NO WELCOME MAT, NO PROBLEM?: FEDERAL-QUESTION JURISDICTION AFTER *GRABLE*

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I. INTRODUCTION

Federal-question jurisdiction has always been an elusive concept at its boundaries. The amorphous, jurisdiction-granting words of 28 U.S.C. § 1331 are: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[1] The key words, "arising under," have proven to be two of the more versatile words in the English language. They mean different things in different contexts, and over time, they have evolved to mean very different things even in the same context. Last term, in *Grable & Sons Metal Products, Inc. v. Darue Engineering &*

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[1] 28 U.S.C. § 1331 (1993).

Manufacturing,[2] the Supreme Court issued the latest edition of its "arising under" dictionary. This Article is a guide to that edition. In this Article, I will attempt to provide a framework for determining whether federal-question jurisdiction is present. While there is much to debate regarding what the law in this area should be, this Article avoids that question and instead endeavors to synthesize the current state of the law after *Grable*.

Having clarified the Article's purpose, I must offer some preliminary warnings. Federal-question jurisdiction cannot be understood without its theoretical and historical contexts. While many cases present easily identifiable federal questions, the boundaries of federal-question jurisdiction "require sensitive judgments about congressional intent, judicial power, and the federal system."[3] And while the new edition modifies the definition of "arising under," the cases decided under earlier editions retain much significance, and understanding them is crucial to understanding *Grable*'s new four-prong edition. Accordingly, I will trace the evolution of the doctrine and policy, which ultimately must shape the interpretation of the *Grable* edition. I will explore, in depth, the four-prong test, synthesizing the earlier case law and highlighting both ambiguities and potential problems within the new test. Ultimately, I will conclude that the *Grable* edition admirably answers more questions than it creates.

This Article proceeds in six parts. In Part II, I will outline the basic structure of the subject-matter-jurisdiction inquiry.[4] There, I will explain the structure of Article III of the Constitution, the significance of its use of the words "arising under," and the interrelationship between those words in the Constitution and the same words in § 1331. In Part III, I will trace the pre-*Grable* interpretation of the federal-question statute to provide the necessary context for understanding *Grable* at a more than superficial level.[5] In Part IV, I will detail the *Grable* decision and how it both arrived at and applied its new four-prong test.[6] Finally, in Part V, I will analyze the four-

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[2] 125 S. Ct. 2363 (2005).

[3] Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 810 (1986).

[4] *See* discussion *infra* Part II.

[5] *See* discussion *infra* Part III.

[6] *See* discussion *infra* Part IV.

prong test and provide a framework for applying it to future cases.[7]

II. THE BASIC STRUCTURE: HOW ARTICLE III AND § 1331 INTERRELATE

Article III, Section 2 of the Constitution provides that the judicial power "shall extend" to certain categories of cases or controversies, known as the heads of jurisdiction.[8] Despite the "shall extend" language, Article III is not a self-executing grant of jurisdiction to the lower federal courts.[9] That is, Article III confers no jurisdiction on the federal district courts.[10] To have subject-matter jurisdiction, the federal district courts need congressional authorization.[11] What purpose, then, do the heads

[7] *See* discussion *infra* Part V.

[8] 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;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State [modified by the 11th Amendment];—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, of the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

[9] *See* Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 807 (1986); Cary v. Curtis, 44 U.S. 236, 245 (1845).

[10] *See Merrell Dow*, 478 U.S. at 807; *Cary*, 44 U.S. at 245; John T. Parry, *No Appeal: The U.S.-U.K. Supplementary Extradition Treaty's Effort To Create Federal Jurisdiction*, 25 LOY. L.A. INT'L & COMP. L. REV. 543, 561–62 (2003). In contrast to lower federal court jurisdiction, Article III's grants of jurisdiction to the Supreme Court are self-executing. *See* Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 23–24 (1981).

[11] *Cary*, 44 U.S. at 245.

> [T]he judicial power of the United States, although it has its origins in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

Id.; *see also* Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) ("Federal Courts are not courts of general jurisdiction; they have only the power that

of jurisdiction serve in Article III, Section 2? The heads of jurisdiction define the limits on *Congress's* power to confer jurisdiction on the federal courts.[12] In other words, Article III, Section 2 defines the maximum reach of the federal judicial power—it sets the limits on what jurisdiction Congress can give its courts.[13] When Congress confers jurisdiction on the federal courts, it must be able to point to one of the heads of jurisdiction as authorizing that particular grant. Thus, determining subject-matter jurisdiction is a two-step process. First, did Congress confer jurisdiction? Second, if Congress did confer jurisdiction, did Congress have the power under Article III, Section 2 to confer that jurisdiction?

Rarely will jurisdictional fights involve the second step. Modern federal-question litigation almost always concerns the scope of the congressional authorization, § 1331. This Article also focuses on the meaning of the congressional authorization. But because § 1331 and Article III, Section 2 use the same "arising under" phrase, distinguishing the two steps is needed, if for no other reason than to prevent confusion.

Article III, Section 2 gives Congress broad power to confer jurisdiction in cases "arising under" the Constitution and laws of the United States.[14] The Constitution allows Congress to confer jurisdiction on the federal courts when a federal issue is merely a potential ingredient of the case—even if the federal issue is not likely to be disputed.[15] *Osborn v. Bank of the United States* illustrates the breadth of congressional power.[16] In *Osborn*, Congress had authorized federal jurisdiction over all suits by or against the Bank of the United States.[17] The Court held that

is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.").

[12] *See* Mesa v. California, 489 U.S. 121, 136 (1989); Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 491 (1983); Sheldon v. Sill, 49 U.S. 441, 449 (1850) ("The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised [by the lower federal courts].").

[13] *See* Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 711 (1997).

[14] 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 . . . .").

[15] *See* Osborn v. Bank of the United States, 22 U.S. 738, 823–24 (1824).

[16] *See id.* at 823.

[17] *See id.* at 817.

Congress had the authority, under the "arising under" head of jurisdiction, to confer federal jurisdiction even in a garden-variety breach-of-contract suit against the Bank, because federal law created the Bank and its right to contract, and because a question about that authority could potentially be raised in any suit against the Bank.[18] While the Supreme Court has never defined the precise boundaries of this power,[19] *Osborn* and its progeny demonstrate an impressive breadth.

The federal-question statute uses the same "arising under" phrase, but the statute requires far more than federal law being merely a potential ingredient in the case.[20] Although some legislative history suggests that Congress may have intended to confer all its power when it passed § 1331, and thus extend jurisdiction to every case in which federal law forms a potential ingredient,[21] the Court has construed the language much more

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[18] *See id.* at 823–25.

[19] Scholars have long debated a theory of so-called "protective jurisdiction." *See, e.g.*, Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169 (1990); Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism, and the Federal Courts*, 54 FLA. L. REV. 361, 363–64 (2002). The Supreme Court has been less interested than the scholars. *See* Mesa v. California, 489 U.S. 121, 137 (1989) ("We have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction, and we do not see any need for doing so here . . . .") (citation omitted).

[20] *See* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8 n.8 (1983).

> The statute's "arising under" language tracks similar language in Art. III, § 2, of the Constitution, which has been construed as permitting Congress to extend federal jurisdiction to any case of which federal law potentially "forms an ingredient," and its limited legislative history suggests that the 44th Congress may have meant to "confer the whole power which the Constitution conferred." Nevertheless, we have only recently reaffirmed what has long been recognized—that "Article III 'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331."

Id. (citations omitted).

[21] *Id.* In the legislative history accompanying § 1331, Senator Carpenter remarked:

> The Constitution says that certain judicial powers shall be conferred upon the United States. The Supreme Court of the United States in an opinion delivered by Judge Story—I do not recollect now in what celebrated case it was, whether *Cohens vs. Virginia* or some of those famous cases—said that it is the duty of the Congress of the United States to vest all the judicial power of the Union in some Federal Court, and if they may withhold a part of it they may withhold all of it and defeat the Constitution by refusing or simply omitting to carry its provisions into execution. . . .
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> . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less. . . . [I]t seems to me that when Congress ought

narrowly.[22] The next Part explores the evolving meaning of the phrase "arising under" in § 1331.

III. SECTION 1331 AND "ARISING UNDER" BEFORE *GRABLE*

Grable clarified (or perhaps more accurately, modified) the test for when a case "arises under" federal law under § 1331. But *Grable*'s test cannot be fully understood without appreciating what came before it. Many pre-*Grable* cases remain important because they have been synthesized into the *Grable* test or address jurisdictional issues unchanged by *Grable*. Others are simply essential to understand some of *Grable*'s language and rationale.

This section proceeds in two parts. First, I will briefly outline the starting place for all § 1331 inquiries: the well-pleaded-complaint rule. The well-pleaded-complaint rule tells the court where to look to determine if a case arises under federal law. *Grable* does not directly impact this rule. Second, I will outline the underlying question that *Grable* addressed: what is the court looking for in the well-pleaded complaint? In other words, what kinds of federal issues in a well-pleaded complaint make the case one that arises under federal law?

A. Where To Look: The Well-Pleaded-Complaint Rule

The well-pleaded-complaint rule is a where-to-look rule. Under § 1331, a case does not "arise under" federal law unless the "plaintiff's statement of his own cause of action shows that it is based upon" the Constitution or laws of the United States.[23] This rule encapsulates two issues. First, to determine federal-question jurisdiction, a court can only look to the plaintiff's complaint, not to counterclaims or other claims by defendants.[24]

> to do what the Supreme Court said more than forty years ago it was its duty to do, vest the power which the Constitution confers in some court of original jurisdiction.

2 CONG. REC. 4986–87 (1874).

[22] *E.g.,* Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804 (1986) (assuming congressional preclusion of federal private remedies for violations of the Food, Drug and Cosmetic Act also precluded jurisdiction under § 1331); *Franchise Tax Bd.*, 463 U.S. 1 (1983) (holding cause not removable where a federal claim would only arise as a defense to a state cause of action).

[23] Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

[24] Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 830–31 (2002).

Second, the court can only look at the well-pleaded part of the plaintiff's complaint. The well-pleaded part includes only that part that is necessary to maintain a viable cause of action.[25] It includes neither defenses the plaintiff anticipates nor the plaintiff's responses to those anticipated defenses.[26]

The leading case is *Louisville & Nashville Railroad Co. v. Mottley*, which involved a breach-of-contract claim brought in federal court. [27] The Mottleys were injured on a railroad.[28] They then settled their negligence claims with the railroad and obtained lifetime passes on the railroad in exchange for their release.[29] The railroad stopped honoring the passes when Congress enacted a federal statute prohibiting certain free-transportation contracts.[30] The Mottleys sued the railroad in federal court, seeking specific performance of the contract.[31] In their complaint, the Mottleys argued that the federal statute did not apply to their contract, and alternatively, that if the statute did apply, it was unconstitutional as applied to the plaintiffs.[32] Although the Mottleys' allegations showed that "very likely, in the course of litigation, a question under the Constitution would arise, they [did] not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution."[33] Although the suit would likely require the Court to construe a federal statute and determine its constitutionality, those questions arose outside the well-pleaded complaint.[34] The questions appeared in the plaintiff's complaint, but not in the

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[25] *See* Gully v. First Nat'l Bank, 299 U.S. 109, 112 (1936); Bar J Sand & Gravel, Inc. v. W. Mobile N.M., Inc., No. Civ. 05-800JBWPL, 2005 WL 3663689, at *6 (D.N.M. Sept. 29, 2005) ("'[A]ny statements in the complaint which go beyond a statement of the plaintiff's claim . . . are to be disregarded' in deciding whether federal question jurisdiction exists." (quoting Mescalero Apache Tribe v. Martinez, 519 F.2d 479, 481 (10th Cir. 1975))); John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 76 TEX. L. REV. 1829, 1834–35 (1998).

[26] Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 840–41 (1989); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987); *see* Christopher A. Cotropia, *Counterclaims, the Well-Pleaded Complaint, and Federal Jurisdiction*, 33 HOFSTRA L. REV. 1, 7 (2004).

[27] 211 U.S. at 149.

[28] *Id.* at 150.

[29] *Id.*

[30] *Id.* at 150–51.

[31] *Id.* at 150.

[32] *Id.* at 151.

[33] *Id.* at 152.

[34] *Id.* at 153.

well-pleaded portion.[35] Rather, those questions appeared only as anticipated defenses or responses to anticipated defenses.[36]

The well-pleaded-complaint rule still survives, often eliminating federal jurisdiction in cases where the principal—or indeed only—contested question involves federal law.[37] For example, the well-pleaded-complaint rule prevents removal based upon the preclusive effect of a prior federal judgment[38] or a federal preemption defense.[39] Nor is federal jurisdiction properly based on the presence of a counterclaim created by federal law, even a compulsory one.[40] The Court has also extended the well-pleaded-complaint rule to the declaratory judgment context.[41]

As noted above, *Grable* does not alter the well-pleaded-complaint rule. The rule still tells us where to look to find the federal issues. *Grable* impacts the next step, determining what

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[35] *Id.* at 153–54.

[36] *Id.* at 154.

[37] *See generally* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717 (1986) (explaining that removal to a federal forum depends on whether the plaintiff could have invoked that forum); Richard E. Levy, Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 639 (1984) ("The well-pleaded complaint rule withdraws from original federal jurisdiction a large number of cases that eventually do turn on the validity of a federal defense, and such cases are within the purposes of federal question jurisdiction.").

[38] *See* Rivet v. Regions Bank of La., 522 U.S. 470, 476–77 (1998).

[39] Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 14 (1983) (finding removal to federal court inappropriate based upon a defense of preemption by federal law). One exception to the well-pleaded-complaint rule is the complete-preemption doctrine. As recently reformulated, the complete-preemption doctrine allows a defendant to remove a case when the plaintiff asserts a state-law claim that falls within the scope of an exclusively federal cause of action. Such a claim, we have learned, is really federal. *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9 (2003). Justice Scalia's dissent aptly notes the oddity of this "federalize-and-remove" exception to the well-pleaded-complaint rule. *Id.* at 18 (Scalia, J., dissenting).

[40] Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 832–34 (2002). Although *Vornado* was a case interpreting the congressional grant of patent jurisdiction under 28 U.S.C. § 1338, the analysis applies equally to § 1331. As the Court noted, "[i]t would be an unprecedented feat of interpretive necromancy to say that § 1338(a)'s 'arising under' language means one thing (the well-pleaded-complaint rule) in its own right, but something quite different (respondent's complaint-or-counterclaim rule) when referred to by § 1295(a)(1)." *Id.* at 833–34; *see also* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 807–10 (1988) (maintaining that a defense arising under patent law does not qualify for federal jurisdiction).

[41] *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673–74 (1950).

kind of federal issues in that well-pleaded complaint give rise to federal-question jurisdiction.

B. What To Look For: The Two Branches

Two distinct branches exist under § 1331. The first branch is common, uncontroversial, and easily applied. The second branch has created problems since its inception. Unsurprisingly, *Grable* is a second-branch case.

The so-called Holmes Test covers the first branch: the easy federal-question cases. It states that when federal law creates the cause of action that the plaintiff asserts, the case "arises under" federal law.[42] So, for example, if the plaintiff sues under 42 U.S.C. § 1983 or Section 4 of the Clayton Act,[43] jurisdiction is proper under § 1331because federal law created the cause of action. Similarly, a claim "arises under" federal law when federal common law creates the cause of action.[44]

Justice Holmes intended his test as one of exclusion. In his view, a suit arises *only* "under the law that creates the cause of action."[45] The test is as easily applied as it is stated. If state law creates a plaintiff's cause of action, the case arises only under state law, regardless of the presence of federal issues. Since § 1331 only grants jurisdiction in cases that arise under federal law, a state-law-created cause of action could never trigger § 1331 jurisdiction.[46] The Holmes Test has survived, but only as a test of *inclusion*. When federal law creates the plaintiff's cause of action, the case still "arises under" federal law.[47] Those are branch one cases.

Branch two was born when the Court rejected the Holmes Test as one of exclusion. In *Smith v. Kansas City Title & Trust*

[42] *See* Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).

[43] 15 U.S.C. § 15 (2000).

[44] *See* Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) ("We see no reason not to give 'laws' its natural meaning, and therefore conclude that § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.") (citation omitted).

[45] Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 215 (1921) (Holmes, J., dissenting).

[46] *See id.* at 214–15.

[47] Some have mentioned a possible narrow exception where even a claim created by federal law will not satisfy § 1331. *See* Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900). *Shoshone* has sparse modern progeny, and Professor Oakley has recently concluded that it did not actually involve a federally created cause of action at all. Oakley, *supra* note 26, at 1841 n.63.

Co., Smith filed a shareholder derivative suit under Missouri law in federal district court against a corporation.[48] Missouri law created a derivative cause of action that allowed shareholders to enjoin corporations from purchasing unlawful bonds.[49] Smith sought to enjoin the corporation from purchasing bonds authorized by the Federal Farm Loan Act of 1916 ("Act").[50] He alleged that those bonds were unlawful because the Federal Farm Loan Act was unconstitutional.[51] The Act's unconstitutionality was the only theory he offered to support his claim, and indeed was the only issue disputed in the case.[52] Thus, while Missouri state law created Smith's cause of action, his well-pleaded complaint necessarily raised a question of federal law as an element of that state law claim. The Court rejected the Holmes Test as one of exclusion and held that the case arose under federal law.[53] Thus, the second branch was born. The Holmes Test still works as a test of inclusion—when federal law creates the plaintiff's cause of action, the case arises under federal law—but even when state law creates the plaintiff's cause of action, the suit may arise under federal law if federal issues are embedded in the state law cause of action.

So what types of federal issues embedded in state-law claims make a case arise under federal law? *Smith* confirmed that there is a second branch but failed to define its boundaries.[54] In the years that followed, no precise definition appeared.[55] Essentially, the answer became a pragmatic one based on a certain amount of judicial intuition—the presence of a federal issue in a state-law

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[48] 255 U.S. 180, 195 (1921).

[49] *See* Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 125 S. Ct. 2363, 2367 (2005) (construing *Smith*).

[50] *Smith*, 255 U.S. at 195.

[51] *Id.*

[52] *See id.* at 199.

[53] *See id.* at 202.

[54] *See id.* at 213–15 (Holmes, J., dissenting).

[55] *See generally* William Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967) (analogizing federal question jurisdiction to a puzzle); 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 (1985) (discussing federal question jurisdiction in hybrid cases involving state and federal law); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953) (noting that jurisdiction under § 1331 has not stretched to the limits of Article III); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (arguing in support of judicial discretion in matters of jurisdiction).

claim made the case arise under federal law when it seemed the federal court should be empowered to hear it.[56] Justice Cardozo wrote: "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[,] . . . a selective process which picks the substantial causes out of the web and lays the other ones aside."[57] Cardozo's statement teaches that the federal issue must be "substantial," a requirement that remains today after *Grable*.

In 1983, in *Franchise Tax Board v. Construction Laborers Vacation Trust*, the Court summarized both branches:

> Under our interpretations, Congress has given the lower federal courts jurisdiction [under § 1331] to hear . . . only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.[58]

Franchise Tax Board seemed to reaffirm unequivocally the existence of the second branch. Although applying its test still required a secret decoder ring to sort through the kaleidoscopic situations, *Franchise Tax Board* taught that an embedded federal issue in a state-law claim sufficed to invoke federal-question jurisdiction when the federal issue was both "necessary" and "substantial."

Three years later, *Merrell Dow Pharmaceuticals Inc. v. Thompson*[59] cast serious doubt upon the existence of the second branch, and much ink was spilt by contemporary courts and commentators debating just what *Merrell Dow* did to the scope of federal subject-matter jurisdiction.[60] While *Grable* recently

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[56] *See* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3562 (2d ed. 1984).

> Rather than attempting a test it might be wiser simply to recognize that "the existing doctrines as to when a case raises a federal question are neither analytical nor entirely logical," and that in the unusual case in which there is a debatable issue about federal question jurisdiction, pragmatic considerations must be taken into account.

Id.

[57] Gully v. First Nat'l Bank, 299 U.S. 109, 117–18 (1936).

[58] 463 U.S. 1, 27–28 (1983).

[59] Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804 (1986).

[60] *See, e.g.*, William V. Luneberg, *Nonoriginalist Interpretation—A Comment on Federal Question Jurisdiction and* Merrell Dow Pharmaceuticals Inc. v. Thompson, 48 U. PITT. L. REV. 757 (1987); Martin H. Redish, *Reassessing the Allocation of*

clarified what *Merrell Dow* "really" meant, a complete post-*Grable* synthesis of the law requires an understanding of that debate.

The *Merrell Dow* facts were not complex. The plaintiffs were mothers who had taken the drug Bendectin during pregnancy and whose children later developed birth defects.[61] In their state-court petition, plaintiffs alleged six causes of action: negligence, gross negligence, fraud, breach of warranty, strict liability, and negligence per se.[62] The first five causes of action relied entirely on state law, but the sixth contained a second-branch, embedded-federal-issue problem. Negligence per se is, of course, a state-law-created cause of action. But that cause of action involved a federal issue because, as their sole basis for proving negligence per se, the plaintiffs alleged that the defendants misbranded the drug in violation of the Federal Food, Drug and Cosmetic Act ("the Drug Act").[63] Citing § 1331 and relying on the *Franchise Tax Board* decision, the defendants removed the case, essentially alleging that the construction of the Drug Act, a federal issue, was both necessary and substantial.[64] Ultimately, the Supreme Court held that the federal issue was necessary but not substantial, and thus jurisdiction was improper.[65]

When the Sixth Circuit examined whether Merrell Dow could remove based upon the presence of an embedded federal issue, it held that there was no "necessary" federal question.[66] In the above-quoted *Franchise Tax Board* language, the Court had stated that the plaintiff's *right to relief* must necessarily depend upon the resolution of a question of federal law.[67] Yet, in *Merrell Dow*, five of the plaintiffs' six causes of action involved no issue of federal law. So, the Sixth Circuit held, the plaintiffs' *right to relief* did not necessarily depend upon the Drug Act's

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Judicial Business Between State and Federal Courts: Federal Jurisdiction and the "Martian Chronicles,*"* 78 VA. L. REV. 1769 (1992); Note, *Mr.* Smith *Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-*Merrell Dow, 115 HARV. L. REV. 2272 (2002).

[61] *Merrell Dow*, 478 U.S. at 805.

[62] *See id.*

[63] *See id.*

[64] *See id.* at 806–07.

[65] *See id.* at 807–17.

[66] *See id.* at 806–07 (construing the Sixth Circuit's decision).

[67] Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27–28 (1983); *see supra* note 59 and accompanying text.

construction because they could recover under five different causes of action without even referencing federal law.[68]

The Supreme Court held that this case did not fail at the "necessary" stage.[69] Instead of looking at the plaintiffs' right to recover in the aggregate, the Court held that necessity is determined on a claim-by-claim basis.[70] The "necessary" component was satisfied because the negligence per se claim necessarily depended upon a question of federal law, even though the plaintiffs asserted other claims. The Court determined that, if the negligence per se claim presented a "sufficient federal question, its relationship to the other, state-law claims would be determined by the ordinary principles of [supplemental jurisdiction]."[71] Part V.A will explore the necessity prong in more detail.[72]

Although there was a necessary federal issue, the Court found that there was no federal-question jurisdiction because the federal issue was not "substantial." The Court noted that the Drug Act did not expressly create a private cause of action, and both parties conceded that the Drug Act did not contain an implied cause of action.[73] The Court held, over a vigorous dissent, that a "congressional determination that there should be no federal remedy for the violation of this federal statute 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."[74] The Court continued:

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[68] *See* Thompson v. Merrell Dow Pharms., Inc., 766 F.2d 1005, 1006 (6th Cir. 1985) ("Because the jury could find negligence on the part of Merrell Dow without finding a violation of the FDCA, the plaintiffs' cause of action did not depend necessarily upon a question of federal law.").

[69] *Cf. Merrell Dow*, 478 U.S. at 817 n.15.

[70] *See id.*

[71] *Id.*

[72] *See* discussion *infra* Part V.A.

[73] *See Merrell Dow*, 478 U.S. at 810–11.

[74] *Id.* at 814. Justice Brennan, in his dissent, countered (with the weight of the legal academy behind him): "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?" *Id.* at 825 (Brennan, J., dissenting); *see* Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After* Merrell Dow, 52 OHIO ST. L.J. 1477, 1524–25 (1991) ("*Merrell Dow*'s confusion of jurisdictional and substantive inquiries hampers the court's discretion to determine whether the federal issue raised by the state claim merits a federal forum in accordance with the purposes of

> The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that it would flout congressional intent to provide a private federal remedy for the violation of the federal statute. We think it would similarly flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be [actionable] under state law, rather than a federal action under federal law.[75]

Many contemporary courts and commentators read this opinion as nearly eliminating the second branch.[76] In his treatise, written after *Merrell Dow*, Professor Chemerinsky altered the *Franchise Tax Board* test to state:

> A case arises under federal law if it is apparent from the face of the plaintiff's complaint either that the plaintiff's cause of action was created by federal law or if the plaintiff's cause of action is based on state law, that a federal law *that creates a cause of action* is an essential component of the plaintiff's claim.[77]

Merrell Dow's meaning was the subject of much guessing.[78] Should it be read to overrule *Smith* implicitly, where jurisdiction existed even though the Federal Farm Loan Act did not create a private cause of action? In *Merrell Dow*, the Court cited *Smith* but never stated that it was overruled.[79] Yet, the Court wrote that exercising jurisdiction over a second-branch case would "flout, or at least undermine" congressional intent when the federal statute did not create a private cause of action.[80] Indeed,

section 1331."); Redish, *supra* note 61, at 1794 ("As Justice William Brennan correctly pointed out . . . such an unformed, subjective test provides neither guidance nor predictability in the shaping of federal question jurisdiction.").

[75] *Merrell Dow*, 478 U.S. at 812.

[76] *See supra* note 61 (citing articles that debate *Merrell Dow*'s effect on the scope of federal subject-matter jurisdiction).

[77] ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.2 (4th ed. 2003) (emphasis added).

[78] *See supra* note 61 (listing articles that discuss *Merrell Dow*'s meaning).

[79] *See Merrell Dow*, 478 U.S. at 814–15 n.12. In fact, the Court also noted the "widely perceived 'irreconcilable' conflict" between *Smith* and *Moore v. Chesapeake & Ohio R.R. Co.*, 291 U.S. 205 (1934), where no jurisdiction was found in a similar embedded-issue case. *See Merrell Dow*, 478 U.S. at 814–15 n.12.

[80] *Merrell Dow*, 478 U.S. at 812.

the Court conspicuously noted that this was the "first case" in which it had reviewed a second-branch case since it had reformulated its implied-cause-of-action test.[81] This conspicuous note seemed to signal that the law was indeed changing, and the lower courts were left without significant guidance, resulting in divergent views over how much of branch two was left after the *Merrell Dow* massacre.[82]

Several circuits subsequently held that the second branch only covered cases where federal law provided a parallel private cause of action.[83] For example, suppose a state consumer-protection statute provides for treble damages and that violations of other specified federal and state "tie-in" statutes are also deemed violations of the consumer-protection statute. Even if one of the tie-in statutes is federal, and even if that federal statute creates its own cause of action, a plaintiff seeking treble damages may choose to assert that violation under the state statute. To avoid flouting, or at least undermining, congressional intent, some circuits viewed the second branch as only encompassing circumstances.

Other circuits refused to read *Merrell Dow* so restrictively. In those circuits, a federal issue could still be "substantial" without Congress specifically providing for a federal remedy.[84]

[81] *Id.* at 811.

[82] *See supra* notes 77–80 and accompanying text. Indeed, a Harvard Law Review note, published in 2002, revealed an amazing statistic: between 1994 and 2002, the courts of appeals heard sixty-nine second-branch cases, reversing the lower court in forty-five of those cases. *See* Note, *supra* note 61, at 2280.

[83] *See, e.g.*, Zubi v. AT&T Corp., 219 F.3d 220, 223 n.5 (3d Cir. 2000) (finding there can be no federal "jurisdiction where Congress has determined that there should be no private cause of action for violation of the federal law"); TCG Detroit v. City of Dearborn, 206 F.3d 618, 622 n.2 (6th Cir. 2000) (relying on *Merrell Dow* and Professor Chemerinsky's distillation of *Merrell Dow* to require a federal private cause of action); Sparta Surgical Corp. v. NASD, 159 F.3d 1209, 1212 (9th Cir. 1998) (reasoning that *Merrell Dow* indicates that "federal question jurisdiction cannot lie absent a private right of action to enforce the federal right" in § 1331 suits); Seinfeld v. Austen, 39 F.3d 761, 764 (7th Cir. 1994) (stating that "[u]nder *Merrell Dow*, therefore, if [sic] 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") (quoting Utley v. Varian Assocs., 811 F.2d 1279, 1283 (9th Cir. 1987)) (internal quotations omitted); Rogers v. Platt, 814 F.2d 683, 688 (D.C. Cir. 1987) (writing that in *Merrell Dow* "a closely divided Court held that if Congress affirmatively determines that there should be *no* private federal cause of action that is effectively the end of the matter").

[84] *See, e.g.*, Long v. Bando Mfg. of Am., Inc., 201 F.3d 754, 759 (6th Cir. 2000) (finding that *Merrell Dow* "clearly left open the possibility of federal jurisdiction even

Those cases, however, are difficult to reconcile with *Merrell Dow*'s warning against flouting congressional intent. Some even suggested that branch two only covered embedded constitutional claims, because in those situations there was no analogous congressional intent to flout.[85]

Even if read to its utmost, the *Merrell Dow* edition of the "arising under" definition did not eliminate the second branch entirely. But just how much of branch two was left? That was the question *Merrell Dow* left open, and the question was answered differently by judges and scholars for the twenty years following *Merrell Dow*. Finally, in *Grable*, the Supreme Court answered, teaching that *Merrell Dow* was actually decided under a previously unarticulated prong to the "arising under" definition.

IV. *GRABLE*'S MODIFIED DEFINITION

Grable was a second-branch case involving an embedded federal tax issue within a state quiet-title claim.[86] To satisfy a tax delinquency, the Internal Revenue Service ("IRS") seized some of Grable's real property.[87] The IRS then sold the property to Darue and gave Darue a quitclaim deed.[88] Five years later, Grable brought a quiet-title action against Darue in state court.[89] While Grable conceded that it had received actual notice of the seizure, Grable claimed that Darue's record title was invalid

in the absence of an express or implied federal cause of action"); Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1056 (9th Cir. 1997) (stating that by requiring federal causes of action, "the State construes both federal question jurisdiction and IGRA [Indian Gaming Regulatory Act] too narrowly and underestimates the federal interest at stake"); Ormet Corp. v. Ohio Power Co., 98 F.3d 799, 807 (4th Cir. 1996) ("The determination of whether a federal issue is sufficiently substantial should be informed by a sensitive judgment about whether the existence of federal judicial power is both appropriate and pragmatic."); W. 14th St. Commercial Corp. v. 5 W. 14th Owners Corp., 815 F.2d 188, 196 (2d Cir. 1987) ("[A]ssuming that plaintiffs have no private right of action under [the Federal Condominium and Cooperative Abuse Act], we conclude that the federal element in plaintiffs' state cause of action would still be sufficiently substantial to confer arising under jurisdiction.").

[85] *See* Alleva, *supra* note 75, at 1527 n.186 (outlining competing interpretations of *Merrell Dow*).

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

[87] *Id.*

[88] *Id.*

[89] *Id.*

because the IRS had not strictly complied with the applicable notice provisions,[90] which Grable contended required personal service. Darue removed the case to federal court, arguing that Grable's quiet-title claim, while created by state law, contained an embedded federal issue, namely the interpretation of the federal tax statute's notice provision.[91]

The Supreme Court began by reaffirming the second branch's vitality. The Court noted that the federal-question statute is "invoked by and large by plaintiffs pleading a cause of action created by federal law."[92] But, the Court continued, there is "another longstanding, if less frequently encountered, variety of federal 'arising under' jurisdiction, this Court having recognized for nearly 100 years that in certain cases[,] federal question jurisdiction will lie over state-law claims that implicate significant federal issues."[93] The Court categorized *Smith* as the "classic example" of a second-branch case and proceeded to reaffirm the second branch's existence.[94] But *Merrell Dow*, which had sparked so much debate, loomed in the background. The *Grable* opinion synthesized the second-branch cases, settled the debate over *Merrell Dow*, and provided a new definition for second-branch cases: jurisdiction is proper in a second-branch case when a "state-law claim necessarily raise[s] 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."[95]

The new definition quoted above consists of four prongs: (1) necessity; (2) actually disputed; (3) substantiality; and (4) disruptiveness. The first three existed before *Grable* and the fourth represents the Court's view of what *Merrell Dow* really meant. Below, I will detail how the Court applied the test to find jurisdiction proper in *Grable*. Then, in Part V, I will evaluate the four prongs in the post-*Grable* world.

The Court easily concluded that Grable's claim passed the necessity and actually disputed prongs. Grable's claim necessarily raised the federal tax issue because the state law

[90] 26 U.S.C. § 6335(a)–(b) (2000).
[91] *Grable*, 125 S. Ct. at 2366.
[92] *Id.*
[93] *Id.* at 2366–67.
[94] *Id.* at 2367.
[95] *Id.* at 2368.

required Grable to specify the facts establishing the superiority of its title, and the only basis Grable had to claim a superior title was the IRS's failure to give personal notice of the property's seizure.[96] In addition, the federal issue was actually disputed; indeed, the Court noted, the meaning of the tax statute appeared to be the only legal or factual issue contested in the case.[97] While *Grable* did not implicate any difficult issues involving the first two prongs, Part V explores them in more depth.[98]

The Court also concluded that the federal tax issue was substantial. The tax issue was an "important issue of federal law that . . . belong[ed] in a federal court."[99] The Court noted that the government has a strong interest in prompt and efficient tax collection and that the "ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers like Darue to satisfy themselves that the Service has touched the bases necessary for good title."[100] Thus, the Court held, the government has "a direct interest in the availability of a federal forum to vindicate its own administrative action, and buyers . . . may find it valuable to come before judges used to federal tax matters."[101]

Finally, the Court turned to the fourth prong, disruptiveness. As noted above, the disruptiveness prong is the new part of the test, and it represents the Court's view of what *Merrell Dow* really meant. Recall *Merrell Dow*, where the Court found no federal-question jurisdiction over the plaintiffs' negligence per se claim, which contained the embedded Drug Act issue. The *Merrell Dow* Court, we thought, resolved the case at the substantiality prong because the Drug Act did not create its own private right of action: "[A] congressional determination that there should be no federal remedy for the violation of [a] federal statute 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."[102] But *Grable* teaches that *Merrell Dow* is not really a substantiality case at all. In *Grable*, the

[96] *Id.*
[97] *Id.*
[98] *See* discussion *infra* Part V.
[99] *Grable*, 125 S. Ct. at 2368.
[100] *Id.*
[101] *Id.*
[102] Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 814 (1986).

Court noted that the absence of a private right of action under the Drug Act affected the *Merrell Dow* result in two ways.[103] First, it is "worth some consideration in the assessment of substantiality,"[104] but its "primary importance,"[105] we now know, is found in the disruptiveness prong.

We now know, from *Grable*, that the *Merrell Dow* Court saw the missing Drug Act right 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" would disrupt the congressionally approved balance of federal and state judicial responsibilities.[106] Because finding jurisdiction over the negligence per se claim would have "attracted a horde of original filings and removal cases raising other state claims with embedded federal issues," a welcome mat was required.[107]

No welcome mat was required in *Grable* because allowing jurisdiction over the quiet-title claim would not be disruptive, as it would have been in *Merrell Dow*. Although Congress "indicated ambivalence . . . by providing no private right of action to Grable, it is the rare state quiet title action that involves contested issues of federal law . . . . Consequently, jurisdiction over actions like Grable's would not materially affect, or threaten to affect, the normal currents of litigation."[108]

Thus, the Court concluded that jurisdiction was proper under the second branch because Grable's state-law claim necessarily raised a federal tax issue, which was actually disputed and substantial. It also provided what is *Grable*'s addition to the "arising under" dictionary: allowing jurisdiction over quiet-title claims with embedded tax issues is not disruptive enough to require a welcome mat. The next Part analyzes the four prongs in greater depth.

V. ANALYZING THE MODIFIED DEFINITION

As noted above, second-branch cases now involve a four-prong jurisdictional inquiry. When a state-law claim contains an

[103] *Grable*, 125 S. Ct. at 2370.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 2371 (footnote omitted).

embedded federal issue, the federal issue must be: (1) necessary; (2) actually disputed; (3) substantial; and (4) accompanied by a welcome mat, if exercising jurisdiction would be disruptive.

A. Necessity

A state law *claim* must "necessarily raise a stated federal issue."[109] The necessity prong requires a distinction between claims and theories. Again, recall *Merrell Dow*. There, the Supreme Court rejected the Sixth Circuit's holding that the embedded Drug Act issue was not necessary.[110] In *Franchise Tax Board*, the Court had stated that the plaintiff's *right to relief* must necessarily depend upon federal law.[111] The Sixth Circuit applied that language to the *Merrell Dow* plaintiffs and concluded that because the plaintiffs could have recovered on five separate claims that involved no issues of federal law, the plaintiffs' right to relief did not necessarily depend upon federal law.[112] The Supreme Court rejected this narrow view of necessity and concluded that federal law need only form a necessary element of *one* of the plaintiff's claims.[113] Whether jurisdiction is proper over the remaining claims is determined by principles of supplemental jurisdiction.[114] Because the plaintiffs' negligence per se claim necessarily depended on the Drug Act, the necessary prong was satisfied.

But let's change the *Merrell Dow* facts slightly. Suppose the plaintiffs had asserted two *theories* to support their negligence per se claims–one alleging the violation of the Drug Act and another alleging the violation of a state statute. Then would federal law form a necessary element of that claim? The answer is probably not, though distinguishing claims from theories is not always clear.

The claims-versus-theories distinction originated in *Christianson v. Colt Industries Operating Corp.*[115] Although *Christianson* was decided in a different context, many courts have applied its reasoning in § 1331 cases. The issue in

[109] *Id.* at 2368.
[110] *See* Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 817 n.15 (1986).
[111] Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S 1, 19–20 (1983).
[112] *See Merrell Dow*, 478 U.S. at 817 n.15.
[113] *See id.*
[114] *See id.*
[115] 486 U.S. 800 (1988).

Christianson was whether the federal circuit had jurisdiction over an appeal. The federal circuit has jurisdiction over appeals from final district court decisions when the district court had jurisdiction under 28 U.S.C. § 1338.[116] Section 1338 provides: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . ."[117] The Court noted that both § 1338 and § 1331 contained the terms "arising under" and held that linguistic consistency demanded that the terms be construed similarly.[118] Thus, the Court evaluated whether the plaintiffs' claims necessarily raised an issue of patent law.

The plaintiffs had asserted two antitrust claims under the Sherman Act: a monopolization claim under Section 2 and a group-boycott claim under Section 1.[119] The plaintiffs had alleged alternative *theories* to support each *claim*, but not all of the theories involved the patent laws.[120] The Court noted that federal jurisdiction focuses on claims, not theories.[121] A claim arises under the patent laws only if a question involving the patent laws is necessary to that claim. Accordingly, 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."[122] Ultimately, the Court held that because each of the plaintiff's claims were supported by alternative theories unrelated to the patent laws, the patent laws were not necessary to either claim; therefore, the case did not arise under the patent laws.[123]

Due to the Court's focus upon linguistic consistency with the term "arising under," it is unsurprising that lower courts have extended this test to the necessity prong of the second-branch federal-question test. For example, in *Willy v. Coastal Corp.*, the plaintiff asserted a wrongful-discharge claim created by state

[116] *See* 28 U.S.C. § 1295(a)(1) (2000).
[117] 28 U.S.C. § 1338 (2000).
[118] *See Christianson*, 486 U.S. at 807–09; *accord* Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 833–34 (2002).
[119] *Christianson*, 486 U.S. at 810.
[120] *See id.*
[121] *See id.*
[122] *Id.*
[123] *Id.* ("The patent-law issue, while arguably necessary to at least one theory under each claim, is not necessary to the overall success of either claim.").

law.[124] The plaintiff alleged that he was fired because he refused to violate various state and federal environmental and securities laws.[125] The court characterized the plaintiff's wrongful-discharge claim as relying upon at least two alternative theories: first, that the plaintiff was fired for refusing to violate federal law; and second, that he was fired for refusing to violate state laws.[126] Relying on *Christianson*, the Fifth Circuit concluded that jurisdiction was improper under the second branch because federal law was not a necessary element of the state-law claim.[127]

Distinguishing claims from theories is not always clear. For example, in *Merrell Dow*, the Court held that the Drug Act was a necessary element of the plaintiff's negligence per se claim. The plaintiff had also asserted a vanilla negligence claim, but the Court treated negligence per se and negligence as different *claims*, and thus federal law was only necessary to one of the claims. Had the Court treated negligence as the claim and negligence per se as one of the theories supporting the claim, the claim would have failed the necessity test because the plaintiff's vanilla negligence claims had nothing to do with federal law.

While the lines between theories and claims are not entirely clear, several principles, which can be synthesized from the discussed cases, guide the inquiry. First, surely whether federal law is necessary should not depend upon how the plaintiff numbers the counts in the complaint. Suppose a plaintiff, sharing the same claims as the *Willy* plaintiff, wants his case to be tried in federal court. Federal jurisdiction cannot depend upon how that plaintiff numbers the counts. It should be immaterial whether the plaintiff separately numbers his wrongful discharge counts or whether the complaint contains only one Roman numeral within which the plaintiff asserts all reasons supporting wrongful discharge. While many jurisdictional principles depend upon the plaintiff being the master of the complaint, which issues qualify for second-branch treatment should not depend on the complaint's organization. The second-branch inquiry is designed to select claims that, while created by state law, deserve a federal forum. The

[124] 855 F.2d 1160, 1162 (5th Cir. 1988).
[125] *Id.*
[126] *Id.* at 1170.
[127] *See id.* at 1171; *accord* Rains v. Criterion Sys., Inc., 80 F.3d 339, 346–47 (9th Cir. 1996) (citing *Willy*, 855 F.2d at 1171).

necessity prong is one step in that inquiry, and allowing the plaintiff to manipulate the outcome by mere numbering would be inconsistent with a process that is supposed to involve selection of worthy federal issues through a "common-sense accommodation of judgment to kaleidoscopic situations."[128]

The second principle that guides the necessity inquiry is that, when a plaintiff asserts different ways in which a defendant violated a particular section of a statute, the allegations under *that section* form a single claim. Further, the ways in which the defendant is alleged to have violated that section are theories, all of which must depend upon federal law to satisfy the necessary prong. For example, in *Christianson*, though the plaintiff alleged different ways in which the defendant violated the group-boycott provision of Section 1 of the Sherman Act, the Court treated those allegations as involving a single group-boycott claim supported by alternative theories.[129] Similarly, in *Dixon v. Coburg Dairy, Inc.*, the Fourth Circuit rejected jurisdiction.[130] There, the plaintiff asserted a violation of a South Carolina statute that made it "unlawful for a person to . . . discharge a citizen from [his or her] employment or occupation . . . because of political opinions or the exercise of political rights and privileges guaranteed . . . by the Constitution and laws of the United States or by the Constitution and laws of [South Carolina]."[131] The plaintiff, who had been fired for bringing a toolbox to work with a Confederate battle flag decal, asserted that his firing was illegal because it violated the First Amendment to the United States Constitution, South Carolina public policy, and the South Carolina Constitution.[132] Although the plaintiff asserted these theories in "separate counts" of his complaint, the court correctly treated the statutory wrongful discharge claim as a single claim and rejected jurisdiction because federal law was not essential to all of the theories supporting that claim.[133]

Third, a plaintiff who asserts violations of different statutory sections, even within the same statute, asserts multiple claims, only one of which must necessarily depend upon federal law.

[128] Gully v. First Nat'l Bank, 299 U.S. 109, 117 (1936).
[129] Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 813 (1988).
[130] Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 814 (4th Cir. 2004).
[131] *Id.* at 814–15 (citation omitted).
[132] *See id.*
[133] *See id.* at 818.

Again, looking to *Christianson*, the plaintiff alleged violations of two sections of the Sherman Act.[134] The Court construed the complaint as stating two claims—one based on each section—and not merely one Sherman Act claim. To satisfy the necessity prong, resolving the question of federal law must be necessary to all the theories supporting one claim.[135]

While distinguishing between common law claims and theories can potentially be more difficult, most cases are not. For example, other courts have followed *Willy* and determined that wrongful discharge is a single claim and the reasons why the discharge was wrongful are theories, all of which must depend upon federal law to satisfy the necessity prong.[136] Similarly, if a plaintiff invokes multiple statutes as establishing a duty for negligence per se, those multiple statutes provide different theories for the claim, and if any of those theories are based on a state statute, federal law cannot be a necessary element of the negligence per se claim. Additionally, *Merrell Dow* provides a basis for analogy when the plaintiff asserts closely related grounds of recovery. Recall that there, the Court construed negligence and negligence per se as different claims, only one of which had to depend necessarily upon federal law.[137] A more questionable distinction appears in *Broder v. Cablevision Systems Corp.*, a recent case where the plaintiff sued a cable company for breach of contract.[138] In that case, the contract obligated the cable company to disclose and charge rates "subject to applicable law."[139] The plaintiff asserted that the cable company breached the contract because it violated both a federal statute and a state statute.[140] The court held that the plaintiff's complaint contained two separate breach-of-contract claims, even

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[134] *Christianson*, 486 U.S. at 810.

> Framed in these terms, our resolution of the jurisdictional issue in this case is straightforward. Petitioners' antitrust count can readily be understood to encompass both a monopolization claim under § 2 of the Sherman Act and a group-boycott claim under § 1. The patent-law issue, while arguably necessary to at least one theory under each claim, is not necessary to the overall success of either claim.

Id.

[135] *See id.* at 810–11.

[136] *See, e.g.*, Rains v. Criterion Sys., Inc., 80 F.3d 339, 346–47 (9th Cir. 1996).

[137] Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 817 n.15 (1986).

[138] Broder v. Cablevision Sys. Corp., 418 F.3d 187, 192 (2d Cir. 2005).

[139] *Id.* at 192.

[140] *See id.* at 191.

though both relied upon the same contract and indeed the same provision.[141]

In summary, the necessity prong is determined on a claim-by-claim basis. Federal law must be a necessary element of a state law *claim*. So long as that test is satisfied, jurisdiction over remaining claims will be determined by principles of supplemental jurisdiction.[142] But federal law will not be a necessary element of a state-law claim when that state-law claim is supported by alternative theories, unless each of those alternative theories requires resolution of a federal issue.

B. Actually Disputed

In a second-branch case, "the federal issue in a state-law claim must actually be in dispute to justify federal-question jurisdiction."[143] In *Grable*, the parties actually disputed the tax issue, and indeed it "appear[ed] to be the only legal or factual issue contested in the case."[144] Thus, the actually disputed prong was satisfied. The Court distinguished an older quiet-title case because, in the older case, "the federal statutes on which title depended were not subject to 'any controversy respecting their validity, construction, or effect.' "[145] While the following paragraphs explore this prong in some detail, I will ultimately conclude that the requirement that a federal issue be "actually disputed" is probably best left to the substantiality prong.

The Court's treatment and articulation of this prong raises a timing anomaly. Federal-question jurisdiction is usually determined from the face of the plaintiff's complaint, yet it is unclear how we can determine what issues are actually disputed from the plaintiff's complaint. In *Grable*, because the case was removed, the Court knew the issue was disputed because it could compare the plaintiff's complaint with the notice of removal. But what if the plaintiff had filed the case originally in federal court? Would the Court look to the answer or a motion to dismiss? Suppose plaintiffs file a second-branch case in federal court, and suppose a federal issue appears on the face of the well-pleaded

[141] *See id.* at 194–95.
[142] *See* 28 U.S.C. § 1367 (2000).
[143] Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 125 S. Ct. 2363, 2369 n.3 (2005).
[144] *Id.* at 2368.
[145] *Id.* at 2369 n.3 (quoting Shulthis v. McDougal, 225 U.S. 561, 570 (1912)).

complaint. When does the court determine whether the federal issue is actually disputed? Does the inquiry end with the answer? What if the defendant's answer disputes the federal issue, but after discovery progresses the defendant clarifies that she no longer disputes the federal issue, but still disputes other issues in the case? Subject-matter jurisdiction can, after all, be raised at any time. Does the fact that the federal issue is no longer disputed divest the court of jurisdiction?

Unless refined, this prong seems to be in tension with the well-pleaded-complaint rule.[146] The well-pleaded-complaint rule has its critics,[147] but it has survived largely because it avoids the type of timing questions raised in the preceding paragraph. The rule often operates to remove from federal jurisdiction even cases that turn entirely on federal law, when the federal issue arises only by way of defense or counterclaim.[148] It has survived, rightly or wrongly, because of the efficiency that results from being able to determine jurisdiction from the outset. If I were writing on a clean slate, I might suggest that federal-question jurisdiction should indeed depend on which federal issues are actually disputed, but a candid synthesis of what the law *is* must account for the ever-looming well-pleaded-complaint rule.

Given the survival of the well-pleaded-complaint rule, it is difficult to conclude that the Court meant, in this narrow context, to direct lower courts to look beyond the plaintiff's complaint. If a court must wait for an answer to determine whether the issue is actually disputed, it is hard to see why a court cannot also look to the answer to find substantial, disputed federal defenses. True, such a distinction would retain some notion of the plaintiff

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[146] *See* WRIGHT, MILLER & COOPER, *supra* note 57, § 3562.

> This formulation . . . seems seriously deficient as a guide to judgment. The test would be difficult, if not impossible, to apply, in view of the rule that jurisdiction must be determined from plaintiff's well-pleaded complaint. The complaint by itself can hardly disclose on what aspects of the case there will be dispute or controversy.

Id.

[147] *See, e.g.*, 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, 599–600 (1987) (arguing that federal courts should abandon the well-pleaded-complaint rule).

[148] *See id.* at 599 (noting that "even if a case turns upon an important question of federal law, and even if that is the only issue in the case, federal question jurisdiction does not exist unless the federal question appears in the 'right' place, that is, in the plaintiff's well-pleaded complaint") (footnote omitted); *see also supra* notes 36–37 and accompanying text.

being "master of his complaint." But the master-of-the-complaint mantra alone is not so much of a justification as it is a tidy restatement of the result of being able to determine jurisdiction from only the plaintiff's pleadings. Once federal-question jurisdiction inquiries proceed to the defendant's answer, it is difficult to justify—under what is left of the well-pleaded-complaint rule—declining jurisdiction when an answer reveals a substantial federal defense or counterclaim.[149]

The Supreme Court's treatment of this prong suggests no calculated departure from the well-pleaded-complaint rule. Indeed, perhaps the Court means that the federal issue raised by the plaintiff must be actually and reasonably disputable. This rephrasing seems more consistent with the Court's treatment of the older quiet-title case where the Court rejected jurisdiction because the "federal statutes on which title depended were not *subject to* 'any controversy respecting their validity, construction, or effect.' "[150] If the federal issue is settled or the answer to the federal question is clear, its presence in a state-law cause of action should not trigger federal jurisdiction.

Ultimately, this prong is unlikely to create many problems. While I have discussed its possible implications, its impact on second-branch cases will probably be negligible. The prong appeared because the *Grable* Court had to distinguish some older quiet-title cases. The "actually disputed" language will likely be repeated in headnote form but should not be extended to intrude upon the well-pleaded-complaint rule because its concerns about federal issues being "not subject to any controversy" are adequately addressed by the substantiality prong, which is discussed below. If a federal issue is not subject to any controversy, it simply is not substantial.

C. Substantial

The federal issue embedded in the state-law claim must be "substantial." No precise definition of substantiality is available, and the precedents in this area are reconcilable only because the

[149] Unless, of course, the silent distinction is that resorting to the answer in the context of the actually disputed prong would *decrease* the availability of federal-question jurisdiction and in the context of a federal defense or counterclaim would *increase* the availability.

[150] *Grable*, 125 S. Ct. at 2369 n.3 (2005) (emphasis added) (quoting Shulthis v. McDougal, 225 U.S. 561, 570 (1912)).

Court has made the "test sufficiently vague and general, [such that] any set of results can be 'reconciled'" with a *post hoc* analysis.[151]

Substantiality depends upon the nature and importance of the embedded federal issue.[152] This broad statement about "nature and importance" can be further broken down. Is there a special need for federal expertise in this matter?[153] Is there a special need for uniformity?[154] Will the issue's resolution reach beyond the instant dispute into areas of particular federal concern?[155] Along with the nature and importance of the federal issue on a national scale, some have suggested that courts should consider how prominent the federal issue is in the particular lawsuit, or in other words, how "central" the federal issue is to the dispute between the parties.[156] This centrality concern seems better suited for the necessity prong, and indeed considering it within the substantiality prong seems to conflict with *Merrell Dow*. The necessity prong covers how prominent the federal issue must be in a lawsuit. If the federal issue is necessary to one claim, the impact of other claims is determined under the supplemental jurisdiction statute,[157] which includes provisions

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[151] Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 822 n.1 (1986) (Brennan, J., dissenting).

[152] *See id.*

[153] *See* U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 383, 391 (3d Cir. 2002) (discussing the embedded admiralty question).

[154] *See* City of Beatrice v. Aquila, No. 4:05CV3284, 2006 WL 208831, at *6 (D. Neb. Jan. 25, 2006) ("If resolution of a federal issue in a state forum could, because of different approaches and inconsistency, undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest which warrants the exercise of federal question jurisdiction."); County of Santa Clara v. Astra USA, Inc., 401 F. Supp. 2d 1022, 1027–28 (N.D. Cal. 2005) (noting a trend of seeking uniformity in areas of exclusive federal jurisdiction); *see also Merrell Dow*, 478 U.S. at 826 (Brennan, J., dissenting); *U.S. Express Lines*, 281 F.3d at 391.

[155] *See Grable*, 125 S. Ct. at 2368; *see also* Municipality of San Juan v. Corporación para el Fomento Económico de la Ciudad Capital, 415 F.3d 145, 148 n.6 (1st Cir. 2005) ("Because the propriety of COFECC's conduct turns entirely on its adherence to the intricate and detailed set of federal regulatory requirements, and the funds at issue are federal grant monies, we agree with the magistrate judge and district court that jurisdiction is proper."); *Astra USA*, 401 F. Supp. 2d at 1027 (saying that a federal issue is substantial when it "directly affect[s] the functioning of the federal government).

[156] *See* Brianna J. Fuller, *Federal Question Jurisdiction*, 37 LOY. L.A. L. REV. 1443, 1459–61 (2004).

[157] *Merrell Dow*, 478 U.S. at 817 n.15.

for declining supplemental jurisdiction when state claims predominate.[158]

Ultimately, the generalizations are just that: general.[159] Justice Brennan seemed to be correct in arguing that the precedents in this area are reconcilable only because the standards are general enough to mold to any desired *post hoc* reconciliation.[160] This, of course, leaves much room for advocacy.

The *Grable* case raises the most compelling of the substantiality concerns. There, resolving the federal tax issue would reach well beyond the parties and impact an area of unique federal concern, IRS tax sales. As one court stated, one suggested approach to determining whether a federal issue is substantial is to determine whether resolving the federal issue would "directly affect the functioning of the federal government."[161] In *Grable*, the Supreme Court noted:

> The meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court. The Government has a strong interest in the 'prompt and certain collection of delinquent taxes,' and the ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers like Darue to satisfy themselves that the Service has touched the bases necessary for good title.[162]

While *stare decisis* will, of course, cause any ruling to reach beyond the parties, and while presumably all federal laws are important, the *Grable* case involved the government's interest "in the availability of a federal forum to vindicate its *own* administrative action . . . ."[163] *Grable* also implicated the other two concerns: the need for uniformity and federal expertise. State courts infrequently address federal tax statutes, and the need for uniformity was important for the reasons noted above.

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[158] 28 U.S.C. § 1367(c)(2) (2000).

[159] *See* Fuller, *supra* note 157, at 1455–65.

[160] *See* Almond v. Capital Props., Inc., 212 F.3d 20, 23–24 (1st Cir. 2000) (concluding that in a second-branch case, "[w]hat remains is the almost unanswerable question of whether the Supreme Court would regard the federal issue in this case as sufficiently important to confer 'arising under' jurisdiction . . . .").

[161] County of Santa Clara v. Astra USA, Inc., 401 F. Supp. 2d 1022, 1027 (N.D. Cal. 2005).

[162] Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 125 S. Ct. 2363, 2368 (2005) (citation omitted).

[163] *Id.* (emphasis added).

It seems unlikely that the Court will find jurisdiction proper when a federal issue is embedded in a garden-variety state tort claim or when the parties incorporate a federal law into a private contract. Before *Grable*, most courts would have held that such a claim did not contain a "substantial" federal issue, but after *Grable* clarified that *Merrell Dow* was not a substantiality case, how the federal issue is incorporated is probably best left to the "disruptiveness" prong. The substantiality prong focuses upon the nature and importance of the federal issue. How that issue is embedded or incorporated does not impact the need for uniformity or federal expertise. Rather, it impacts whether a welcome mat is needed.[164] Phrased differently—and perhaps too candidly—the substantiality prong appears to represent whether the court thinks this issue deserves federal resolution. The disruptiveness prong accounts for the structural reality that Congress, not the courts, has the final say in what issues deserve federal resolution.[165]

D. Disruptiveness

A court cannot exercise second-branch jurisdiction if doing so would disrupt the "congressionally approved balance of federal and state judicial responsibilities."[166] The disruptiveness prong is a potential veto, grounded in the principle that Congress controls federal jurisdiction. Even when a federal issue is necessary, actually disputed, and substantial, jurisdiction is improper if exercising it would be disruptive.[167] Exercising jurisdiction is disruptive if Congress has provided no welcome mat when one is needed. Note, though, that not all cases require a welcome mat.

As a preliminary matter, a welcome mat will rarely exist in a second-branch case. A welcome mat exists when a plaintiff asserts a state-law claim that incorporates a federal law and when Congress provided a federal private right of action for violations of the federal law. A welcome mat is rare in second-branch cases because, ordinarily, when a case involves a federal

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[164] *See infra* Part V.D; *see also* Buis v. Wells Fargo Bank, 401 F. Supp. 2d 612, 615 (N.D. Tex. 2005).

[165] Congress's final say, of course, is regulated by the Constitution. *See supra* Part II.

[166] *Grable*, 125 S. Ct. at 2368.

[167] *See Buis*, 401 F. Supp. 2d at 615.

statute that creates a cause of action, the plaintiff will have sued under that statute. That is, most cases involving cause-of-action-creating federal statutes are first-branch cases.[168] If a welcome mat is present in a second-branch case, the disruptiveness inquiry ends, and jurisdiction is proper as long as the other three prongs are met.

But a welcome mat is not always needed. The presence of a federal right of action for the embedded federal law is not a "missing federal door key, always required," but is rather only a welcome mat, needed when exercising jurisdiction over a class of cases would materially disrupt the flow of litigation between state and federal courts.[169] Contrasting *Grable* and *Merrell Dow* provides the starting place for determining when this welcome mat is needed.[170]

In *Merrell Dow* (as construed by *Grable*) jurisdiction was absent because hearing the case without a welcome mat would have been disruptive. There, the plaintiffs incorporated the Drug Act standard into their negligence per se claim. The Drug Act did not create a private right of action—it contained no welcome mat.[171] A welcome mat was required because allowing garden-variety tort claims into federal court when they incorporated federal law would have "heralded a potentially enormous shift of traditionally state cases into federal courts."[172] As the Court noted, "One only needed to consider the treatment of federal violations generally in garden-variety state tort law. 'The violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings.' "[173] When allowing a type of embedded issue into federal court would attract a "horde of original filings and removal cases," federal courts need the congressional welcome mat—even if they view the issue as substantial enough to warrant federal adjudication.[174]

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[168] *See supra* Part III.B (suggesting how a second-branch case could involve an embedded federal statute that creates a cause of action).

[169] *Grable*, 125 S. Ct. at 2370.

[170] *See, e.g.*, McCormick v. Excel Corp., No. 05-C-0740, 2006 WL 229029, at *2 (E.D. Wis. Jan. 30, 2006) ("The cases before me are closer to *Merrell Dow* than *Grable*.").

[171] *Grable,* 125 S. Ct. at 2371 (construing *Merrell Dow*).

[172] *Id.* at 2370–71 (construing *Merrell Dow*).

[173] *Id.* at 2370 (citation omitted).

[174] *Id.*

By contrast, in *Grable*, federal-question jurisdiction was proper despite the absence of a welcome mat because only the "rare state quiet title action . . . involves contested issues of federal law."[175] As the Court noted, exercising "jurisdiction over actions like Grable's would not materially affect, or threaten to affect, the normal currents of litigation."[176]

The disruptiveness prong is based mostly on concerns about separation of powers. Congress is responsible for defining the federal courts' jurisdiction. Deciding whether jurisdiction is proper is supposed to be an exercise in statutory construction. But until *Merrell Dow*, jurisdiction depended largely upon judicial views of the proper allocation of jurisdiction. *Merrell Dow* introduced the novel concept of congressional intent into the jurisdictional inquiry, but its reasoning was unpersuasive. *Grable* found a middle ground, requiring express congressional approval before significantly altering the federal docket, but allowing jurisdiction in those rare cases where the phrase "arising under" can fairly reflect implicit congressional approval based on the impossibility of Congress laying welcome mats for the myriad unforeseeable ways in which federal issues may arise.

Given the sensitive concerns outlined above, *Grable*'s proceed-without-a-welcome-mat holding should not be read too broadly. Garden-variety tort claims often involve embedded federal issues, and *Merrell Dow* teaches that a welcome mat is needed in such cases.[177] Thus, exercising jurisdiction in cases like negligence per se, breach of fiduciary duty, malpractice, and wrongful discharge would be disruptive and cannot genuinely be distinguished from *Merrell Dow*.[178] It would be similarly disruptive to allow private parties to incorporate federal

[175] *Id.* at 2371.

[176] *Id.*

[177] *See* RA Inv. I, LLC v. Smith & Frank Group Servs., No. 4:05CV363, 2005 WL 3299710, at *3–4 (E.D. Tex. Dec. 5, 2005) (gathering post-*Grable* cases involving tax issues embedded in tort claims); Cantwell v. Deutsche Bank Sec., Inc., No. Civ.A. 305CV1378-D, 2005 WL 2296049, at *2–3 (N.D. Tex. Sept. 21, 2005).

[178] *See* Leggette v. Wash. Mut. Bank, No. 3:03-CV-2909-D, 2005 WL 2679699, at *4 (N.D. Tex. Oct. 19, 2005) ("Exercising federal jurisdiction over home foreclosure disputes typically governed by private contract and state law portends a significant transfer of judicial responsibilities from state to federal courts."); Sarantino v. Am. Airlines, Inc., No. 4:05MD1702 JCH, 2005 WL 2406024, at *8 (E.D. Mo. Sept. 29, 2005); State v. Abbott Labs., 390 F. Supp. 2d 815, 823 (W.D. Wis. 2005) ("By contrast, the present case is one of many that have been filed by states across the country concerning pharmaceutical companies' alleged fraud in price-setting.").

standards into their contracts and create jurisdiction where Congress has not.[179] And importantly, the Court clarified that disruptiveness is a veto, separate from concerns about substantiality. The separation of powers concerns underlying the disruptiveness prong cannot be alleviated by a court's view about the importance of the federal issue. *Grable* teaches that is a separate inquiry.

VI. CONCLUSION

Grable's new edition confirms that the second branch lives. Its four-prong test, while certainly not providing a bright line, creates a workable structure when the steps are kept conceptually distinct. The first prong—necessity—and the well-pleaded-complaint rule govern the placement of the federal issue in the case and how prominent the federal issue must be in relation to the lawsuit. The second prong—actually disputed—is more conceptually troubling and is properly treated under the substantiality prong. The third prong—substantiality—still allows for judicial consideration of the need for federal adjudication, considering the nature and importance of the federal issue. The fourth prong—disruptiveness—is a possible veto, grounded in the notion that Congress, not the courts, controls federal jurisdiction. This latter prong requires restraint. It is separate from the substantiality determination and requires judicial deference to Congress's judgment about the proper allocation of the federal judicial power.

Unless the second branch is entirely eliminated,[180] complete clarity in this area is unobtainable. If *Grable* is adhered to faithfully, it will result in few second-branch cases properly within § 1331. Whether that result is desirable can—and surely will—be debated, but the *Grable* edition admirably answers more questions than it creates and provides a reasonable structure for the inquiry. This clarity is a welcome change to the post-*Merrell Dow* world.

[179] *See* Elmira Teachers' Ass'n v. Elmira City Sch. Dist., No. 05-CV-6513 CJS, 2006 WL 240552, at *6 (W.D.N.Y. Jan. 27, 2006).

[180] *See Grable*, 125 S. Ct. at 2371–72 (Thomas, J., concurring) (noting an openness to consider a return to the Holmes test as one of exclusion). I view such elimination extremely unlikely. Such a marked departure from a construction of § 1331 would require an inquiry into the meaning of § 1331, which would likely reveal an implausible answer—that Congress probably intended to extend jurisdiction to the constitutional maximum.