jurisdictional questions, the statute necessarily confers some discretionary power on the district courts. It is the amount and nature of this discretionary power that

90. *See* Marshall, *supra* note 3, at 241 (arguing that "[p]ragmatic considerations should form the crux of the jurisdictional analysis in state-federal hybrid claims" and noting that "concern is warranted over the potential for overwhelming the federal docket if courts obtain original jurisdiction over a class of claims"); *see also* Luneburg, *supra* note 39, at 769–70 (discussing the role that concerns for docket load may have played in the *Merrell Dow* decision).

91. *See, e.g.*, Shapiro, *supra* note 76, at 545 (arguing that judicial discretion in jurisdictional decisionmaking "is wholly consistent with the Anglo-American legal tradition"); *see also* Alleva, *supra* note 2, at 1481–82 (noting that the Supreme Court has given federal district courts "considerable discretion within the broader congressional directive to determine the jurisdictional sufficiency of hybrid actions").

92. Redish, *supra* note 21, at 1785–86. In Professor Redish's view,

> [t]he federal courts do not exist for the purpose of clearing their dockets. They exist to unify the federal system, to interpret and enforce federal law, and to prevent interstate prejudices and allegiances from balkanizing the nation. If the commitment of significant resources is required to accomplish this goal, then so be it.

Id. at 1786.

The dissenters in *Merrell Dow* also weighed in on this issue, arguing that "while the increased volume of litigation may appropriately be considered in connection with reasoned arguments that justify limiting the reach of § 1331, . . . the day has [not] yet arrived when this Court may trim a statute solely because it thinks that Congress made it too broad." Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 829 (1986) (Brennan, J., dissenting). A resolution of this broader issue—whether caseload factors *should* have a place in jurisdictional decisions—is beyond the scope of this Recent Development, which accepts, as a matter of positive law, that caseload factors *do* have a place in jurisdictional decisions after *Grable*.

Yet another commentator has suggested that judicial discretion in jurisdictional decisions often ends up wasting time and money. *See* Note, *supra* note 22, at 2279–80.

causes disagreement among scholars. Regardless of one's opinion on the normative issue of whether caseload factors *should* play a role in jurisdictional decisions, the positive law on this point is clear. *Grable* grants district courts deciding cases on the fringes of § 1331 discretion to consider the burdens on the federal docket that might result from exercising jurisdiction over a class of cases like the one at bar. Application of the *Grable* balancing test in two pre-*Merrell Dow* cases—*Smith v. Kansas City Title & Trust Co.*[93] and *Moore v. Chesapeake & Ohio Railway Co.*[94]—shows that this pragmatic balancing test could produce consistent jurisdictional results in even the most difficult hybrid claim cases.[95]

Smith involved a shareholder's suit to prevent a bank from investing in bonds issued under the Federal Farm Loan Act.[96] The plaintiff alleged that the loan act authorizing the bonds was unconstitutional.[97] The Federal Farm Loan Act was a complicated statute providing for the creation of Federal Land Banks, which issued loans for the purchase of farm lands.[98] The Act also authorized Federal Land Banks to sell bonds and make interest from these bonds exempt from federal, state, and local taxation.[99] The plaintiffs alleged that Congress lacked power to create the Federal Land Banks and exempt the banks' bonds from taxation.[100] The Supreme Court, raising the jurisdictional question sua sponte,[101] determined that jurisdiction was proper because any decision in the case depended on the determination of the constitutional validity of a federal statute.[102]

In *Moore*, a railroad employee sued his employer under the Kentucky Employers' Liability Act for injuries allegedly caused by defective equipment.[103] The Kentucky statute incorporated by

93. 255 U.S. 180 (1921).

94. 291 U.S. 205 (1934).

95. The majority in *Merrell Dow* noted that the "widely perceived 'irreconcilable' conflict" between the outcomes in *Smith* and *Moore* could be understood by reference to the "nature of the federal issues at stake." *See Merrell Dow*, 478 U.S. at 814 n.12. The dissenters conceded that such an analysis could reconcile the two cases, but "only because a test based upon an ad hoc evaluation of the importance of the federal issue is infinitely malleable." *See id.* at 822 n.1 (Brennan, J., dissenting).

96. *Smith*, 255 U.S. at 195; *see* Federal Farm Loan Act, Pub. L. No. 64-158, 39 Stat. 360 (1916).

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

98. *See id.* at 202–03.

99. *See id.* at 207.

100. *See id.* at 198.

101. *See id.* at 199 ("No objection is made to the federal jurisdiction, either original or appellate, by the parties to this suit, but that question will be first examined.").

102. *See id.* at 201.

103. *See* Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205, 207–08 (1934).

reference the terms of the Federal Safety Appliance Acts.[104] Under the Kentucky statute, a violation of the standards set forth in the federal safety laws constituted negligence per se and eliminated the defenses of contributory negligence and assumption of risk.[105] The Supreme Court found federal question jurisdiction lacking, relying on the fact that the plaintiff's suit was in essence a state-law tort action.[106]

The difference in the federal interest in adjudicating the two cases is apparent from the bare fact that the plaintiff in *Smith* asked the court to strike down a federal statute as unconstitutional[107] while the plaintiff in *Moore* merely asked the court to find that a private party had violated a duty imposed by a federal statute.[108] It is also readily apparent that opening the door of the federal courthouse to the class of claims represented by *Moore*—state tort actions incorporating a duty imposed on employers by federal law—could result in a significant increase in federal cases.[109] The class of claims represented by the *Smith* case, on the other hand, is likely to be relatively small,[110] including only those cases where the constitutional validity of an act of Congress is directly challenged, with that constitutional challenge serving as the primary basis for the plaintiff's claim. Furthermore, once decided, *Smith* would determine the constitutionality of the Federal Farm Loan Act for good,[111] while cases like *Moore* could recur indefinitely, with courts refining and revising the scope of an employer's duty under the Federal Safety

104. *Id.* at 213.

105. *See id.* The plaintiff in *Moore* also alleged a violation of the Federal Employers' Liability Act. *Id.* at 208. The Federal Employers' Liability Act, like the Kentucky act, incorporated the standards of the Federal Safety Appliance Acts. *Id.* at 210.

106. *See id.* at 216–17. Notably, the Court sustained jurisdiction over this same claim on diversity grounds, and sustained jurisdiction over a second claim under the Federal Employers' Liability Act on federal question grounds. *See id.* at 210–11.

107. *See Smith*, 255 U.S. at 195.

108. *See Moore*, 291 U.S. at 207–08.

109. *See, e.g.*, 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 17.6 (2d ed. 1986) (noting "the ever-growing number of regulatory statutes that are drawn into accident litigation" to establish tort liability). This is precisely the point the *Grable* Court made about *Merrell Dow*. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 125 S. Ct. 2363, 2370 (2005) ("[E]xercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues.").

110. *See* Cohen, *supra* note 45, at 906 (noting that "there is little reason to fear that the sustaining of jurisdiction in [the] class of litigation [represented by *Smith*] would add significantly to the workload of an overburdened federal judiciary").

111. *See* Note, *supra* note 22, at 2288 (noting that a decision on the constitutionality of the Act would determine " 'the continued vitality of the statute' " (quoting Arther R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX L. REV 1781, 1788 (1998))).

Appliance Acts. Thus, the pragmatic caseload factor would weigh strongly against the federal interest in providing a forum in *Moore*, while in *Smith*, the federal interest in providing a forum would easily outweigh the potential burden on the federal docket caused by filings of similar cases.

In most federal cases where subject matter jurisdiction is grounded on § 1331, federal law creates the cause of action, and disposes of the jurisdictional question with relative ease.[112] Close cases presenting mixed issues of state and federal law, however, force district courts to confront a confusing line of cases in which the Supreme Court's attempts to articulate an all-purpose, bright-line test for the § 1331 inquiry have consistently failed. *Grable*'s two-prong test, with its misleading instruction to conform jurisdictional decisions to congressional intent regarding the division of labor between state and federal courts,[113] does not advance the state of the law in this area. Fortunately, the Court's reconciliation of its holdings in *Grable* and *Merrell Dow* offers an example of the kind of functional, pragmatic analysis that can lead to consistent and intelligible jurisdictional results in difficult hybrid claim cases.[114] *Grable*'s balancing test, by pitting the federal interest in providing a forum against the risk of overwhelming the federal docket, provides district courts with the proper measure of guidance and discretion necessary to allow realization of the goals of federal question jurisdiction.

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112. *See, e.g.*, *Grable*, 125 S. Ct. at 2366 (noting that § 1331 "is invoked by and large by plaintiffs pleading a cause of action created by federal law"); *see also* Cohen, *supra* note 45, at 905–06 ("The bulk of federal civil litigation in the federal courts presents no jurisdictional problem. Routine federal question litigation arises under federal statutes which not only create federal causes of action but contain special grants of jurisdiction as well.").

113. *See Grable*, 125 S. Ct. at 2368.

114. *See id.* at 2369–71.