Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After *Merrell Dow*

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I. INTRODUCTION

More than a century ago, Congress enacted the general federal question statute (now section 1331) and granted the lower federal courts the power to hear civil actions arising under the Constitution, laws, or treaties of the United States.[1] The statute embodies Congress' decision to delegate to those courts the power to frame specific standards for defining the scope of their federal question authority.[2] Thus, section 1331 enables the federal courts, as front-line arbiters of jurisdiction, to refine their general arising under power on a case-by-case basis in accordance with Congress' legislative directive.[3] In this way,

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[1] Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (1875) (current version at 28 U.S.C. § 1331 (1988)); *see infra* note 40 for the original text of this section. The statute, its essential language virtually unchanged, now reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." For a discussion of § 1331's origin and evolution, see *infra* notes 40 & 46. A study of the Supreme Court's appellate jurisdiction over federal question cases is beyond the scope of this Article.

[2] *See* Althouse, *How To Build A Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1486 (1987) ("Although Congress initially prescribes the jurisdiction of the federal courts, the courts themselves find extensive room for interpretation of these grants of jurisdiction.") (footnotes omitted); Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035, 1048 (1989–90) [hereinafter Althouse, *The Humble and the Treasonous*] ("judicial interpretation of statutes is an inevitable aspect of legislation; and, except where the statutory language is completely clear, interpretation is unavoidably influenced by judicial notions of what jurisdiction should be"); O'Neil, *Foreword: Symposium on Federal Judicial Power*, 39 DE PAUL L. REV. 229, 229 (1989) ("Congress and the federal courts together . . . define the federal judicial power" in a "joint effort."); Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 577 (1985) ("productive dialogue" occurs "between the courts and the legislature when each recognizes the shared responsibility for defining the contours of judicial authority"); *cf.* Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1356 (1986) (the Supreme Court's procedural common law defining its own appellate jurisdiction facilitates an "evolutionary dialogue between the Court and Congress" by which "the Court fills gaps in enacted law and frees a Congress, otherwise occupied by matters of substance, from constant jurisdictional fine tuning"). *But see* Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 49, 54–55 (1990) (jurisdictional "uncertainty is resolved on a case-by-case basis through an elaborate dialogue between" Congress and the courts who share, as virtual equals, the responsibility for jurisdiction).

[3] *See* Althouse, *The Humble and the Treasonous*, *supra* note 2, at 1049 (in the jurisdictional "partnership, . . . Congress sets the initial broad outlines . . . [and] the Court adapts those statutes in response to actual case settings"); Shapiro, *supra* note 2, at 547 (enabling federal courts to choose whether to assert jurisdiction aids "development of rules for the finer tuning of general jurisdictional grants"); C. MONTGOMERY, A MANUAL OF FEDERAL JURISDICTION AND PROCEDURE 128–29 (3d ed. 1927) (the general federal question statute "is evidently so indefinite as to leave much to judicial interpretation" and

the federal courts have the responsibility to articulate and implement Congress' section 1331's forum intent in the context of particular controversies.[4]

Since its enactment, however, section 1331 has eluded precise definition and consistent application, causing well-documented chagrin to courts and commentators alike.[5] The statute's interpretation has been complicated by the

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"the courts have reserved a right to decide each particular case in view of the facts thereof"); *cf.* Wachtler, *Judicial Lawmaking,* 65 N.Y.U. L. REV. 1, 18 (1990) (the "central ingredient" of the judicial process "is the constant bombardment, in the crucible of the lawsuit, of law as applied by the judge to specific factual real-world events and persons. . . . [W]here judicial rules are subject to legislative revision, the courts' rational tradition, independence, and most of all its intimate view of existing real facts and the impact of law, make it a superb and legitimate lawmaking partner with the legislature.") (footnote omitted).

Recent litigation trends make it particularly important to discern the scope of federal question jurisdiction as the docket assault on federal courts intensifies in both quantity and complexity of cases. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 6 (April 2, 1990) ("It appears that the long-expected crisis of the federal courts, caused by unabated rapid growth in case filings, is at last upon us."); Rehnquist, *1989 Year End Report,* 22 THE THIRD BRANCH 2 (Jan. 1990) ("Complex cases that require extensive judicial time now represent a greater portion of the overall [federal] caseload.").

[4] Congress, of course, can correct the courts' jurisdictional missteps. Take, for example, Congress' passage of the supplemental jurisdiction statute. Act of Dec. 1, 1990, § 310, 104 Stat. 5089, 5113 (1990) (codified at 28 U.S.C.A. § 1367 (West Supp. 1991)). In § 1367, Congress codified the long-recognized authority of the federal courts to exercise pendent and ancillary jurisdiction and overruled Finley v. United States, 490 U.S. 545 (1989), in which the Supreme Court had "cast substantial doubt" on the federal courts' power in this area. *See* 136 CONG. REC. S17580–81 (daily ed. Oct. 27, 1990) (section-by-section analysis) ("This section would authorize jurisdiction in a case like *Finley,* as well as essentially restore the pre-*Finley* understanding of the authorization for and limits on other forms of supplemental jurisdiction."); *see also* Althouse, *The Humble and the Treasonous, supra* note 2, at 1049 ("Congress retains the ultimate power to redefine jurisdiction, subject to constitutional limitations, defined by the Court.") (footnote omitted).

[5] *E.g.,* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8 (1983) ("the statutory phrase 'arising under' . . . has resisted all attempts to frame a single, precise definition for determining which cases fall within . . . and . . . outside" original district court jurisdiction); Romero v. International Terminal Operating Co., 358 U.S. 354, 378 (1959) (the statute's "simple language . . . conceals complexities of construction and policy"); McGoon v. Northern Pac. Ry. Co., 204 F. 998, 1000 (D.N.D. 1913) ("Few subjects . . . are involved in greater perplexity" and the "[m]any criteria" established for determining arising under jurisdiction can be "classified," but not "harmonized"); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 482 (1969) ("In determining which cases are federal question cases, within the statutory grant of jurisdiction, there is a proliferation of theories, but the case law cannot be rationalized by any one of them."); P. BATOR, D. MELTZER, P. MISHKIN, & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 966 (3d ed. 1988) ("Section 1331 is encrusted with a complex gloss of interpretive doctrines."); D. CURRIE, FEDERAL COURTS 174 (4th ed. 1990) ("the question whether a suit seeking a state-created remedy for violation of federal law falls within federal-question jurisdiction has long perplexed both the Court and the scholars"); M. REDISH, FEDERAL JURISDICTION:

fact that the Congress which first enacted section 1331 provided little indication of its intended scope,[6] particularly with respect to hybrid state law causes of action with federal elements.[7] Accordingly, the United States Supreme Court,

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TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 96 (2d ed. 1990) ("substantial disagreement exists over [§ 1331's] exact meaning and scope"); 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3562, at 17 (1984) (defining "arising under" has been the "most difficult single problem in determining whether federal question jurisdiction exists"); C. WRIGHT, LAW OF FEDERAL COURTS § 17, at 91 (4th ed. 1983) ("it cannot be said that any clear test has yet been developed to determine which cases 'arise under'"); Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 890 (1967) (arising under jurisdiction "has been a puzzle to judge and scholar alike") (footnotes omitted); Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289, 322 (1969) (federal question law is a "nightmarishly confused jurisdictional tangle").

[6] *Infra* note 46. This absence of congressional guidance may, in part, explain why the Supreme Court has not developed an approach to § 1331 that explicitly and consistently addresses the purposes underlying federal question jurisdiction and applies the factors influencing § 1331 allocations. *See infra* notes 77–194 and accompanying text; *see also* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 825–28 (1986) (Brennan, J., dissenting) (admonishing the majority for failing to analyze the § 1331 case before it in light of the reasons for federal question jurisdiction); Doernberg & Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 U.C.L.A. L. Rev. 529, 535 (1989) (noting that the Supreme Court has never "affirmatively delineat[ed] the characteristics of a federal question case") (footnote omitted); 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, 647 (1987) [hereinafter Doernberg, *There's No Reason for It*] (noting in connection with the well-pleaded complaint rule that "the current structure [of federal question jurisdiction] arose with little consideration of the reasons for [its] existence."); Friedman, *supra* note 2, at 22 ("lacking in any grounding in the federal statute or its legislative history . . . are the perplexing cases addressing what constitutes a 'federal question' for the purpose of lower federal court jurisdiction.") (footnote omitted).

[7] By their nature, hybrid claims pose delicate questions of forum allocation. They test the § 1331 reach of the federal courts precisely because they defy neat categorization as either "federal" or "state" claims and require close judicial analysis of the mingled federal and state interests they embody to determine whether Congress would sanction extension of the courts' federal question power to the hybrid controversy. *See Romero*, 358 U.S. at 393 n.4 (Brennan, J., dissenting) (noting "the problem of interpreting, in its periphery where state and federal elements are blended, the scope of the arising-under provisions of § 1331"); Hirshman, *Whose Law Is It Anyway? A Reconsideration of Federal Question Jurisdiction over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17, 17–18 (1984) ("Determinations about hybrid cases are important, because they mark the limits of the exercise of original federal question jurisdiction under 28 U.S.C. § 1331, and federal adjudication of whole categories of litigation depends upon where that line is drawn.") (footnote omitted); Comment, Merrell Dow Pharmaceuticals, Inc. v. Thompson: *Limitations on Federal Question Jurisdiction*, 39 BAYLOR L. REV. 543, 547 (1987) ("The problems of federal jurisdiction are most visible in cases where the plaintiff's claim states a

without congressional contravention,[8] has attempted to strike a principled accommodation of congressional and judicial perspectives in its interpretation of section 1331, mindful that "in our federal system allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy."[9]

That accommodation, by and large, gave the federal trial courts considerable discretion[10] within the broader congressional directive to

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federal cause of action incorporating state law or a state cause of action incorporating federal law.") (footnote omitted).

Thus, the judiciary's discretionary power to refine its own jurisdiction is especially important in the close cases presented by the federalism prisms of hybrid claims. This Article will focus on state law causes of action implicating federal statutes. For illuminating discussions of hybrid claims, *see generally* Greene, *supra* note 5; Hirshman, *supra*; *see also* Hornstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 IND. L.J. 563 (1980–1981); Comment, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L.J. 1144 (1985).

[8] Through the years, Congress has amended the federal question statute, but has preserved the crucial arising under language in virtually the same form and left undisturbed the classic Supreme Court cases construing it. *Infra* note 40.

[9] *Romero*, 358 U.S. at 411 (Brennan, J., dissenting); *see also id.* at 379 (§ 1331 must be treated in "the interpretative setting of history, legal lore, and due regard for the interests of our federal system").

[10] *See, e.g., Merrell Dow*, 478 U.S. at 810 ("exploring the outer reaches of § 1331 require[s] sensitive judgments about congressional intent, judicial power, and the federal system"); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 20 (1983) (§ 1331 should be construed "with an eye to practicality and necessity"); *Romero*, 358 U.S. at 379 (the federal question statute is not "a wooden set of self-sufficient words" and must be construed "in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy"); Cohen, *supra* note 5, at 905 (§ 1331 determinations involve "weighing countervailing pragmatic considerations in determining whether classes of cases should be eligible for initial trial in federal courts"); Shapiro, *supra* note 2, at 566–70, 588 (federal court adjudication of § 1331 disputes "does and should carry with it significant leeway for the exercise of reasoned discretion").

See also Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 U.C.L.A. L. REV. 233, 292 (1988) [hereinafter Chemerinsky, *Parity Reconsidered*] (noting that even a Supreme Court dedicated to following Congress' jurisdictional will for the federal courts "still will have a great deal of discretion in fashioning jurisdictional rules [and] will need some principle for exercising this discretion . . . where Congress is silent or its intent is unclear"); *see also id.* at 294 ("there will be many jurisdictional issues where congressional intent is nonexistent or unclear, providing the Court with substantial discretion in defining federal court jurisdiction").

In this way, § 1331's expansive language and resistance to pinpoint definition represent a plus rather than a problem: both give the statute a resilience necessary for the courts' exercise of case-specific discretion to derive and implement Congress' directions for allocating claims between the federal and state judicial systems. *Cf.* Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An "Institutionalist" Perspective*, 83 NW. U.L. REV. 761, 785 (1989) (a court must not use statutory

determine the jurisdictional sufficiency of hybrid actions by examining the centrality of the federal issue to resolution of the state law claim before the court.[11] This important strain of the Court's section 1331 precedent endorsed a forum test that focused on whether plaintiff's right to relief under state law required the trial court to construe an implicated federal statute, rather than on the possibly pertinent substantive intent of Congress reflected in that statute as it might bear upon the section 1331 forum determination. In essence, this case-centered approach attempted to measure the importance of the federal element in terms of its dispositive effect upon the claim and presumed the desirability of a federal forum option when that element was prominent enough to influence case outcome.

Merrell Dow Pharmaceuticals, Inc. v. Thompson,[12] however, dramatically changed this case-centered approach. The jurisdictional dilemma presented in *Merrell Dow* arose out of defendant Merrell Dow Pharmaceuticals, Inc.'s argument that plaintiffs' hybrid claim—a state law negligence cause of action alleging that defendant's violation of the Federal Food, Drug and Cosmetic Act[13] constituted negligence under Ohio state law[14]—was sufficiently federal in

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construction "as a mere guise for substitution of its own policy choices, in derogation of those made by the representative branches" and must interpret a statute "in the manner most consistent with attainment of the policies" it seeks to achieve).

[11] *E.g., see* the discussion of Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921), *infra* notes 104–12 and accompanying text, and Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), *infra* notes 145–50 and accompanying text.

[12] 478 U.S. 804 (1986).

[13] Act of June 25, 1938, 52 Stat. 1040, as amended, 21 U.S.C. §§ 301-93 (1988) [hereinafter FDCA or the Act].

[14] Respondent-plaintiffs, residents of Scotland and Canada suing individually and on behalf of their minor children, brought two separate but almost identical complaints in Ohio state court. Each alleged that petitioner-defendant Merrell Dow's drug Bendectin caused multiple birth deformities in their children. Brief of Petitioner On Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit at 3, Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986) (No. 85-619). *See generally* 2 M.G. DIXON & F.C. WOODSIDE, DRUG PRODUCT LIABILITY § 15.64[1] at 186, 190 (1988) (Pregnant women used Bendectin to alleviate the nausea and vomiting of morning sickness. Estimates connect its use in more than 33 million pregnancies around the world.) In particular, plaintiffs' Fourth Cause of Action alleged that Merrell Dow's misbranding of Bendectin violated the FDCA's labeling requirements (§§ 352 and 321), proximately caused their children's birth defects, and constituted a rebuttable presumption of negligence under state law. *See* Complaint and Jury Demand, ¶¶ 25-27 (Ohio C.P. Sept. 1, 1983) (No. A8307058) (on microfilm at the University of North Dakota Law School Library).

Relying upon the federal law allegations in the Fourth Cause of Action to establish federal question jurisdiction, Merrell Dow removed the actions to Ohio federal district court, where they were consolidated. *Merrell Dow*, 478 U.S. at 806. The propriety of Merrell Dow's removal "turn[ed] on whether the case [fell] within the original 'federal question' jurisdiction of the federal courts"—the issue before the Supreme Court because a defendant can only remove a case that could have been brought in federal court originally.

character to justify the district court's exercise of federal question jurisdiction.[15] A five to four majority of the Supreme Court disagreed. Bypassing classic section 1331 precedent that could have supported a finding of jurisdiction based on the centrality of the federal issue to plaintiff's recovery,[16]

Merrell Dow, 478 U.S. at 808; 28 U.S.C. § 1441(b) (1982). (§ 1441(b) precluded diversity jurisdiction as a ground for removal because Merrell Dow was a citizen of the state (Ohio) in which the action was brought. 28 U.S.C. § 1441(b); *Merrell Dow*, 478 U.S. at 806 n.1.) Plaintiffs then moved to remand. Conceding that the FDCA did not create a private right of action, plaintiffs argued that their fourth count did not arise under any federal law, and that they had merely invoked the FDCA's misbranding provisions for the "appropriate *standard of care* to be employed by the Ohio Court in determining if Merrell has been negligent." Plaintiffs' Motion To Remand Under § 1447(c) For Lack of Jurisdiction, at 5a–6a (Oct. 14, 1983); *cf.* 2 M.G. DIXON & F.C. WOODSIDE, DRUG PRODUCT LIABILITY §14.04[3] at 74–77 (1988) (because the lower federal courts have refused to imply a private cause of action for damages directly under the FDCA, plaintiffs in drug liability cases often allege that violations of the Act's labeling requirements amount to negligence per se, or to evidence or an inference of negligence under state law).

District court Judge Carl B. Rubin, finding § 1331 jurisdiction, denied plaintiffs' remand motion, but dismissed the action (as Merrell Dow had urged) on *forum non conveniens* grounds. *Merrell Dow*, 478 U.S. at 806. In a two-page opinion, the Sixth Circuit reversed, finding no federal question jurisdiction, and ordered both cases remanded back to Ohio state court. Thompson v. Merrell Dow Pharmaceuticals, Inc., 766 F.2d 1005, 1006 (6th Cir. 1985), *aff'd*, 478 U.S. 804 (1986). The Supreme Court affirmed the Sixth Circuit's judgment, offering, however, its unique § 1331 analysis. *Merrell Dow*, 478 U.S. 804, 817, 817 n.15 (1986); *infra* notes 153–94 and accompanying text.

[15] Merrell Dow might have preferred the federal forum because it had a strong argument that the action, once in federal court, should be dismissed on *forum non conveniens* grounds. *E.g.*, Dowling v. Richardson-Merrell, Inc., 727 F.2d 608, 616 (6th Cir. 1984), *aff'g and modifying, In re* Richardson-Merrell, Inc., 545 F. Supp. 1130 (S.D. Ohio 1983) (Rubin, C.J.) (upholding Judge Rubin's order dismissing 12 actions brought by United Kingdom citizens against Merrell Dow on *forum non conveniens* grounds given the United Kingdom's significant interest in the manufacture, marketing, prescription, and regulation of Debendox (Bendectin's British counterpart) administered by British physicians to British citizens); *In re* Richardson-Merrill, Inc., "Benedectin" Products Liability Litigation, MDL No. 486, slip op. at 7a (S.D. Ohio May 14, 1984).

Other practical considerations that might explain Merrell Dow's preference for a federal forum include greater uniformity of procedural and evidentiary rules, the potential for consolidation or common issue trials in what defendant believed to be a strong case in its favor, the benefits of coordinated discovery or defenses generally, and a larger, more diverse pool of potential jurors. *See* 3 F.C. WOODSIDE III, DRUG PRODUCT LIABILITY § 21.02[2] at 5–6 & § 30.02[2] at 7 (1988).

[16] That precedent, as noted, is Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921), a case both Justice Brennan (in his *Merrell Dow* dissent joined by Justices White, Marshall, and Blackmun) and district court Judge Rubin relied upon heavily to conclude that § 1331 jurisdiction existed. *Merrell Dow*, 478 U.S. at 820–24, 827–28 (Brennan, J., dissenting) (explaining that "[t]he continuing vitality of *Smith* is beyond challenge" and applying *Smith* to find federal question jurisdiction over plaintiffs' hybrid claim because the statutory issue it raised required the court to discern the meaning and application of the

the Court instead focused on the specific substantive statute raised by the state law claim (here, the FDCA) to determine whether Congress had provided either an express or *implied* cause of action or remedy to privately enforce that statute.[17] Acknowledging the novelty of making the test for statutorily implied private remedies part of its section 1331 methodology,[18] the Court emphasized the importance of testing the substantive statute for implied remedies and attempted to reconcile or at least to couple the Court's federal question doctrine with its implication doctrine.[19]

The Court then concluded that Congress' failure to provide either a *cause of action* or *remedy* within the FDCA necessarily precluded the court's exercise of federal question *jurisdiction* over the state law claim which incorporated that Act regardless of the dispositive effect of the federal issue within the lawsuit.[20] Thus, *Merrell Dow* approved a mechanistic jurisdictional formula: If there is no federal cause of action or remedy (either express or implied) in the incorporated federal statute, then there is no federal jurisdiction over state law claims seeking to enforce the implicated federal standard.

A number of federal circuit and district courts have adopted this strict reading of *Merrell Dow*.[21] There are, however, serious shortcomings to this approach. *Merrell Dow*'s inordinate emphasis on the cause of action or remedy

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FDCA and was an "essential element" of the state claim); *see also id.* at 806–07. For a discussion of *Smith*'s importance in the Court's § 1331 jurisprudence, *see infra* notes 104–12, 145–50, 314–15 and accompanying text.

[17] *Merrell Dow*, 478 U.S. at 810-14.

[18] Justice Stevens, writing for the majority, admitted that "[t]his is the first case in which we have reviewed this type of jurisdictional claim in light of these [implied right of action] factors." *Id.* at 811.

[19] *Id.* at 810-12. For an explanation of the Supreme Court's federal question and statutory implication doctrines, see *infra* notes 63–194 and accompanying text and *infra* notes 230–59 and accompanying text, respectively.

[20] *See Merrell Dow*, 478 U.S. at 814 (footnote omitted); *id.* at 812. Courts use the terms "cause of action" and "remedy" somewhat interchangeably in the implication context. *E.g., id.* at 810-12.

[21] *Infra* notes 195–227 and accompanying text; *see also* Comment, *supra* note 7, at 560–63. For enlightening treatments of *Merrell Dow*, *see, e.g.*, E. CHEMERINSKY, FEDERAL JURISDICTION 239-41 (1989); HART & WECHSLER, *supra* note 5, at 1020–21; M. REDISH, *supra* note 5, at 99–105; Doernberg, *There's No Reason for It, supra* note 6, at 635–40, 649, 657–58; Doernberg & Mushlin, *supra* note 6, at 539–40, 586–87; Friedman, *supra* note 2, at 21–24; Luneburg, *Nonoriginalist Interpretation: A Comment on Federal Question Jurisdiction and* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 48 U. PITT. L. REV. 757 (1987); Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts,* 38 HASTINGS L.J. 665, 711–16 (1987); Comment, *supra* note 7; *The Supreme Court—Leading Cases,* 100 HARV. L. REV. 100, 230–40 (1986); *see also* Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983,* 77 GEO. L.J. 1493, 1526 (1989) (*Merrell Dow* indicates that state causes of action incorporating federal elements are "clearly second-class citizens for jurisdictional purposes.") (footnote omitted).

as a jurisdictional determinant improperly grounds the federal question analysis on a congressional substantive intent that is not dispositive of Congress' forum intent under section 1331 and amounts to a virtual substitution of the remedial for the jurisdictional inquiry.[22] As a result, *Merrell Dow*'s remedy requirement unduly inhibits judicial prerogative sanctioned by section 1331 to explore the considerations necessary to principled allocations of hybrid claims, most notably the dispositive nature of the federal issue within the lawsuit.[23]

Despite these shortcomings, *Merrell Dow* spotlights the provoking question whether the case-centered approach to hybrid claim determinations has failed to adequately account for Congress' substantive objectives within the implicated statute as they bear upon the forum determination. Perhaps, as *Merrell Dow*

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[22] Under a strict reading of *Merrell Dow* in the hybrid claim context, the implication test essentially doubles for the federal question test because the federal statute involved in the state claim typically fails to provide expressly for private enforcement and the court has to determine whether to imply a remedy, and consequently under *Merrell Dow,* supply the basis for federal jurisdiction. Thus, the § 1331 inquiry often reduces to the finding about implied remedies. *See infra* notes 195–227 and accompanying text.

As Professor Doernberg noted, a strict reading of *Merrell Dow* may mean "no cause of action not created by Congress will be able to be heard in the federal courts pursuant to section 1331." Doernberg, *There's No Reason for It, supra* note 6, at 638 (footnote omitted); *see also* E. CHEMERINSKY, *supra* note 21, at 240 ("[F]ederal question jurisdiction [under *Merrell Dow*] exists only if the *federal law itself* creates a cause of action, albeit one not relied on by the plaintiff."); *The Supreme Court—Leading Cases, supra* note 21, at 236 & n.34 (1986) ("The Court has never before [*Merrell Dow*] held that sustaining federal jurisdiction requires the presence of a federal remedy."). This Article will shorthand *Merrell Dow*'s virtual equation of remedy (or cause of action) and jurisdiction as the "remedy requirement."

[23] *See* Cohen, *supra* note 5, at 916 (§ 1331 considerations include the potential caseload increase, the extent to which the class of case turns on issues of state or federal law, the need for federal expertise to handle federal law, and the need for a sympathetic federal tribunal); Solimine, *Enforcement and Interpretation of Settlements of Federal Civil Rights Actions,* 19 RUTGERS L.J. 295, 309 (1988) (§ 1331 considerations include "congressional intent, the degree of federal interest in the litigation, the relative prominence of federal and state issues, and the likely burden on federal judicial resources in accepting jurisdiction") (footnote omitted); *cf.* Friedman, *supra* note 2, at 52 (delineating the "protection of federal rights and interests, considerations of comity and federalism, caseloads and . . . judicial resources, and the need for uniformity" as appropriate factors to consider in shaping federal jurisdiction); Shapiro, *supra* note 2, at 579–88 (delineating "equitable discretion, federalism and comity, separation of powers, and judicial administration" as appropriate criteria for guiding discretion in federal jurisdictional determinations); *see also* Cohen, *supra* note 5, at 907 ("A frank recognition of the pragmatic nature of the [federal question] decision-making process would help throw light on the factors which actually induce decision."); Luneburg, *supra* note 21, at 758 ("Since [judicial] lawmaking may form a significant element in statutory interpretation, candor by the courts in what they are doing would seem to be clearly called for."); Shapiro, *supra* note 2, at 578–79 (stressing the importance of "principled discretion" and candor in jurisdictional determinations).

implies, a more "comprehensive" approach to section 1331 distributions is appropriate. This approach might require examination of all considerations—both jurisdictional *and* substantive—relevant to whether a state law claim warrants the protective offerings of federal trial forums. To experiment, this Article posits such an approach, but concludes that it is ultimately subversive of the general federal question statute and should be rejected in favor of a return to the case-centered analysis (measuring the centrality of the federal issue to plaintiff's recovery) absent further word from Congress.

In overview: Part II of this Article sets the larger constitutional framework for section 1331 hybrid determinations by exploring the article III origins of the jurisdictional collaboration and Congress' delegation of case-specific federal question authority to the lower courts. Part III shows how *Merrell Dow* unnecessarily and unjustifiably sacrifices this congressionally-sanctioned judicial prerogative—without any indication from Congress that this change should occur—in its confusion of remedial with jurisdictional intent. To illuminate *Merrell Dow*'s impact on the Supreme Court's statutory federal question doctrine, Section B (after Section A reinforces the purposes of federal question jurisdiction, often ignored in the Supreme Court's section 1331 opinions) revisits classic pre-*Merrell Dow* federal question cases (1) to show the development of the discretionary case-centered emphasis of pre-*Merrell Dow* precedent and (2) to explore the Court's treatment of jurisdictional and substantive considerations in hybrid claim allocations, especially the value attached to the substantive cause of action as jurisdictional determinant. Then, Section C shows how *Merrell Dow* has altered the Court's former accommodation of judicial prerogative in the federal question collaboration by essentially substituting a remedial for a jurisdictional inquiry. Lower court decisions following *Merrell Dow*'s restrictive approach are reviewed in Section D. These cases illustrate the dampening effect *Merrell Dow* has had on judicial prerogative or initiative to assess traditional section 1331 considerations, especially the role played by the federal issue within the claims before the court.

Part IV demonstrates in detail why *Merrell Dow*'s remedy requirement threatens the integrity of a discretionary section 1331 inquiry and cannot stand in place of a full-blown jurisdictional assessment. Section A explains the Supreme Court's statutory implied remedies doctrine, itself discretion-restrictive. Section B then demonstrates that *Merrell Dow*'s blend of statutory implication and federal question doctrines fails to achieve a coherent jurisdictional formula and inhibits judicial discretion under section 1331. The ostensible benefits of making a private action or remedy within the implicated federal statute the jurisdictional barometer are exposed as illusory in Section C.

Lastly, Section D of Part IV explores *Merrell Dow*'s invitation to consider a section 1331 inquiry that assesses the substantive aspect of hybrid claim allocations. It presents a preliminary sketch of an alternative to *Merrell Dow*'s

objectionable remedy requirement—a multi-factor federal question inquiry, consistent with the purposes of federal question jurisdiction, that is both respectful of judicial prerogative and responsive to specific congressional substantive aims that may relate to forum selection. It concludes, however, that this approach is ultimately unsound and urges a return to the pre-*Merrell Dow* case-centered approach to section 1331 allocations.

II. THE CONSTITUTIONAL FRAMEWORK: ARTICLE III ORIGINS OF THE GENERAL FEDERAL QUESTION POWER

Article III created a disembodied federal judicial power ("The judicial Power of the United States"),[24] which it defined by limitation to the specific types of "cases" and "controversies" enumerated.[25] The article vested the judicial power directly "in one supreme Court" and indirectly "in such inferior Courts as *the Congress* may from time to time ordain and establish."[26] Thus, article III itself established the Supreme Court, but gave Congress the power to constitute the lower federal courts should Congress see fit to do so.[27] Notably, article III gave no explicit direction about Congress' ability to control the types of cases or controversies those courts might hear, once created.[28]

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[24] U.S. CONST. art. III, § 1.

[25] *See id.* at § 2. Article III's restriction of the federal judicial power to specified subjects of interstate, national, and international significance is a respectful acknowledgment of the state courts' pre-existence and preeminent status in the new system of government, which was fashioned to accommodate the state sovereigns already in place. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 155 (2d ed. 1988); *see also* HART & WECHSLER, *supra* note 5, at 13–18 (Article III's nine heads of federal jurisdiction reflect its focus on the vindication of federal authority, admiralty and maritime cases, foreign relations, interstate umpiring, and controversies between citizens of different states.); THE FEDERALIST No. 81, at 485–86 (A. Hamilton) (C. Rossiter ed. 1961) (noting that the inferior federal courts will be especially suited to determine "matters of national jurisdiction," but that the "fitness and competency" of state courts "should be allowed in the utmost latitude"); THE FEDERALIST No. 82, at 491–93 (A. Hamilton) (C. Rossiter ed. 1961) (describing state court retention of pre-existing authority and exercise of concurrent jurisdiction).

[26] U.S. CONST. art. III, § 1 (emphasis added); *see also id.* art. 1, § 8, cl. 9 (empowering Congress "[t]o constitute Tribunals inferior to the supreme Court").

[27] E. CHEMERINSKY, *supra* note 21, at 3; HART & WECHSLER, *supra* note 5, at 10–11; *see also* Mishkin, *The Federal "Question" in the District Courts,* 53 COLUM. L. REV. 157, 157 n.1 (1953). For concise overviews of the vigorous debate about Congress' power to restrict or revoke entirely lower federal court jurisdiction, see E. CHEMERINSKY, *supra* note 21, at § 3.3 and M. REDISH, *supra* note 5, at 29–52; *see also Article III and The Judiciary Act of 1789,* 138 U. PA. L. REV. 1499 (1990).

[28] *See* London, *"Federal Question" Jurisdiction—A Snare and a Delusion,* 57 MICH. L. REV. 835, 836 (1959) ("the extent to which this constitutional grant of judicial power would be exercised, particularly with respect to the type and number of inferior courts and the scope of their jurisdiction, was left to the discretion of Congress") (footnote omitted).

Congress lost little time in interpreting and exercising its article III prerogative. The first session of the first Congress authorized the first set of inferior courts in The Judiciary Act of 1789,[29] but stopped short of vesting them with the full range of the federal judicial power delineated by article III.[30] To date, Congress has never granted the lower federal courts full article III authority,[31] and the Supreme Court has respected Congress' sizable power to control lower court jurisdiction.[32] Thus, the lower federal courts not only *exist* by virtue of congressional directive, but the nature and breadth of their jurisdiction is also controlled by Congress.[33]

Contrast this silence with article III's express mandate that Congress shall regulate the Supreme Court's appellate jurisdiction. U.S. CONST. art. III, § 2, cl. 2.

[29] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (1789); Warren, *New Light on the History of The Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49, 49 (1923).

[30] The First Judiciary Act, for example, did not give the federal courts federal question authority (although article III expressly provided for it) and established an amount in controversy requirement for diversity cases (although article III nowhere mentioned it). London, *supra* note 28, at 836; *compare* U.S. CONST. art. III, § 2 *with* Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73 (1789) (requiring a $500 diversity threshold).

[31] E. CHEMERINSKY, *supra* note 21, at 149-50.

[32] *E.g.,* Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe."); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922) (Congress "may give, withhold or restrict [lower court] jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.") (citations omitted); Sheldon v. Sill, 49 U.S. (8 How.) 441, 448 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."); *see also* L. TRIBE, *supra* note 25, at 43; Redish & Woods, *Congressional Power To Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,* 124 U. PA. L. REV. 45, 46 (1975) ("[I]t has generally been accepted that Congress may adjust the jurisdiction of the federal courts in virtually any manner.") (footnote omitted).

[33] Accordingly, the lower federal courts are courts of limited jurisdiction, able to hear only cases or controversies that are both constitutionally ordained and congressionally (*i.e.,* statutorily) sanctioned. Professor Forrester has explained this principle of dual authorization: "Congress must give the [lower federal] courts authority to exercise the power which is created by the Constitution. The Constitution contains the reservoir or potential of judicial power which Congress may confer, piecemeal, upon the courts." Forrester, *The Nature of a "Federal Question,"* XVI TUL. L. REV. 362, 362-63 (1942) (footnote omitted); *see also* The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868) (to create lower court jurisdiction, "[t]he Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it"). Contrast the limited jurisdiction of the federal courts with the general jurisdiction of the state courts, which can hear a broad range of cases in the absence of statutory authorization. L. BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 43 (1986).

That control, however, is not absolute. Congressional grants of lower court jurisdiction must comport with article III strictures[34] or risk invalidation by the Supreme Court.[35] And, within the confines of broad jurisdictional grants, Congress itself has often accorded the courts—in part by silent acquiescence[36]—considerable discretion to refine the contours of their own jurisdiction, consistent with legislative intent, on a case-by-case basis.[37] Thus, Congress has given the federal courts the simultaneous power to exert and to police the jurisdictional power they possess, a unique manifestation of systemic trust ultimately grounded on the fact that the representative Congress may always readjust, consistent with the Constitution, the jurisdictional perimeter sculpted by the judiciary.[38]

The constitutional authorization for federal question jurisdiction resides in article III's "arising under" clause, which states that the federal 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."[39] Section 1331, Congress' counterpart bestowal of

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[34] *E.g.*, Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 491 (1983) ("This Court's cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution."); National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 607 (1949) ("If we accept the elementary doctrine that the words of Article III are not self-exercising grants of jurisdiction to the inferior federal courts, then I think those words must mark the limits of the power Congress may confer on the district courts.") (Rutledge, J., concurring) (footnote omitted); *id.* at 652 ("Article III defines and confines the limits of jurisdiction of the courts which are established under [it].") (Frankfurter, J., dissenting).

For discussions of non-article III constitutional limitations on Congress' article III power, see, *e.g.*, Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) ("It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements, or, what in some instances may be the same thing, without regard to them [*i.e.*, due process, the separation and independence of government powers, and the constitutional integrity of the judicial process].") ; Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert denied*, 335 U.S. 887 (1948) (positing a fifth amendment limitation on Congress' article III power).

[35] The Supreme Court has the power to review the constitutionality of congressional enactments under the doctrine of judicial review. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[36] In the statutory federal question area, for example, the historical reality is that Congress, to this point, has left intact the Supreme Court's complicated trail of precedent.

[37] *Supra* notes 2–3, 10, 23 and accompanying text; *see also* Shapiro, *supra* note 2, at 568 ("no [§ 1331] formulation can possibly explain or even begin to account for the variety of outcomes unless it accords sufficient room for the federal courts to make a range of choices based on considerations of judicial administration and the degree of federal concern") (footnote omitted).

[38] *Supra* note 4.

[39] U.S. CONST. art. III, § 2, cl. 1.

general federal question jurisdiction, borrows liberally from the constitutional language, stating that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[40]

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[40] 28 U.S.C. § 1331 (1988).

Congress' authorization of general federal jurisdiction has a curious history. The first Congress which created the lower federal courts did not invest them with original jurisdiction over federal questions, arguably the area most warranting their existence. *See* Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 640–42 (1942) (hypothesizing (1) that federal question jurisdiction was the cost of the compromise making The First Judiciary Act of 1789 palatable both to those who championed inferior courts with federal question authority as crucial to the new government and to those who opposed creation of the inferior courts altogether and (2) that federal question, rather than diversity, jurisdiction was sacrificed because (a) impartial tribunals, capable of transcending intrastate, interstate, or international prejudices, were vital to the economic well-being of the fledgling nation and (b) that jurisdiction could always be vested when circumstances required it); *see also* London, *supra* note 28, at 836 (The First Judiciary Act's failure to provide general federal question jurisdiction "was not an oversight but reflected a compromise made necessary by the determined opposition of the antifederalists to a national judiciary") (footnote omitted). *But see* Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14 OKLA. CITY U. L. REV. 521 (1989) (arguing that the distribution of jurisdiction in the Judiciary Act of 1789 reveals that the Act fully vested federal question jurisdiction).

Then, when Congress first authorized the courts' general federal question jurisdiction 12 years later in the Midnight Judges Act of 1801, Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92 (1801), it repealed the grant in a little more than a year, Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132 (1802). For the next 70 or so years, Congress selectively conferred federal question jurisdiction on the lower federal courts in specific statutes. *See, e.g.*, the first Civil Rights Act, Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27 (1866), which granted federal jurisdiction over "all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act;" *see also* HART & WECHSLER, *supra* note 5, at 960–62.

Finally, in 1875, Congress enacted the general federal question statute (§ 1331's predecessor) with a $500 jurisdictional amount. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875). The post-Civil War "consolidation of national sentiment," HART & WECHSLER, *supra* note 5, at 960, and suspicion of state courts as adjudicators of federal rights prompted its passage. *Infra* note 60 and accompanying text. Section 1 of the Act provided that the federal courts

> shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, *and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority* . . . .

Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875) (emphasis added). The statute's operative "arising under" language has survived a number of amendments, *see* C. WRIGHT,

Despite the similarity of the constitutional and statutory federal question provisions, the Supreme Court has given them significantly different interpretations.[41] In *Osborn v. Bank of the United States*,[42] the Court broadly construed article III's arising under clause to permit federal question jurisdiction whenever a federal issue "forms an ingredient of the original cause" and might arise in the lawsuit, no matter how remote or actualized that possibility.[43] In contrast, the Supreme Court has given section 1331 a more limited construction by requiring the federal question asserted not only to meet the well-pleaded complaint rule,[44] but to be sufficiently substantial and vital to

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supra note 5, § 17, at 90, although Congress had raised the jurisdictional amount requirement to $10,000 before eliminating it entirely in 1980. Act of Dec. 1, 1980, § 2(a), 94 Stat. 2369; HART & WECHSLER, *supra* note 5, at 963 n.32. Interestingly, between 1875 and 1980, Congress enacted numerous jurisdictional provisions in particular substantive statutes as well as subject-specific jurisdictional statutes that did not contain an amount in controversy requirement. HART & WECHSLER, *supra* note 5, at 963–66; Lynch v. Household Finance Corp., 405 U.S. 538, 549 n.17 (listing statutes granting jurisdiction, "without regard to the amount in controversy, in virtually all areas that otherwise would fall under the general federal-question statute"). These post-federal question statute enactments support the inference that Congress, when it wished, specifically provided for jurisdiction, but otherwise reserved forum allocations (of a minimum threshold value) to the courts' discretion under § 1331—a discretion Congress broadened by removing the jurisdictional amount from the statute.

For a detailed history of the statute's development, see, *e.g.*, HART & WECHSLER, *supra* note 5, at 960-66; Doernberg, *There's No Reason for It*, *supra* note 6, at 601–07; Forrester, *supra* note 33, at 374–75.

[41] *See, e.g.*, Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 494–95 (1983) (article III arising under jurisdiction is "broader" than statutory federal question jurisdiction and "this Court never has held [them] . . . identical"); Romero v. International Terminal Operating Co., 358 U.S. 354, 379 n.51 (1959) ("the many limitations" on § 1331 "are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts").

[42] 22 U.S. (9 Wheat.) 738 (1824).

[43] *Id.* at 823; *accord* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 807 (1986) ("the constitutional meaning of 'arising under' may extend to all cases in which a federal question is 'an ingredient' of the action"); *Verlinden*, 461 U.S. at 492 (under *Osborn*, "Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law."); *see* M. REDISH, *supra* note 5, at 86 (*Osborn*, read literally, means "the mere possibility of a federal issue is sufficient to authorize Congress to bring a case into federal court . . . even though in actuality the entire case will have absolutely nothing to do with federal law."). *Osborn* shows Justice Marshall, with characteristic vision, "construing for the future," Chadbourn & Levin, *supra* note 40, at 649, by early establishing in article III a broad constitutional reserve of federal question power for Congress and the courts to draw upon, especially when Congress had not as yet given the federal courts general federal question authority. *See* M. REDISH, *supra* note 5, at 86; Cohen, *supra* note 5, at 891.

[44] This is the judicial requirement that the federal question supporting § 1331 jurisdiction cannot be supplied by the answer or the reply, but must appear on the face of

the claim's resolution before it merits federal treatment.[45] Significantly, the Court has exercised its jurisdictional prerogative to narrow section 1331's

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plaintiff's complaint, as a necessary part of plaintiff's claim, and not in anticipation of probable defenses. *E.g.*, Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908); Taylor v. Anderson, 234 U.S. 74, 75 (1914); Gully v. First Nat'l Bank, 299 U.S. 109, 112–13 (1936). In declaratory judgment actions, the hypothetical underlying coercive action must comport with the rule. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 16 (1983) ("'if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking'") (quoting 10A C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2767, pp. 744–45 (2d ed. 1983)); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671–72 (1950) (the federal Declaratory Judgment Act does not expand federal jurisdiction and plaintiff's declaratory complaint, viewed as a coercive claim for damages, must satisfy the well-pleaded complaint rule); West 14th St. Commercial Corp. v. 5 West 14th Owners Corp., 815 F.2d 188, 194 (2d Cir.), *cert. denied,* 484 U.S. 850, 871 (1987) ("a court must look beyond the declaratory judgment allegations and determine whether a substantial federal question arises either from the [declaratory judgment] defendant's threatened action . . . or from the [declaratory] complaint when viewed as a request for coercive relief apart from the defendant's anticipated suit") (citations omitted); *see also* Doernberg, *There's No Reason for It, supra* note 6, at 640–46 (examining *Skelly's* and *Franchise Tax Board's* treatment of declaratory judgments).

The well-pleaded complaint rule has been justified because it "spares the courts the uncertainty of guessing whether federal issues will be raised after the complaint and enables the jurisdictional determination to be made at the outset." *See* Currie, *The Federal Courts and the American Law Institute, Part II,* 36 U. CHI. L. REV. 268, 270 (1969) [hereinafter Currie, *Part II*]. But, "[t]he federal interest in having federal courts adjudicate federal issues is just as great when the federal question arises in a defense, or in a response to a defense, as when it is presented in the plaintiff's complaint." E. CHEMERINSKY, *supra* note 21, at 235. And the purposes of federal question jurisdiction "are ill served by a rule that arbitrarily consigns important federal issues to the state courts because they happen to appear in the 'wrong' pleading." Doernberg, *There's No Reason for It, supra* note 6, at 661 (footnote omitted). *See generally id.* for a thorough critique of the rule.

Despite the rule's shortcomings, recent Supreme Court cases indicate that it is firmly entrenched in statutory federal question jurisprudence. *E.g.*, Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 840-41 (1989); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808–09 (1988); Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987); *Merrell Dow,* 478 U.S. at 808; *Franchise Tax Bd.*, 463 U.S. at 9-12.

[45] *E.g., Franchise Tax Bd.*, 463 U.S. at 27–28 ("Congress has given the lower federal courts jurisdiction to hear . . . only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."); *see also Merrell Dow,* 478 U.S. at 814 (Congress' assumed determination not to provide a private federal remedy for the FDCA's violation "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.") (footnote omitted); *The Supreme Court—Leading Cases, supra* note 21, at 234 n.30 (federal question formulas "are

scope despite legislative history—admittedly meager—that Congress intended to vest the full extent of constitutional federal question power in the lower courts.[46] These court-imposed restrictions have worked to preserve the

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all some composite of a substantiality test, generally requiring that an important federal issue be an essential element of the plaintiff's claim"). *See generally* ALI STUDY, *supra* note 5, at 484–87. *But see Merrell Dow,* 478 U.S. at 824 n.3 (Brennan, J., dissenting) (substantiality means that the federal question is "colorable" and has a "reasonable foundation").

It is interesting to note that in evaluating the jurisdictional sufficiency or substantiality of the federal issue raised by state claims, the Court has variously appraised (a) the issue's authenticity, non-frivolousness, or basis in federal law, *e.g.,* Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921) (the federal issue must "rest[ ] upon a reasonable foundation" and not be "merely colorable."); Robinson v. Anderson, 121 U.S. 522, 524 (1887) ("the case made by the complaint was fictitious and not real" and should be dismissed under § 5 of the 1875 Act because the suit "'does not really and substantially involve a dispute or controversy'" within the court's jurisdiction) (citing Starin v. New York, 115 U.S. 248, 251 (1885)), (b) the likelihood of its actual contest, *e.g., Gully,* 299 U.S. at 117, 118 ("the most one can say is that a question of federal law is lurking in the background" and that courts have distinguished between "basic" and "collateral" controversies and "necessary" and "merely possible" disputes); *Smith,* 255 U.S. at 201 (the federal issue must be "directly drawn in question" and the "decision depend[ent] upon [its] . . . determination."), and (c) the outcome determinative nature of the federal issue or the centrality of its resolution to the relief requested. *E.g., Gully,* 299 U.S. at 112 ("[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."); *Smith,* 255 U.S. at 199 ("the right to relief [must] depend[ ] upon the construction or application of the Constitution or laws of the United States").

[46] Congress, in its debates over the Act of 1875, paid scant attention to the general federal question provision of the bill—which was one among several sections—and its significance seems to have escaped general notice. Romero v. International Terminal Operating Co., 358 U.S. 354, 398–99 (1959) (Brennan, J., dissenting); Forrester, *supra* note 33, at 375. Nonetheless, the parallel language of the constitutional and statutory provisions, what little circumstantial evidence can be gleaned from the congressional floor, *e.g.,* 2 CONG. REC. 4987 (1874) (remarks of Sen. Carpenter, a primary author of the Act, declaring generally that "[t]his bill gives precisely the power which the Constitution confers nothing more, nothing less"), and the dearth of contemporary commentary about the 1875 provision may indicate that Congress intended to and did grant the full constitutional power, as the bill in plain terms purported. *Merrell Dow,* 478 U.S. 804, 818 (Brennan, J., dissenting); *Franchise Tax Bd.,* 463 U.S. at 8 n.8; Forrester, *supra* note 33, at 374–77; *cf.* Doernberg, *There's No Reason for It, supra* note 6, at 603–04 (although the Supreme Court "appeared to adopt [the] broad view" of the 1875 Act shortly after its enactment, "it is clear that the statutory provision has not generally been accorded the same breadth as the constitutional grant") (footnote omitted). As an example of the Supreme Court's early approach, *see, e.g.,* Starin v. New York, 115 U.S. 249, 257 (1885), in which the Court cited *Osborn, inter alia,* in attempting to define the reach of the 1875 Act. *See also* Doernberg, *You Can Lead a Horse to Water . . .: The Supreme Court's Refusal To Allow the Exercise of Original Jurisdiction Conferred by Congress,* 40 CASE W. RES. L. REV. 999, 1003 (1989–90) [hereinafter Doernberg, *You Can Lead a Horse*].

traditional domain of state court adjudication and to protect the federal courts from the docket paralysis a more expansive interpretation of section 1331 would have fostered.[47]

Two vital concepts pertinent to *Merrell Dow* emerge from this exploration of article III origins of federal question jurisdiction. First is the constitutionally ordained role for Congress in authorizing and defining the scope of that jurisdiction. In effect, Congress is the intermediary between the Constitution and the lower courts, charged with the fundamental decisions about the jurisdictional reach of these coordinate-branch forums. Absent unconstitutionality, Congress controls lower federal court jurisdiction. Second is that Congress, although the primary determinant of these matters, hardly has the sole voice in jurisdictional decisions. Congress has permitted the federal courts to play an indispensable role in defining their original federal question jurisdiction by accommodating case-specific judicial discretion within the bounds of the overarching congressional directive.

Accordingly, section 1331 represents a sound congressional delegation to the federal courts of the power to develop specific standards of federal question jurisdiction. However, the Supreme Court in *Merrell Dow* surrendered, absent legislative jurisdictional directives to do so, much of the judicial discretion Congress has traditionally accorded the federal courts in their case-by-case attempts to reach principled section 1331 determinations.[48] Understanding *Merrell Dow*'s abdication of judicial prerogative under section 1331 begins with exploring the purposes of that statute and then taking a different look at the classic Supreme Court federal question cases leading up to, and given new meaning by, *Merrell Dow.*

But see 2 CONG. REC. 4980–87 (1874) (which reveals that Sen. Carpenter's famous remark, supposedly the most probative comment made about the federal question provision, was made during the course of a debate about a different provision of the bill (§ 11) pertaining to service of process).

[47] *See, e.g., Gully*, 299 U.S. at 117–18; Shulthis v. McDougal, 225 U.S. 561, 569-70 (1912); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900); Cohen, *supra* note 5, at 895, 903; London, *supra* note 28, at 838-40; Comment, *supra* note 7, at 546-47.

[48] An enthusiastic proponent of jurisdictional dialogue between Congress and the courts, Professor Friedman proposes a jurisdictional model which goes so far as to "challenge[ ] the central assumption that Congress bears primary responsibility for defining federal court jurisdiction," Friedman, *supra* note 2, at 2 (footnote omitted), and suggests that the responsibility for jurisdictional definition is "shared" so that "there is no final authority." *Id.* at 61, 54. He appears to view *Merrell Dow* as an endeavor to enter into dialogue with Congress by inviting congressional reaction to judicial statements about jurisdiction. *Id.* at 24. This Article, however, takes a very different path and views *Merrell Dow* more as an abdication of the judiciary's responsibility to exercise its congressionally-sanctioned jurisdictional prerogative in a federal question collaboration where Congress is the supreme partner.

III. *MERRELL DOW* IN CONTEXT: A TURN AWAY FROM THE CASE-CENTERED APPROACH TO HYBRID CLAIM ALLOCATIONS

A. *The Purposes of Federal Question Jurisdiction*

As adjudicators, the federal trial courts are institutionally distinctive. Unlike the all-purpose state courts,[49] they function especially "to expound principles of federal law"[50] and "to protect federal rights and interests"[51] within their circumscribed sphere of authority. Central to this special role is the assumption that federal trial forums differ from state trial forums in ways that work to maximize the correct interpretation and proper effectuation of federal interests.[52] These distinctive institutional features, particularly pertinent to adjudications involving explication of national law, include: (1) an expertise in discerning and interpreting federal interests,[53] (2) a sympathetic, but respectful,

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[49] *See supra* note 33.

[50] *See* M. REDISH, *supra* note 5, at 96; *see also* H.R. REP. NO. 1461, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5063, 5063 (noting that the 1980 Act eliminating the amount in controversy requirement in § 1331 cases "represents sound principles of federalism by mandating that the Federal courts should bear the responsibility of deciding all questions of Federal law"); The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 253 (1868) ("It is the right and duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals.").

[51] M. REDISH, *supra* note 5, at 96; *see also* HART & WECHSLER, *supra* note 5, at 961 (after the Civil War, "the national courts became the primary forum for the vindication of federal rights"). As Professor Mishkin explained in his enduring observations about federal-state forum differences, "with the expanding scope of federal legislation, the exercise of power over [federal question] cases . . . constitutes one of the major purposes of a full independent system of national trial courts." Mishkin, *supra* note 27, at 157 (footnote omitted). He has forcefully argued that "institutional variations" between federal and state forums make the federal courts peculiarly suited to safeguard federal rights. *Id.* at 176.

[52] Of course, the parity debate (about whether the federal and state courts are fungible forums for vindication of federal rights) still rages. *E.g.*, Chemerinsky, *Parity Reconsidered, supra* note 10; Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 U.C.L.A. L. REV. 329 (1988); Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283 (1988) [hereinafter Wells, *Is Disparity a Problem?*]; Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

[53] The federal courts specialize in federal law matters and have developed considerable expertise in—or at least familiarity with—the meaning and application of the Constitution, congressional statutes, and federal agency regulations. *E.g.*, Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 826-28 (1986) (Brennan, J., dissenting) (forums specializing in federal law with federal question cases as their "basic grist" are more likely to apply the law expertly, correctly, uniformly, and sympathetically); ALI STUDY, *supra* note 5, at 164-65 ("The federal courts have acquired a considerable expertness in the interpretation and application of federal law which would be lost if federal question cases

national perspective,[54] (3) the potential for uniform interpretation of federal law,[55] and (4) the impartiality and confidence afforded by independence.[56]

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were given to the state courts."); M. REDISH, *supra* note 5, at 2 ("[The] federal courts have developed a vast expertise in dealing with the intricacies of federal law, while the state judiciary has, quite naturally, devoted the bulk of its efforts to the evolution and refinement of state law and policy. It would be unreasonable to expect state judiciaries to possess a facility equal to that of the federal courts in adjudicating federal law.") (footnote omitted); *see also* M. REDISH, *supra* note 5, at 2 ("because of the process of presidential selection and Senate confirmation, we can usually be assured of a floor of competence in the federal judiciary.").

[54] Federal judges, even if drawn from the state where the federal court sits, are more likely to have a national perspective on matters before them given their employer, mode of selection, expertise, and the check of circuit court review. Thus, the federal courts are more likely to be receptive to federal claims and less likely to sacrifice national for local interests. *See* THE FEDERALIST NO. 81 at 486 (A. Hamilton) (C. Rossiter ed. 1961) ("the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes"); ALI STUDY, *supra* note 5, at 167–68 (federal trial forums offer a "marked advantage" in the face of state hostility because "[a]n unsympathetic state court may impede the assertion of a federal right by delay" and Supreme Court review over state courts "is much more limited"); Mishkin, *supra* note 27, at 158 (federal judges, paid and selected by the national government and protected with life tenure for good behavior, "are more likely to give full scope to any given Supreme Court decision, and particularly ones unpopular locally, than are their state counterparts") (footnote omitted); Currie, *The Federal Courts and the American Law Institute, Part I,* 36 U. CHI. L. REV. 1, 2–3 (1968) ("Because of persistent state-federal hostilities, . . . we do not seem to have reached the point where Supreme Court review of state courts is always adequate to assure recognition of federal rights.") (footnote omitted) [hereinafter Currie, *Part I*]; Neuborne, *supra* note 52, at 1124–25 (the "psychological set" of the federal bench makes it "more likely to enforce constitutional rights vigorously" because of its "elite tradition" or "institutional mission," its apparent acknowledgment of "an affirmative obligation to carry out and even anticipate" the Supreme Court's direction, and its distance from the daily business of enforcing constitutional rights at the "cynicism-breeding" level of state criminal, family, and civil courts, which enhances enforcement of these rights in the abstract). For a discussion of state hostility to federal law, *see* Doernberg, *There's No Reason for It, supra* note 6, at 647–48 n.220.

At the same time, the federal judiciary, cognizant of its limited authority within the federalist scheme, has generally displayed an institutional humility respectful of state power and interests. An important and pertinent illustration of this self-limitation is the Supreme Court's decision to construe the general federal question statute more narrowly than article III's reserve of federal question power. *Supra* notes 42–47 and accompanying text. This restraint, coupled with their national perspective, may peculiarly suit the federal courts to treat hybrid claims which require balancing both federal and state concerns.

[55] Expert judges representing the national judiciary are more likely to provide uniformity in construing and applying federal law. The regional appellate review structure, the use of the same evidentiary and procedural rules in courtrooms across the country, and the selection of judges by the same procedures and the same employer also promote system-wide consistency in the decisionmaking process. *See* THE FEDERALIST NO. 80 at 476 (A. Hamilton) (Rossiter ed. 1961) ("Thirteen independent courts of final jurisdiction over the

While the enacting Congress provided little guidance about section 1331's scope and application,[57] the federal question statute served these four institutional distinctions and with them, the federal judiciary's purpose "to protect the national interest in the application of federal law"[58] by making more

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same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."); ALI STUDY, *supra* note 5, at 165–66 (federal courts "are more likely to apply federal law sympathetically and understandingly than are state courts" and therefore are more likely to achieve greater uniformity in results); Mishkin, *supra* note 27, at 158–59, 170 (The federal courts' "sympathetic handling of . . . Supreme Court rulings" is key to "achieving widespread, uniform effectuation of federal law" given that the Supreme Court—the Constitution's "ultimate judicial exponent of federal rights"—actually decides relatively few cases, and by necessity, relies heavily upon the lower federal courts to "police" its decisions and to promote "the effectuation of national rights.") (footnote omitted); *cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (uniformity is necessary lest federal law "would be different in different states" and may "never have precisely the same construction, obligation, or efficacy, in any two states").

Of course, the uniformity goal for the lower courts is often more aspirational than achievable given conflicting federal circuit and district court interpretations of the same subjects. Nonetheless, consistency in federal law treatments is more likely attained with the federal forum option than without it. *Merrell Dow*, 478 U.S. at 826 (Brennan, J., dissenting) ("while perfect uniformity may not have been achieved, experience indicates that the availability of a federal forum in federal-question cases has done much to advance that goal").

[56] Article III bars any salary reductions for federal judges and requires lifetime appointments, subject to good behavior. U.S. CONST. art. III, § 1. These salary and life tenure provisions insulate federal judges from political and popular pressures and encourage fair and impartial decisionmaking responsive to interests before, rather than external to, the court. Thus, the federal judiciary's independence works to facilitate the courts' other functions by ensuring that federal judges are free to apply federal law correctly and consistently, even in difficult or sensitive cases, and have the institutional confidence to vindicate federal rights in the face of either congressional, executive, state, or popular resistance. *E.g.*, THE FEDERALIST NO. 81 at 486 (A. Hamilton) (Rossiter ed. 1961) ("State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws."); M. REDISH, *supra* note 5, at 2 ("because federal judges are guaranteed the independence protections of article III, while many state judges are forced to stand for election, we can generally be assured of a greater degree of independence of the federal judiciary from external political forces.") (footnote omitted); Mishkin, *supra* note 27, at 158 (noting the advantages of life-tenured, less localized decisionmakers); Neuborne, *supra* note 52, at 1127 ("Federal district judges, appointed for life and removable only by impeachment, are as insulated from majoritarian pressures as is functionally possible, precisely to insure their ability to enforce the Constitution without fear of reprisal.") (footnote omitted); *cf.* Matasar & Bruch, *supra* note 2, at 1339 n.240 (deference by the nonmajoritarian federal judiciary to the majoritarian Congress in interpreting its own jurisdiction might be a default on its role to protect minority interests).

[57] *Supra* note 46.

[58] ALI STUDY, *supra* note 5, at 477.

claims involving federal interests eligible for expert, sympathetic, uniform, and independent treatment.[59] The circumstances of the statute's enactment evidence its protective aim. Adopted in 1875 by a post-Civil War Congress apparently distrustful of the state courts as the primary vindicators of federal rights,[60] the general federal question statute signaled that certain claims formerly confined to the state courts, absent specific congressional permission for federal adjudication, might warrant the special protections and early attention of national decisionmakers (at the factfinding stage) long before the availability (if any) of Supreme Court review.[61]

In this way, section 1331 represented a startling advance for the lower federal courts. The existence of the general grant of federal question authority meant that Congress' failure to provide expressly for federal jurisdiction over particular cases did not necessarily end the federal jurisdictional inquiry if congressional permission to hear the case could be found by virtue of section 1331. Accordingly, the statute gave to the federal courts greater flexibility to decide whether certain claims—including *state* causes of action implicating federal interests—might merit initial federal adjudication.[62] Federal trial forums might now be available to hear any number of claims that Congress either did

[59] *See Merrell Dow*, 478 U.S. at 826–27 (Brennan, J., dissenting) (citing the need for uniformity, expertise, and sympathy in interpreting federal law as "reasons Congress found it necessary to add [federal question] jurisdiction to the district courts"); D. CURRIE, *supra* note 5, at 139 (federal question jurisdiction "should be retained at the core of district-court business" given the expertise, uniformity, and sympathy rationales).

[60] Among other reconstruction problems, Congress faced southern defiance of the constitutional amendments and federal statutes aimed to ensure black equality. *See, e.g.*, K.M. STAMPP, THE ERA OF RECONSTRUCTION 1865–1877, 14–15, 131–32, 135–41 (1965); *see also* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 55–59, 64–69 (1928); HART & WECHSLER, *supra* note 5, at 960–61; Doernberg, *There's No Reason for It*, *supra* note 6, at 603 n.27.

[61] Thus, the federal question issue is often one of forum choice: Finding § 1331 jurisdiction may provide plaintiffs (or defendants upon removal) with what may be an important—perhaps outcome determinative—alternative forum to air grievances even though the state courts are presumed the adjudicative equals of the federal courts on questions of federal law. *Cf.* Howlett v. Rose, 110 S. Ct. 2430, 2438 (1990) ("Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The supremacy clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law . . . ."); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 & 478 n.4 (1981) ("the Constitution limits the powers of each [sovereign] and requires the States to recognize federal law as paramount. . . . If Congress does not confer jurisdiction on federal courts to hear a particular federal claim, the state courts stand ready to vindicate the federal right, subject always to review, of course, in this Court.").

[62] These are precisely the types of claims that the Supreme Court has used to test the limits of the federal question grant. *E.g.*, Gully v. First Nat'l Bank, 299 U.S. 109 (1936) (rejecting jurisdiction over the hybrid claim); Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) (finding jurisdiction over the hybrid claim).

not anticipate or chose not to "federalize" in gross by statute and delegated to the federal courts for jurisdictional sorting on a case-by-case basis in accordance with prevailing legal and political norms. In short, Congress' general grant of federal question authority not only empowered the federal courts to hear a wider variety of claims, but enabled them to exercise expanded front-line prerogative about sometimes delicate claim allocations that were difficult or impossible to determine from a distant legislative chamber.

B. *Pre*-Merrell Dow *Federal Question Doctrine Revisited*

1. *A Brief Overview*

Logically, then, a coherent federal question inquiry might discern whether the distinctive federal forum protections of expertise, receptivity, uniformity, and independence are warranted to vindicate the federal interest at issue. As this Section shows, however, classic Supreme Court decisions in this area fail either to articulate or to analyze whether the particular claims before them merit these protections (even when they reach the correct result). Instead, the Court—including the *Merrell Dow* majority—has offered a string of jurisdictional prescriptions that merely shorthand often unspoken assumptions about the purposes underlying Congress' grant of the federal question power,[63] in part, perhaps, because Congress has said so little about its section 1331 intent.

But another explanation for this deficiency helps to justify it: Asking a trial court to determine whether any particular substantive federal interest or congressional objective merits expert, sympathetic, uniform, and independent treatment might embroil the court in a subjective, case-by-case assessment of the need for these federal forum protections—arguably, an impossible and

[63] Consider, for example, *American Well*'s cause of action approach, *Smith*'s outcome determinative approach, *Moore*'s mere incorporation approach, *Gully*'s "essential element" and "common sense accommodation" approach, and *Merrell Dow*'s remedy requirement. These prescriptions are compressions—rather than expressions—of the considerations that might comprise the federal question inquiry. *Cf.* 13B C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 3562, at 19 (courts deciding federal question cases tend to "repeat uncritically language from earlier decisions as a substitute for analysis of the case that is actually before them"); Cohen, *supra* note 5, 892 n.18 ("The confusion of doctrine in this area results, at least in part, from the continued repetition of meaningless or even misleading phrases."); Comment, *supra* note 7, at 551 ("The [Supreme] Court . . . has failed to identify the pertinent considerations for determining federal question jurisdiction and how they are to be applied.") (footnote omitted); *see also* Cohen, *supra* note 5, at 911–12 (jurisdictional formulas "tend to obscure the pragmatic considerations which may govern decisions in the classes of cases for which the formulas are valid"). For amplification of American Well Works v. Layne & Bowler Co., 241 U.S. 257 (1916) and Moore v. Chesapeake & Ohio Railway, 291 U.S. 205 (1934), see *infra* notes 93–103 and accompanying text and notes 120–26 and accompanying text, respectively.

impermissible determination more appropriately within the legislature's province. From this perspective, it is less surprising that the Court's general federal question doctrine has often avoided the types of jurisdictional value judgments that would, in effect, require relative rankings of substantive interests as well as sensitive judgments about state court competence and receptiveness in determining whether particular hybrid claims warranted federal forum protections.[64] Accordingly, a dominant strain of pre-*Merrell Dow* federal question precedent for hybrid claims collapsed the inquiry from statutory purposes into the question whether resolution of the state claim before the court turned on construction of federal law. This test assured the centrality of the federal question to case outcome (given its dispositive nature) and therefore patently justified the need for federal forum protections (*i.e.*, expertise, receptivity, uniformity, and independence) to ensure the correct and consistent interpretation of a pivotal federal issue without judicial judgment about the worthiness of the implicated federal interest or the capability of the state forum. The Court adopted this approach in *Smith v. Kansas City Title & Trust Co.*,[65] basing federal question jurisdiction on the dispositive nature of the federal issue within the litigation, rather than on the significance of the implicated federal substantive interest in the broader scheme of governance.[66]

A natural component of *Smith*'s jurisdictional theory was rejection of the substantive cause of action as the ultimate jurisdictional determinant—the stringent approach endorsed by the Court but five years before *Smith* in *American Well Works v. Layne & Bowler Co.*[67]—because it hampered a trial court's discretion to assess the prominence or dispositive nature of the federal issue embedded within the hybrid claim and undermined section 1331's purpose to provide federal decisionmakers for cases turning on federal law constructions. Yet, despite *Smith*'s de-emphasis of the substantive aspect of jurisdiction (in circumventing *American Well*'s focus on the substantive law creating the cause of action or remedy and in failing to analyze the nature of the implicated federal interest), other pre-*Merrell Dow* Supreme Court decisions both before and after *Smith* indicated the possible importance of exploring the substantive nature of the federal right at issue and its impact upon the forum determination.[68] *Shoshone Mining Co. v. Rutter*,[69] *Puerto Rico v. Russell &*

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[64] *See infra* note 330 and accompanying text.

[65] 255 U.S. 180 (1921).

[66] *Infra* note 112 and accompanying text.

[67] 241 U.S. 257 (1916).

[68] Professor Wells has proposed this definition of the distinction between substantive and jurisdictional rules:

> Substantive rules are based on legislative and judicial assessments of the society's wants and needs, and they help to shape the world of primary activity outside the courtroom. Jurisdictional and procedural rules are addressed to lawyers and judges in their professional roles and govern the means by which disputes regarding the content

Co.,[70] and *Gully v. First National Bank*,[71] most expressly hinted at an approach to section 1331 allocations responsive to Congress' substantive intent as it might bear upon the forum determination—an approach elevated and expanded by *Merrell Dow*'s focus on the congressional cause of action or remedy within the implicated substantive statute and its apparent consideration of the nature of the federal interest at issue.

In this way, *Merrell Dow* represents a telling, but unnecessary, restriction upon judicial prerogative in the section 1331 collaboration because of its new—and misplaced—emphasis on the cause of action or remedy in the implicated substantive statute as having overriding jurisdictional significance. In effectively substituting Congress' remedial intent for jurisdictional intent in the section 1331 hybrid claim analysis, *Merrell Dow* took "jurisdictional" cues that Congress, in fact, did not send. The result is relinquishment of the court's congressionally-sanctioned discretion to entertain hybrid state law claims with dispositive federal presence *whether or not* the implicated federal law is privately enforceable. Thus, *Merrell Dow*'s remedy requirement becomes but another stylized jurisdictional formula that, in effect, undermines the judiciary's discretion under the general grant of federal question jurisdiction in hybrid claim cases.

Accordingly, this Section revisits, through a somewhat different lens, landmark Supreme Court federal question decisions to illustrate the jurisdictional-substantive tension in the Court's doctrine and ultimately to illuminate *Merrell Dow*'s treatment of that tension in the context of congressional directive and judicial discretion in the section 1331 collaboration.[72] It demonstrates that pre-*Merrell Dow* case law came to reject the cause of action as the sole jurisdictional determinant in federal question hybrid claim determinations and, by and large, endorsed a section 1331 inquiry based upon a case-centered notion of the dispositiveness of the implicated federal issue with little overt exploration of the purposes underlying federal question jurisdiction. Section III(C) demonstrates that *Merrell Dow* significantly changed this situation (1) by reviving a cause of action emphasis for hybrid

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> or application of substantive rules should be resolved. . . . The distinction should not be overstated, however, for procedural rules may have substantive consequences.

Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499, 504 (1989) [hereinafter Wells, *The Impact of Substantive Interests*].

[69] 177 U.S. 505 (1900); *see infra* notes 79–92 and accompanying text.

[70] 288 U.S. 476 (1933); *see infra* notes 113–19 and accompanying text.

[71] 299 U.S. 109 (1936); *see infra* notes 127–44 and accompanying text.

[72] For works examining federal question statute case law, see, *e.g.*, M. REDISH, *supra* note 5, at 95–117; E. CHEMERINSKY, *supra* note 21, at 230-41; Doernberg & Mushlin, *supra* note 6, at 533-47; Doernberg, *There's No Reason for It, supra* note 6; Hirshman, *supra* note 7, at 22-42; Cohen, *supra* note 5; Mishkin, *supra* note 27, at 160-84; Chadbourn & Levin, *supra* note 40, at 650-74.

claim allocations at a second level of the section 1331 analysis and (2) by giving new prominence to the substantive aspect of jurisdiction by requiring a cause of action or remedy within the implicated substantive statute to support federal question jurisdiction, thereby (3) sacrificing the courts' traditional—and as yet not revoked by Congress—discretion under the general federal question statute to make hybrid claim allocations by improperly substituting the remedial inquiry for the jurisdictional inquiry and undermining the case-centered approach to section 1331 allocations.

2. *Revisiting the Classics*

Indeed, *Merrell Dow*'s section 1331 analysis "focus[ed] almost entirely on the significance of *Congress'* decision not to provide a private cause of action" under the FDCA, the incorporated federal substantive statute.[73] Justice Stevens opened the Court's opinion stating the question presented as "whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one 'arising under the Constitution, laws, or treaties of the United States.'"[74] In mirrored response, he closed *Merrell Dow* with these words:

> We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."[75]

In short, *Merrell Dow* held that there shall be no section 1331 jurisdiction over state law claims when the federal element of those claims is a federal statutory standard, and the federal substantive statute lacks its own private cause of action or remedy for self-vindication directly under that statute.[76]

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[73] *The Supreme Court—Leading Cases, supra* note 21, at 235–36 (emphasis added); *see also id.* at 236 ("Here the Court may have gone too far; indeed, it may have transformed the federal question jurisdictional prerequisite into a requirement of the existence of a federal remedy rather than the presence of an important federal issue—at least insofar as a private litigant relies on violation of a federal statute.").

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

[75] *Id.* at 817.

[76] The language of *Merrell Dow*'s concluding paragraph, in terms not limited to the FDCA, supports this broad proposition. *See also* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 822 n.2 (1988) (Stevens, J., concurring) (restating this broad holding); *The Supreme Court—Leading Cases, supra* note 21, at 233 ("the Court appeared to extend its reasoning beyond the FDCA to cover all federal statutes"). *But see infra* notes

But *Merrell Dow*'s emphatic conclusion about the congressional message conveyed by the cause of action is hardly compelled by previous statutory federal question precedent, a strong strain of which rejected the cause of action as the decisive jurisdictional determinant.[77] Eighty-six years before *Merrell Dow*, first in *Blackburn v. Portland Gold Mining Co.*[78] and then upon reexamination of the same issue in *Shoshone Mining Co. v. Rutter*,[79] the Supreme Court held that "the mere fact" that Congress had authorized a cause of action for adverse claimants to settle conflicting mining claims over land titled in the United States was "not in and of itself sufficient to vest jurisdiction in the Federal courts."[80] The federal statute at issue in *Blackburn* and *Shoshone* permitted adverse claimants "to commence proceedings in *a court of competent jurisdiction* . . . to determine . . . the right of possession" but did not specify whether federal or state courts should adjudicate these disputes.[81] The statute further prescribed that the right to possession turned on "local customs or rules of miners . . . so far as the same are applicable and not inconsistent with the laws of the United States."[82]

The Supreme Court in both cases declined federal question jurisdiction despite Congress' explicit provision for the adverse suit because the claims before the Court did not involve questions of the federal statute's "construction or effect," but instead turned on interpretation of the facts under local rules.[83]

183–84, 186, 313 (noting that *Merrell Dow* may still permit § 1331 jurisdiction over state law hybrid claims raising federal constitutional questions or important federal interests).

[77] Unclear is *Merrell Dow's* meaning when Congress has provided a cause of action or remedy within the implicated federal statute. A reading of the case in converse suggests that this automatically signals federal question jurisdiction as long as resolution of the state claim turned on construction of the FDCA. *See Merrell Dow*, 478 U.S. at 825 n.4 (Brennan, J., dissenting) ("Under the Court's analysis . . . if a party persuaded a court that there is a private cause of action under the FDCA, there would be federal jurisdiction under *Smith* and *Franchise Tax Board* over a state cause of action making violations of the FDCA actionable. Such jurisdiction would apparently exist even if the plaintiff did not seek the federal remedy."). *See also infra* note 191. In any event, *Merrell Dow*'s focus on Congress' decision concerning the cause of action or remedy within the incorporated statute is misplaced.

[78] 175 U.S. 571 (1900), decided Jan. 8, 1900.

[79] 177 U.S. 505 (1900), decided Apr. 30, 1900, less than four months after *Blackburn*.

[80] *Shoshone*, 177 U.S. at 513; *accord Blackburn*, 175 U.S. at 579, 585.

[81] *Blackburn*, 175 U.S. at 578–79 (emphasis added); *accord Shoshone*, 177 U.S. at 506.

[82] *Blackburn*, 175 U.S. at 587; *accord Shoshone*, 177 U.S. at 508.

[83] *Shoshone*, 177 U.S. at 509 (this dispute did not necessarily "involve any question as to the construction or effect" of the federal statute); *see also id.* at 510 (adverse suits do "not always call for any construction of an act of Congress" or involve disputes which depend upon the construction or effect of federal law); *accord Blackburn*, 175 U.S. at 588 ("no question is made as to the meaning and construction" of the federal statute); *see also id.* at 587–88 (positing that a "disputed construction" of the federal law would present a federal question); *see also* Shulthis v. McDougal, 225 U.S. 561, 569 (1912) ("A suit to

In each decision, the Court quoted with approval from *Gold-Washing & Water Co. v. Keyes*,[84] the Supreme Court's first interpretation of the fledgling federal question statute,[85] in which the Court required actions arising under the 1875 Act to "'really and substantially [involve] a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States."[86] Thus, apparently influencing the Court's

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

Blackburn further reasoned that the "fact alone" that a controversy arose under the federal statute did not automatically create federal question jurisdiction in the absence of a "showing that the controversy was *determinable* by one of two conflicting constructions of the Federal statute, and not one of mere fact in which *the validity of the statute was not drawn into question.*" *Blackburn*, 175 U.S. at 585 (emphasis added). Notably, Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 201, 199 (1921), later echoed the highlighted language and adopted the "construction or effect" rationale so central to *Blackburn* and *Shoshone*. *Infra* notes 107 & 109; *see also* Starin v. New York, 115 U.S. 248, 258 (1885) ("[t]he decision of these questions does not depend on the Constitution or laws of the United States" and neither "enter[s] into the determination of the cause" such that construction "one way will defeat the defendants, or in another sustain them").

[84] 96 U.S. 199 (1877); *see Shoshone*, 177 U.S. at 507; *Blackburn*, 175 U.S. at 580-81.

[85] *See* London, *supra* note 28, at 841.

[86] *Gold-Washing*, 96 U.S. at 203-04. In *Gold-Washing*, the Supreme Court, considering a removed action, made plain that federal jurisdiction can only attach when "[t]he decision of the case must depend upon [the] construction" of federal law, *id.* at 203, concluding that "[t]he suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved." *Id. See also* Hopkins v. Walker, 244 U.S. 486, 489 (1917) (A case arises under federal law "where an appropriate statement of the plaintiff's cause of action, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of a law of Congress.").

The *Gold-Washing* phrase "really and substantially" is derived from § 5 of the Act of 1875, which provided that if the court satisfies itself at "any time" after a suit is commenced or removed to federal court "that such suit does not *really and substantially* involve a dispute or controversy properly within [its] jurisdiction," the court shall dismiss or remand it. Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472 (1875) (emphasis added) (current version at 28 U.S.C. § 1447(c) (1982) in the removal context). Chadbourn and Levin suggest that § 5 gave federal courts flexibility to weed out claims that technically involved federal questions as required by § 1 of the Act (which defined "arising under," *supra* note 40) but which were not actually disputed or presented for determination. Chadbourn & Levin, *supra* note 40, at 649–50; *see also* Robinson v. Anderson, 121 U.S. 522, 524 (1887) (dismissing under § 5 of the 1875 Act an action commenced in federal court because the federal allegations were "immaterial in the determination of the matter really in dispute between the parties" and were made "'for the purpose of creating a case' . . . when none in fact existed"); London, *supra* note 28, at 839 n.17 (§ 5 offered a safeguard against an

conclusion was its sense that the mining disputes at issue—though remotely federal in character because the United States was the title source—did not present a jurisdictionally sufficient federal question because their resolution did not turn on interpretation of federal law.[87] Neither *Blackburn* nor *Shoshone* expressly undertook the task of defining substantiality.[88]

In rejecting the cause of action as the hallmark of the forum determination, the Court did not explicitly articulate the expertise, sympathy, uniformity, and independence rationales of federal question jurisdiction. But the Court's finding that the claims before it did not involve the "construction or effect" of federal law was tantamount to a conclusion that there was no need for these protections because federal law did not govern case outcome: Congress specifically envisioned local resolution of disputed claims in accordance with local rules and practices. Thus, the Court reached its forum decision by analysis of Congress' substantive goals under the statute in conjunction with Congress' jurisdictional goals under section 1331.[89] *Shoshone* in particular examined the nature and intensity of the substantive federal interest involved, the statute's scheme and purpose, the states' interest in adjudication, the litigation reality of these types of disputes, and their potential impact on the federal caseload should the federal courts be permitted to hear them.[90] Esteeming the nature of

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unduly expansive interpretation of statutory arising under); *cf. Merrell Dow,* 478 U.S. at 813 ("the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction") (footnote omitted). Chadbourn and Levin also argue that the Supreme Court's initial failure in *Gold-Washing* to distinguish between §§ 1 & 5 and the Court's consequent blend of the arising under and substantiality concepts has caused great confusion in federal question doctrine. Chadbourn & Levin, *supra* note 40, at 650-52; *see also supra* note 45.

[87] *Shoshone,* 177 U.S. at 509; *accord Blackburn,* 175 U.S. at 579.

[88] This approach of approving citation to *Gold-Washing* without explicit amplification of the substantiality standard it endorsed surfaces in other key Supreme Court federal question cases. *E.g.,* Puerto Rico v. Russell & Co., 288 U.S. 476 (1933), *infra* note 116; *see also infra* notes 109 & 143.

[89] Significantly, *Shoshone* acknowledged Congress' ability to legislate substantively in specific statutes with pre-existing grants of general jurisdiction in mind. The Court noted Congress' evident contemplation that these title disputes might be properly decided by either a state or federal court and "left the matter to be determined by the ordinary rules in respect to the jurisdiction of the Federal courts." *Shoshone,* 177 U.S. at 511; *accord Blackburn,* 175 U.S. at 579; *see also Shoshone,* 177 U.S. at 506–07.

[90] *Shoshone* found that Congress had passed the law to provide procedures to resolve title disputes between adverse mining property claimants who had yet to acquire title from the government. *Shoshone,* 177 U.S. at 513. The Court also found, however, that the statute's design and its deference to local mining rules indicated that Congress did not deem this administration of federal lands "so essential" a federal interest as to vest exclusive jurisdiction in the federal courts, particularly when the state courts heard "the great bulk" of property rights litigation. *Shoshone,* 177 U.S. at 511, 506, 508; *accord Blackburn,* 175 U.S. at 586–87. In effect, Congress had created a forum option for the courts to resolve on a case-by-case basis under their traditional jurisdictional rules because "in a given case the

these claims over their technical origin in federal law, the Court then made a pragmatic forum allocation decision, consistent with Congress' general jurisdictional mandate and its specific intent to localize dispute resolution, to keep the federal courts clear of state-centered and potentially voluminous claims unless they required a dispositive construction of federal law.[91] In this way, *Shoshone* at once paved the way for *Smith*'s discretionary assessment of the centrality of the federal issue within the lawsuit, but went beyond *Smith*'s case-centered approach by buttressing its conclusion with a showing that a federal forum was not necessary to advance Congress' substantive objectives.[92]

But sixteen years after *Blackburn* and *Shoshone,* in *American Well Works v. Layne & Bowler Co.*,[93] the Court endorsed a formalistic cause of action approach, eventually reincarnated in *Merrell Dow* seventy years later.[94] In *American Well,* plaintiff, a pump manufacturer, sought damages for harm to its business for trade libel, alleging defendants had defamed plaintiff's title to its highly regarded pump by falsely asserting that plaintiff had infringed defendant's pump patent, by suing purchasers of plaintiff's pump, and by threatening suit against others who used the product.[95] Emphasizing shell over substance, and minimizing the reality that a central issue in the case required interpretation of federal patent law, the Supreme Court denied federal

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right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact." *Shoshone*, 177 U.S. at 508, 511; *accord Blackburn,* 175 U.S. at 585, 587. As to the federal docket, the Court observed that if a suit to enforce a right originating in federal law necessarily arose under that law "every action to establish title to real estate (at least in the newer States) would be such a one, as all titles in those States come from" the federal government. *Shoshone*, 177 U.S. at 507; *accord Blackburn,* 175 U.S. at 582.

[91] *See* Cohen, *supra* note 5, at 903 (In *Shoshone,* "[t]he Court, for pragmatic reasons, had refused to extend the jurisdiction to a large class of cases which would, in most instances, involve no clearly defined federal interest and no issue of federal law. The Court's failure if one there was lies in its failure to explain the result.").

[92] *Shoshone*'s accounting for Congress' substantive goals seems understandable because the case involved a *federal* cause of action (expressly authorized by Congress) with state elements. *Smith,* on the other hand, involved a *state* cause of action with federal issues. *Infra* notes 108–09 and accompanying text. As shown in Part IV(D) *infra*, a § 1331 approach to state law claims implicating federal statutes which attempts to discern and account for Congress' non-jurisdictional intent as it might bear upon the forum determination has serious drawbacks. *Merrell Dow*'s remedy requirement is an extreme example of a forum test which attempts to account for substantive intent by its virtual substitution of the remedial for the jurisdictional inquiry.

[93] 241 U.S. 257 (1916).

[94] *See* Comment, *supra* note 7, at 559 (*Merrell Dow* may "signal a return" to *American Well*'s cause of action test).

[95] *American Well*, 241 U.S. at 258. Plaintiff brought suit in state court. The Supreme Court considered the jurisdictional question in the removal context. *Id.*

jurisdiction on the ground that state substantive law created the cause of action.[96]

By making the cause of action the dispositive jurisdictional factor, the Court precluded federal adjudication, despite the prominence of a federal patent question because the State—rather than the United States—authorized the suit.[97] The Court made no attempt to confront or distinguish the *Blackburn-Shoshone* principle that the sovereign authorizing a cause of action is not necessarily the sovereign who should hear the claim. The opinion is starkly devoid of any exploration of the federal patent law's role in resolution of the action or of why the claim before it might or (in this instance) might not warrant the distinctive

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[96] Justice Holmes emphatically stated: "[W]hether [there] is a wrong or not depends upon the law of the State where the act is done, not upon the patent law, and therefore the suit arises under the law of the State. *A suit arises under the law that creates the cause of action." Id.* at 260 (emphasis added); *cf.* Note, *The Outer Limits of "Arising Under,"* 54 N.Y.U. L. REV. 978, 982 (1979) ("Holmes maintained that the remedy sought by the plaintiff must be prescribed by federal law for the suit to 'arise under' federal law.") (footnote omitted); Feibelman v. Packard, 109 U.S. 421, 423 (1883) (looking to "the nature of the plaintiff's cause of action" to determine that a removed suit on a marshall's bond for unlawful taking of property arose under a federal law expressly authorizing such suits). Justice McKenna dissented in *American Well,* stating "that the case involves a direct and substantial controversy under the patent laws." *American Well,* 241 U.S. at 260 (McKenna, J., dissenting).

It is worth noting that *American Well* made no mention of the general arising under statute, but involved the analogous question of whether plaintiff's claim arose under federal patent law. *See* 28 U.S.C. § 1338 (1988), which currently provides that the district courts shall have original and exclusive jurisdiction "of any civil action arising under any Act of Congress relating to patents." While courts have treated these arising under inquiries interchangeably, *e.g.,* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 807–09 (1988); HART & WECHSLER, *supra* note 5, at 1000, a case like *American Well* might be distinguished on the basis of its patent dimension. Because a finding of federal jurisdiction would have made the action exclusively federal and precluded state adjudication, the Court may have been especially sensitive to indications from the state sovereign—in the form of pertinent state-sanctioned causes of action or remedies—that it had an interest in enforcing these types of claims even if based in part on federal patent law. *Id.; cf.* Doernberg & Mushlin, *supra* note 6, at 536 n.33 (suggesting that *American Well*'s result may rest solely on well-pleaded complaint grounds and may not have been an attempt to fashion new general federal question standard); Hirshman, *supra* note 7, at 27 (suggesting that *American Well* "may . . . rest on the well-pleaded complaint rule" because the federal patent law question "arguably enters the case as a defense").

[97] *See* Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 214 (1921) (Holmes, J., dissenting) (disputing federal jurisdiction over a state law claim depending upon construction of the federal constitution because "the cause of action arises not under any law of the United States but wholly under Missouri law. . . . [I]t seems to me that a suit cannot be said to arise under any other law than that which creates the cause of action"); *cf.* Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1195 (7th Cir. 1987) ("merely naming a federal statute in a complaint will not confer federal jurisdiction if the only relief the plaintiff actually wants is based on state rather than federal law").

treatment of a federal forum. In locking forum selection to the substantive law providing the cause of action or remedy, *American Well* defined the jurisdictional sufficiency or substantiality of the federal question purely in terms of the sovereign's substantive enforcement or remedial objectives. Thus, in requiring a federal cause of action for federal jurisdiction, *American Well* prefigured *Merrell Dow*'s mechanical equation of an insubstantial federal question with the absence of federally provided actions or remedies in the implicated federal substantive statute.[98]

Indeed, Justice Holmes' focus on cause of action and the substantive law that created it is not entirely misplaced. It certainly helps to ensure that federal law will govern disposition and define the contours of the claim, thus providing strong justification for section 1331 jurisdiction. In addition, the *American Well* rule adds predictability to the federal question inquiry and works to minimize litigation over threshold jurisdictional questions in the relative ease of its application.[99] But the protective purposes to be served by federal adjudication under the federal question statute suggest the undue narrowness of the Holmes' postulate for hybrid claims.[100] Federal interests may need federal forum protections even and especially when part of state-created causes of action that may frustrate them. As Professor Doernberg has noted, the *American Well* cause of action test is "dysfunctional" because "[i]t simply cannot be

[98] There is a vital difference, however, between the two opinions: By 1986, *Merrell Dow* had at least acknowledged that *American Well*'s cause of action filter was too stringent a federal question test because, strictly and solely applied, it automatically excluded from the federal court *any* claim created by state law, no matter how prominent the federal question and no matter how urgently the federal interest at stake might warrant federal forum protections. *Cf. Merrell Dow,* 478 U.S. at 808–09 n.5 (recognizing that § 1331 may cover state law claims where the vindication of state rights turned on the construction of federal law). Despite this recognition, *Merrell Dow* reintroduced the *American Well* approach at a later stage of the federal question analysis by requiring a federally-created cause of action or remedy within the federal statute incorporated by the state claim in order to sustain § 1331 jurisdiction. *Id.* at 812, 814, 817; *see also infra* notes 167–72, 193 and accompanying text.

[99] It is no surprise that Justice Holmes advocated a test which appeared to increase the reliability of predicting how courts will resolve jurisdictional issues. *See* Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."); *cf.* Currie, *Part I, supra* note 54, at 1 ("Jurisdiction should be as self-regulated as breathing; the principal job of the courts is to decide whether plaintiff gets his money, and litigation over whether the case is in the right court is essentially a waste of time and resources.") (footnote omitted).

[100] Note, in this connection, that § 1331 provides jurisdiction over civil actions "arising under" federal law and not "created by federal law." *See also supra* note 98, describing *Merrell Dow*'s acknowledgment of *American Well*'s undue narrowness.

demonstrated that important federal issues arise only as parts of federally created causes of action."[101]

Moreover, our dual court system "makes some jurisdictional litigation inevitable"[102] and is the cost of enforcing the jurisdictional limitations on the lower federal courts in order to preserve the primacy of the state courts as the general adjudicators in the constitutional scheme. Lastly, *American Well*'s cause of action test ignores a recognized principle reflected in *Shoshone* that jurisdiction and cause of action are not synonymous.[103] To automatically

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[101] Doernberg, *There's No Reason for It, supra* note 6, at 661–62 n.279. Many have criticized *American Well. E.g.*, Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983) ("even the most ardent proponent of the Holmes test has admitted that it has been rejected as an exclusionary principle"); T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.), *cert. denied*, 381 U.S. 915 (1965) (*Smith* is a "path-breaking opinion" and "Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended."); D. CURRIE, FEDERAL JURISDICTION 104 (3d ed. 1990) ("Holmes' test of the law that created the cause of action is of no help in those cases in which it is most needed, namely, when part of the cause is created by federal law and part of it by state."); M. REDISH, *supra* note 5, at 97 ("Holmes' theory might be accused of putting form over substance. If many of the significant issues in the case are to turn on principles of federal law, is it advisable to deny federal jurisdiction merely because the vehicle for presenting those actions is state-created?"); Cohen, *supra* note 5, at 898 (the *American Well* test has "severe limitations"); Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 689 (1981) [hereinafter, Field, *The Uncertain Nature of Federal Jurisdiction*] (arguing that the *American Well* test "*cannot* be the exclusive test of federal question jurisdiction" because "the cause of action under which a suit is brought is *always* properly part of the complaint" such that requiring a federal action would render the well-pleaded complaint rule "superfluous"); Note, *supra* note 96, at 1004, 1001 (the *American Well* standard is "arbitrary and misconceived" because it "could not account for the fact that federal law creates primary relationships that have dimensions and applications beyond those points at which express remedies are provided.") (footnotes omitted).

[102] Currie, *Part II, supra* note 44, at 2.

[103] Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900) (holding that federal courts do not necessarily have jurisdiction over causes of action created by federal law).

So, too, jurisdiction and remedy are separate inquiries. In his *Merrell Dow* dissent, Justice Brennan reinforced the importance of the jurisdiction-remedy distinction. *Merrell Dow*, 478 U.S. at 825 (Brennan, J., dissenting) (noting that "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."); *see also* Caterpillar Inc. v. Williams, 482 U.S. 386, 391 n.4 (1987) (Brennan, J., for a unanimous court) ("'The nature of the relief available after jurisdiction attaches, is, of course, different from the question whether there is jurisdiction to adjudicate the controversy . . . .'") (quoting with approval Avco Corp. v. Machinists, 390 U.S. 557, 561 (1968)). And, as Justice Brennan has pointed out, persuasive support for the distinction is Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199–201 (1921), in which the Court found federal question jurisdiction even though the right and remedy were state-created. *Merrell Dow*, 478 U.S. at 819 (Brennan, J., dissenting).

equate the legislature's enforcement objectives (*i.e.*, *whether* a particular right or interest should be enforceable) with its forum objectives (*i.e.*, *which* forum may hear that enforcement action) results in a blur of substantive and jurisdictional concerns disrespectful of the court's delegated authority under the general federal question statute to determine whether federal forum protections are warranted in particular cases regardless of their cause of action labels.

The Supreme Court's rebuff of *American Well* as the sole jurisdictional test came just five years later. In *Smith v. Kansas City Title & Trust Co.*,[104] the

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The Court has often acknowledged the distinctions between jurisdiction, cause of action, and remedies. *E.g.*, Montana-Dakota Utils. Co. v. Public Serv. Co., 341 U.S. 246, 249 (1951) ("[T]he question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action. The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions."); Bell v. Hood, 327 U.S. 678, 681–83 (1946) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. . . . [T]he court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief . . . [unless the claim was] made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous."); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 595 (1983) ("Whether a litigant has a cause of action 'is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.'") (quoting Davis v. Passman, 442 U.S. 228, 239–40 (1979)); *Davis*, 442 U.S. at 240 n.18 ("A plaintiff may have a cause of action even though he be entitled to no relief at all . . . ."); Burks v. Lasker, 441 U.S. 471, 476 n.5 (1979) ("The question whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided."); Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 671 (1950) (With the federal Declaratory Judgment Act, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction"); The Fair v. Kohler Die Co., 228 U.S. 22, 25 (1913) (Holmes, J.) ("Jurisdiction is authority to decide the case either way.").

See also Doernberg & Mushlin, *supra* note 6, at 539 n.46 ("Congress' determination not to provide a federal cause of action does not compel the conclusion that . . . Congress was unwilling for federal courts to be open to such actions."); Zeigler, *supra* note 21, at 715, 722 ("*Merrell Dow*'s inferences about congressional intent to deny a private federal cause of action and thus to deny federal jurisdiction are shaky at best. . . . The existence or nonexistence of a remedy does not affect a court's subject matter jurisdiction. When a plaintiff alleges the denial of a right created by federal law, the case plainly arises under that law within the meaning of article III and 28 U.S.C. § 1331.") (footnotes omitted); Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 373 n.123 (1988) (*Bell* contradicts *American Well* by separating the jurisdictional and cause of action inquiries); Field, *Sources of Law: The Scope of the Federal Common Law*, 99 HARV. L. REV. 881, 932 n.220 (1986) ("Congress has nowhere manifested an intention that federal courts exercise federal question jurisdiction only when a federal remedy exists. . . . The remedy rule itself is a judicial creation [citing *American Well*] and reflects substantial judicial restraint; federal question jurisdiction could, consistently with all manifestations of congressional intent, be defined much more broadly.") (citation omitted).

[104] 255 U.S. 180 (1921).

Court's federal question seesaw tilted back towards the *Shoshone* approach with its emphasis on a more discretionary assessment of considerations bearing upon the forum determination, as the Court took definitive steps away from the cause of action straightjacket and softened *American Well*'s harsh exclusive effect of precluding state-sanctioned claims with federal elements from federal court. In *Smith*, a shareholder of the defendant trust company filed suit in federal district court to enjoin the corporation from investing in federal bonds issued under the authority of the Federal Farm Loan Act.[105] Those bonds, plaintiff claimed, were invalid because the Federal Farm Loan Act was unconstitutional and the corporation's bond purchases would violate Missouri law, which prohibited the company from investing in unlawful securities.[106] Thus, resolution of plaintiff's state-created cause of action turned on the constitutionality of the federal statute.

Without even so much as a passing reference to *American Well*, the Court sustained federal question jurisdiction even though the suit arose under state law because plaintiff's "right to relief depend[ed] upon the construction or application of the Constitution or laws of the United States."[107] The Court in effect recognized that the centrality or importance of the federal issue to recovery justified the court's exercise of jurisdiction even though plaintiff's "actual vehicle for getting into court"[108] was purely a creature of state law.[109]

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[105] *Id.* at 195.

[106] *Id.* at 198-99, 201.

[107] *Id.* at 199. The Court, in the tradition of *Gold-Washing*, *Blackburn*, and *Shoshone*, *supra* notes 83–87 and accompanying text, announced:

> The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.

Id.; *cf. Merrell Dow*, 478 U.S. at 819 (Brennan, J., dissenting) (*Smith* established that there may be federal jurisdiction "even though both the right asserted and the remedy sought by the plaintiff are state created.").

Justice Holmes penned a pointed dissent in which he revealed the crux of his disagreement with the Court and amplified his *American Well* principle: "[T]he law must create at least a part of the cause of action by its own force, for it is the *suit*, not a *question* in the suit, that must arise under the law of the United States." *Smith*, 255 U.S. at 215 (Holmes, J., dissenting) (emphasis added).

[108] M. REDISH, *supra* note 5, at 98.

[109] Echoing crucial language used by *Blackburn*, *Smith* found it "apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue." *Smith*, 255 U.S. at 201; *supra* note 83.

Notably, *Smith* seemed to attempt a formulation of substantiality, requiring that the claim "is not merely colorable, and rests upon a reasonable foundation." *Smith*, 255 U.S. at

Accordingly, *Smith* signaled—as *Shoshone* before it—that strict classification of a cause of action as "state" or "federal" could take second seat to the litigation reality that the outcome of the case depended upon resolution of a federal constitutional or statutory issue.[110] However, the Court *again* reached its decision without confrontation and elaboration of the purposes underlying federal question jurisdiction. The Court implicitly recognized that a constitutional assessment of a federal statute determinative of plaintiff's claim warranted the distinctive protections of a federal forum reflected in its expertise, receptivity, uniformity potential, and independence.[111] Indeed, *Smith*

199. The Court indirectly referenced the *Gold-Washing* standard by specific citation to "paragraph 3" of the *Shulthis* decision, in which *Shulthis*—itself citing to *Gold-Washing*—stated that "a suit does not . . . arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." Shulthis v. McDougal, 225 U.S. 561, 569 (1912).

110 *See* Doernberg & Mushlin, *supra* note 6, at 537 (*Smith* permitted federal jurisdiction if the federal issue was outcome determinative and "appeared unconcerned" about the cause of action as jurisdictional measure). Judge Friendly has described *Smith* as a "path-breaking opinion" in noting its effect on federal question doctrine:

> It has come to be realized that Mr. Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended. Even though the claim is created by state law, a case may "arise under" a law of the United States [in accordance with *Smith*] if the complaint discloses a need for determining the meaning or application of such a law.

T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964), *cert. denied,* 381 U.S. 915 (1965).

With its emphasis on realistic assessment of the centrality of federal issues, *Smith* is consistent with *Shoshone*. In *Shoshone*, the Court refused to find federal question jurisdiction even though federal law created the cause of action *and* the right at issue because the federal act directed that "local customs or rules" would determine that federal right. Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507–08 (1900). Thus, as a matter of litigation reality, state law would predominate, and the "right may or may not involve the construction or effect of the Constitution or a law or treaty of the United States." *Id.* at 507–08. Similarly, in *Smith*, the Court found federal jurisdiction because the state cause of action and state remedies depended upon construction of federal law. *Cf.* M. REDISH, *supra* note 5, at 103 (*Smith* can be seen as the "reverse" of *Shoshone* because "*Smith* arose from a state-created cause of action which would ultimately turn on issues of federal law").

111 *Cf.* M. REDISH, *supra* note 5, at 98 (noting that the *Smith* majority offered a "sympathetic" interpretation of jurisdiction given that "a significant—if not primary—purpose for providing federal question jurisdiction is to take advantage of the federal courts' expertise on matters of federal law"); *see also id.* at 102 (*Smith* acknowledges the need for federal expertise in federal law interpretation in the context of state claims); Cohen, *supra* note 5, at 906 ("In cases like *Smith* . . . it is certain that the federal constitutional issues will form the core of the litigation."); Greene, *supra* note 5, at 324 (federal jurisdiction "has been justified by the likelihood that a federal question will assume prominence in the litigation").

seemed to view the federal courts as appropriate forums for hearing dispositive questions of federal law and did not find it necessary to evaluate the nature of the federal statute at issue as part of the forum analysis.[112] Unlike *Shoshone*—and perhaps because the *Smith* cause of action was of state and not federal origin—the Court did not explore the substantive interests at stake to support its conclusion, apparently satisfied that the centrality of the federal issue to plaintiff's recovery alone justified the federal forum. In short, *Smith*'s case-centered approach offered a relatively efficient measure of jurisdictional sufficiency for state law hybrid claims, based on the actual role played by the federal issue in the litigation, which did not depend upon assessment of the federal interest or congressional objectives served by the implicated federal statute.

Smith's jurisdictional realism, much like *Shoshone*'s before it, offered the courts some latitude to explore and balance the forum variables at issue. No longer need courts slavishly conclude, per *American Well*, that all state-created causes of action should be litigated in state court regardless of prominent federal law presence. *Puerto Rico v. Russell & Co.*[113] continued this realistic approach. There, the Court held that a suit brought pursuant to a congressional law authorizing a cause of action to recover taxes levied by the Puerto Rican legislature did not give rise to federal question jurisdiction because plaintiff did not seek enforcement of a federal right.[114]

Forsaking the stark cause of action approach and cautioning that federal jurisdiction cannot be invoked "merely because the plaintiff's right to sue is derived from federal law,"[115] the Court concluded (citing *Shoshone*, *Blackburn*, and *Gold-Washing*[116]) that "[t]he federal nature of the right to be established is decisive—not the source of the authority to establish it."[117]

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[112] *See* Doernberg, *There's No Reason for It*, *supra* note 6, at 657–58 (describing the advantages of the outcome determinative test over *Merrell Dow*'s standardless and abstract substantiality test, noting that the outcome determinative test "is applied through close examination of the structure of a specific case and the federal issue's role in resolving the matter"); *see also* Doernberg & Mushlin, *supra* note 6, at 540 ("the *Merrell Dow* majority seemed to be more concerned about the federal issue's general importance outside the context of the individual case").

[113] 288 U.S. 476 (1933).

[114] *Id.* at 482–83.

[115] *Id.* at 483.

[116] *Id.* The Court specifically cited *Gold-Washing* to the precise page of its "really and substantially" standard. *Id.* (citing Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203 (1877)).

[117] *Russell*, 288 U.S. at 483. The Court stressed that:

> No question of interpretation or enforcement of the federal statute appears upon the face of the complaint. Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted

Although the Court failed to analyze or even mention the expertise, receptivity, uniformity, and independence rationales for federal jurisdiction, these factors seemed central to its decision given the Court's *Smith*-like observation that the question before it did not involve "interpretation or enforcement of the federal statute."[118] While the Court's emphasis on "the federal nature of the right" may have indicated some sensitivity to the substantive aspect of the jurisdictional determination, the Court did not confuse Congress' substantive decision to create a cause of action in the federal act with its jurisdictional decision to provide a federal forum, noting that Congress' authorization of the action did not mean that the suit "[arose] under the laws of the United States within the meaning of the jurisdictional statutes."[119]

Less than a year after *Russell,* however, the Supreme Court further confounded its federal question doctrine in *Moore v. Chesapeake & Ohio Railway*[120] with an apparent affirmation of a narrow cause of action approach. The Court declined to find original federal question jurisdiction over a state claim provided by the Kentucky Employers' Liability Act permitting private enforcement of duties Congress prescribed in the Federal Safety Appliance Act.[121] In the *Smith* sense, plaintiff's right to recover depended upon construction of the duties defined by the federal statute.[122] Nonetheless, the Court seemed to find the state legislature's affirmative decision to provide a cause of action to establish liability in accordance with state law—and Congress' corresponding failure to do so at the federal level—to be dispositive

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is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute.

Id. at 483; *accord* Shoshone Mining Co. v. Rutter, 177 U.S. 505, 510 (1900) ("A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute.").

[118] *Russell*, 288 U.S. at 483.

[119] *Id.*

[120] 291 U.S. 205 (1934). In the second count of his complaint, plaintiff, a railroad employee injured due to a defective uncoupling lever, sued the carrier for injuries received in intrastate commerce by invoking both federal and state acts. *Id.* at 208. The Court construed this count to state a cause of action under Kentucky law. *Id.* at 217. Note, in contrast, that the federal law did provide a right of action for employees in interstate commerce. *Id.* at 210–11.

[121] *Id.* at 212–15. Interestingly, in rejecting federal district court jurisdiction, both *Moore* and *Merrell Dow* emphasized that the Supreme Court could review the state court interpretations of the implicated federal statutes. *Id.* at 214; *accord Merrell Dow,* 478 U.S. at 816.

[122] *See Moore*, 291 U.S. at 214.

of the forum question.[123] Mere adoption of the federal standards did not alter the state law character of the claim so as to create a substantial federal issue.[124] In effect, the Court acknowledged the Kentucky legislature's ability to embrace federal standards as its own without simultaneously forfeiting control over hearing the claims that it created.[125] Predictably, the Court did not justify its decision to preclude initial federal adjudication by disproving the need for federal expertise, sympathy, uniformity, and independence in resolving a claim

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[123] *Id.* at 212-16. Distantly foreshadowing *Merrell Dow*, the Court pointed out that the incorporated Federal Safety Appliance Acts did not provide plaintiff's cause of action, but exactly what significance the Court attached to this fact is difficult to tell. *Id.* at 215. *Merrell Dow*, of course, made explicit the importance of that congressional enforcement decision and effectively brought *Moore* full cycle in the context of the state negligence claim before it: "Given the significance of the assumed congressional determination to preclude federal private remedies [under the FDCA], *the presence of the federal issue as an element of the state tort* is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system." *Merrell Dow*, 478 U.S. at 814 (emphasis added); *see also infra* notes 184 & 186 (exploring *Merrell Dow*'s treatment of *Moore*).

[124] The Court seemed to conclude that Kentucky's incorporation of federal law into state legislation reflected a conscious state choice to make a federal standard its own just as if the state legislature had originally created and adopted it. Thus, the Court explained that "invoking the Federal Safety Appliance Acts, while declaring on the Kentucky Employers' Liability Act, cannot be regarded as setting up a claim which lay outside the purview of the state statute," *Moore*, 291 U.S. at 213, and noted that plaintiff "relied upon" the laws of Kentucky, which "determined" what, if any, liability existed. *Id.* at 212. Justice Holmes had anticipated *Moore*'s logic in his *Smith* dissent:

> The whole foundation of the duty is Missouri law, which at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up, so I repeat once more the cause of action arises wholly from the law of the State.

Smith v. Kansas City Title & Trust, Co., 255 U.S. 180, 214 (1921) (Holmes, J., dissenting). *Cf.* Doernberg, *There's No Reason for It*, *supra* note 6, at 632 (suggesting that the seemingly disparate results in *Smith* and *Moore* can be explained by the well-pleaded complaint rule); *see also* M. REDISH, *supra* note 5, at 99 ("To the extent [*Smith* and *Moore*] were in conflict, it appeared that the principle enunciated in *Smith* was the one widely followed by modern lower federal courts.") (footnote omitted). *But see infra* note 186 (suggesting that the differences between *Smith* and *Moore* do not necessarily justify their different results).

[125] Professor Cohen has put *Moore* in a class of cases where "the law that creates the cause of action" test has worked well as a jurisdictional formula to keep the federal courts clear of personal injury claims "unless they contained something more than federal law used to measure the wrongfulness of the defendant's conduct." Cohen, *supra* note 5, at 911–12; *see also id.* at 911 (whether hybrid personal injury cases arise under federal law is "decided by reference to the question whether federal law gives an express or implied cause of action, or whether federal law merely sets a standard of conduct for a state cause of action") (footnote omitted).

that retained its quintessential "stateness" despite federal traits. Nor did the Court attempt a definition of substantiality.[126]

Gully v. First National Bank [127] then moved the jurisdictional seesaw back to a more level plane by sanctioning what seemed to be a sensible mix (later expressly endorsed by the Supreme Court[128]) of both *American Well*'s formalism and *Smith*'s realism. Mississippi's Collector of Taxes sued a national bank in Mississippi state court for state taxes the bank owed by virtue of its assumption, by contract, of this debt from an insolvent predecessor bank.[129] The bank removed the case to federal court, arguing that the action arose under federal law because the state tax collector's authority to sue "by necessary implication" rested on the federal statute that gave permission for states to tax national banks.[130]

Justice Cardozo, speaking for the Court, denied federal jurisdiction and offered a novel synthesis of prior Court pronouncements.[131] Cardozo first addressed *American Well*'s rationale, noting that "[t]he suit is built upon a contract which in point of obligation has its genesis in the law of Mississippi" and that the contract's enforcement had "no necessary connection" to "a controversy arising under federal law."[132] But Cardozo did not stop there, as a strict application of *American Well* would have required. Instead, he went on to examine whether plaintiff relied upon "a federal right in support of his claim that the contract has been broken,"[133] announcing that "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."[134] In denying federal jurisdiction, Cardozo found the federal law permitting the tax assessment to be

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[126] Not surprisingly, *Moore* did not cite *Gold-Washing*. With the federal law at issue (here, the Federal Safety Appliance Acts) effectively transformed into state law via state legislative action, there remained no dispute which "really and substantially . . . depend[ed] upon the construction or effect" of a federal statute. *Cf.* Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203-04 (1877).

[127] 299 U.S. 109 (1936).

[128] *See infra* note 148 and accompanying text.

[129] *Gully*, 299 U.S. at 111-12.

[130] *Id.* at 112, 115.

[131] *See id.* at 114-18; *see also* Cohen, *supra* note 5, at 904-05 (Cardozo broke new ground in acknowledging a common sense pragmatic approach to federal question jurisdiction).

[132] *Gully*, 299 U.S. at 114. Justice Cardozo did not cite *American Well.*

[133] *Id.* at 115; *see also id.* at 114, where Cardozo reiterated: "Today, even more clearly than in the past, 'the federal nature of the right to be established is decisive—not the source of the authority to establish it.'" *Id.* at 114 (quoting Puerto Rico v. Russell & Co., 288 U.S. 476, 483 (1933)). He also quoted *Shulthis* and cited *Shoshone* in this regard. *Id.*

[134] *Gully*, 299 U.S. at 112. To stress the centrality of the federal element to the outcome of the case, Justice Cardozo added that "[t]he right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Id.*

too remote—at best "lurking in the background"[135]—and unessential to disposition of the claim.[136]

Cardozo's second step is significant. While he examined the cause of action at the outset of his analysis,[137] he did not resolve the jurisdictional issue until he had explored the centrality of the federal element to case outcome—a rough fusion of *American Well* and *Smith* approaches.[138] Noting that "the probable course of the trial, the real substance of the controversy, has taken on new significance,"[139] Cardozo cited *Shoshone* to support his analysis that the jurisdictional determination does not begin and end with the cause of action, but should account for additional factors influencing the litigation reality of the claim, particularly the prominence of the federal right asserted and the immediacy of its connection to the relief sought.[140] Cardozo gave renewed emphasis to the view that simplistically classifying the vehicle used to enforce the right—whether a federal or state cause of action—was not more important than determining the nature and pertinence of the right itself, thus highlighting the need for "common-sense accommodation of judgment" in federal question determinations in order to transcend *American Well*'s inelasticity as a jurisdictional test.[141] The Court's acknowledgment that the federal nature of the right at issue had jurisdictional significance suggested Cardozo's sensitivity to a substantive facet of the federal question determination, but the Court did not expressly explore this type of approach.

Gully therefore invited the courts to take an active role in federal question decisions by finding "room . . . for weighing countervailing pragmatic

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[135] *Id.* at 117.

[136] Justice Cardozo concluded: "That there *is* a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid." *Id.* at 115.

[137] As Professor Cohen observed: "Inquiry into whether federal or state law confers the plaintiff's cause of action can be, at most, only a starting point for analysis." Cohen, *supra* note 5, at 903.

[138] Interestingly, Justice Cardozo did not cite either *American Well* or *Smith*; *cf.* Doernberg & Mushlin, *supra* note 6, at 538 n.39 (describing *Gully*'s three-part federal question test). *See also* Doernberg, *supra* note 6, at 631–35 (arguing that both *Gully* and *Moore* could have been decided by simple declaration that neither case satisfied the well-pleaded complaint rule).

[139] *Gully*, 299 U.S. at 113–14.

[140] *Id.* at 114.

[141] "This Court," Justice Cardozo explained, "has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. . . . To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that *common-sense accommodation of judgment* to kaleidoscopic situations . . . . " *Id.* at 117 (citation omitted & emphasis added).

considerations."[142] In *Smith*'s tradition, *Gully* recognized that making the presence or absence of a federal cause of action the dispositive jurisdictional determinant oversimplified the federal question inquiry and thwarted the courts' flexibility at the front line to make intelligent forum selections that would harmonize the litigation reality of the case before it with the overarching jurisdictional considerations inherent in section 1331 determinations. *Gully*, too, failed to make an explicit assessment of the purposes underlying the courts' general federal question jurisdiction, but instead focused on the essentiality of the federal right to case outcome and the concomitant, though unstated, need for expert, sympathetic, and independent federal adjudication. Nor did the Court overtly tackle a definition of substantiality.[143] Nonetheless, Cardozo, in *Smith*'s vein, encouraged an approach to federal question allocations requiring the courts to make discretionary jurisdictional judgments about the role played by the federal element in the case before it, and, in *Shoshone*'s and *Russell*'s vein, hinted that substantive considerations, such as the nature of the federal right at issue, might also play some part in that assessment.[144]

Franchise Tax Board v. Construction Laborers Vacation Trust,[145] one of the Supreme Court's most important statements on statutory federal question jurisdiction after *Gully*, reaffirmed in principle the more discretionary approach with an explicit endorsement of *Smith*'s handling of state law hybrid claims. Quoting with approval *Gully*'s call for "that common-sense accommodation of judgment," a unanimous Court, per Justice Brennan, avowed its long-standing allegiance to interpreting jurisdictional legislation "with an eye to practicality and necessity"[146] and acknowledged both the difficulty with *American Well*'s mechanistic approach and the acceptability of *Smith*'s more flexible contribution to federal question jurisprudence:

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[142] Cohen, *supra* note 5, at 905. Although Justice Cardozo did not delineate those pragmatic considerations, Professor Cohen has suggested that traditional § 1331 factors courts balance include federal caseload increase, the pivotal nature of federal or state law, the need for federal expertise, and the need for a sympathetic federal forum. *Id.* at 916.

[143] Notably, Justice Cardozo acknowledged the need to "pick[ ] the substantial causes out of the web and lay[ ] the other ones aside." *Gully*, 299 U.S. at 118. He even cited in its entirety *Shulthis*'s (echoing *Gold-Washing's*) admonishment that "a suit does not [arise under] unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Id.* at 114 (citing Shulthis v. McDougal, 225 U.S. 561, 569 (1912)); *cf.* Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203–04 (1877) (for jurisdiction to attach, the suit must "'really and substantially involve[ ] a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States.").

[144] *See supra* notes 89–92, 116–19 and accompanying text.

[145] 463 U.S. 1 (1983).

[146] *Id.* at 20–21 (citations omitted).

> [I]t is well settled that Justice Holmes' test [in *American Well*] is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction. We have often held that a case "arose under" federal law where the vindication of a right under state law necessarily turned on some construction of federal law [citing *Smith*], and even the most ardent proponent of the Holmes test has admitted that it has been rejected as an exclusionary principle.[147]

The Court then presented a two-step approach—much like *Gully*'s apparent blend of *American Well* and *Smith*—for section 1331 determinations: "Congress has given the lower federal courts jurisdiction to hear . . . only those cases in which a well-pleaded complaint establishes either [1] that federal law creates the cause of action or [2] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."[148]

Thus, the first step of the *Franchise Tax Board* synthesis inquired whether federal law created the cause of action, enlisting *American Well* at the threshold to identify those cases most clearly arising under federal law (*e.g.*, congressionally authorized claims likely requiring federal law interpretations). If state and not federal law created the cause of action, the federal question inquiry did not automatically end, but progressed to the second step, which examined whether plaintiff's right to relief under state law nonetheless depended upon resolution of a substantial question of federal law, adopting the *Smith* rationale for the closer cases (*e.g.*, state law claims incorporating dispositive federal statutes or issues).[149] Thus, *Franchise Tax Board*'s explicit

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[147] *Id.* at 9 (citations omitted).

[148] *Id.* at 27-28. The Court restated this approach two other times, each restatement requiring a well-pleaded complaint and a "substantial" federal question: (1) "Even though state law creates appellant's causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties . . . ." *id.* at 13 and (2) "As an initial proposition, then, the 'law that creates the cause of action' is state law, and original federal jurisdiction 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, or that the other claim is 'really' one of federal law." *Id.*

Shoshone fits neatly in *Franchise Tax Board*'s two-step approach as an exception to the threshold *American Well* test: Even if federal law creates the cause of action, jurisdiction may be denied if resolution of the claim does not turn upon the construction or effect of federal law.

[149] In his *Merrell Dow* dissent, Justice Brennan attempted clarification of *Franchise Tax Board*'s requirement of a "substantial" federal question:

> In context, . . . it is clear that this was simply another way of stating that the federal question must be colorable and have a reasonable foundation. This

limitation of *American Well* and simultaneous endorsement of *Smith* as the more sensible approach in difficult state law hybrid cases gave *Smith* new significance in the Court's updated section 1331 jurisprudence.[150]

Given *Franchise Tax Board*'s respectful treatment of *Smith* (which itself had roots in *Gold-Washing*, *Blackburn*, and *Shoshone*, which were reaffirmed by *Gully*), it is hardly any wonder that the district court in *Merrell Dow*, less than a year after *Franchise Tax Board*, found section 1331 jurisdiction and cited both *Smith* and *Franchise Tax Board* to support its conclusion.[151] It came as some surprise when the Supreme Court rejected this approach by sidestepping *Smith* and breathing new life into *American Well*'s cause of action approach by centering its section 1331 analysis on the presence or absence of a federal cause of action in the implicated federal statute.[152] How did the Court do this?

> understanding is consistent with the manner in which the *Smith* test has always been applied, as well as with the way we have used the concept of a "substantial" federal question in other cases concerning federal jurisdiction.

Merrell Dow, 478 U.S. at 824 n.3 (Brennan, J., dissenting) (citations omitted).

[150] *See id.* at 822 (Brennan, J., dissenting) (noting *Franchise Tax Board*'s reaffirmance of *Smith*). Note, however, that *Franchise Tax Board*, based on a construction of the well-pleaded complaint rule and "for reasons involving perhaps more history than logic," *Franchise Tax Bd.*, 463 U.S. at 4, declined jurisdiction over a claim removed from California state court filed there by a California state taxing authority under California's declaratory judgment statute to collect unpaid state income taxes held in trust by an ERISA-covered employee benefit plan—a holding the *Merrell Dow* majority stresses in its cautious treatment of *Smith*. *See Merrell Dow*, 478 U.S. at 809. Despite the Court's declination of jurisdiction, *Franchise Tax Board* goes out of its way to sanction an expansive reading of *Smith* and the federal question statute itself, *see Franchise Tax Bd.*, 463 U.S. at 9, and its holding—consistent with the practical and realistic approach the opinion purports to adopt—is guided by a keen respect for California's jurisdictional preference "to enforce [its] own laws in [its] own courts . . . ." *Id.* at 21; *see also id.* at 21 n.22 ("considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it"). For an in-depth analysis of *Franchise Tax Board* and its curious treatment of the declaratory judgment act's effect on federal question determinations, see Doernberg, *There's No Reason for It*, *supra* note 6, at 640-46.

[151] *In re* Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation, MDL No. 486, slip op. at 6a–7a (S.D. Ohio May 14, 1984). The district court reasoned: "Although plaintiffs' fourth cause of action is technically a claim for negligence pursuant to state law, the sole basis for the claim is the alleged violation of the federal Act by defendant. Therefore, the key issue with respect to that cause of action is whether defendant's conduct violated the Act." *Id.*

[152] *Merrell Dow*, 478 U.S. at 812, 814, 817. Justice Brennan dissented vigorously, countering that the "continuing vitality of *Smith* is beyond challenge." *Id.* at 820 (Brennan, J., dissenting); *see also* Wheeldin v. Wheeler, 373 U.S. 647, 659 (1963) (Brennan, J., dissenting) ("*Smith* remains firm authority for the principle that 'where federal law has inserted itself into the texture of state law, a claim founded on the national legislation could be brought into a federal forum' even if the right of action was state-created.") (citing

C. *Enter* Merrell Dow

In general concept, *Merrell Dow* seemed to champion discretion in jurisdictional determinations, acknowledging that "exploring the outer reaches of section 1331 . . . require[d] sensitive judgments about congressional intent, judicial power, and the federal system."[153] The Court spoke approvingly of *Gully*'s "emphasis on principled, pragmatic distinctions,"[154] reiterated *Romero*'s directive against treating the federal question statute "as a wooden set of self-sufficient words,"[155] and resounded *Franchise Tax Board*'s call for interpreting section 1331 "with an eye to practicality and necessity."[156] And much in the manner of *Franchise Tax Board*, the Court seemed to recognize, at least initially, that the *American Well* test was merely a starting point for section 1331 determinations and was best used as a rule of inclusion to net the more obvious cases where the federal law at issue created the cause of action.[157] The Court explained that a case may also arise under federal law "where the vindication of a right under state law necessarily turned on some construction of federal law,"[158] citing *Franchise Tax Board* and noting *Smith* as "[t]he case most frequently cited for that proposition."[159]

It is at this point, however, that the Court began its retreat from these expansive principles. The Court asserted that "[o]ur actual holding in *Franchise*

Mishkin, *supra* note 27, at 166); Wells, *The Unimportance of Precedent in the Law of Federal Courts*, 39 DE PAUL L. REV. 357, 366 n.57 (1989) (citing *American Well* and *Smith* as evidence of the Supreme Court's "instability" in construing § 1331 and noting *Merrell Dow*'s reversion to *American Well* without overruling *Smith*).

153 *Merrell Dow*, 478 U.S. at 810; *cf.* Luneburg, *supra* note 21, at 768 ("The notion that federal jurisdiction depends on a pragmatic assessment of the importance of federal court adjudication of cases where the issues touch matters of federal concern is seemingly embraced by the [*Merrell Dow*] majority. . . .").

154 *Id.* at 813 (citing Gully v. First Nat'l Bank, 299 U.S. 109, 117–18 (1936)).

155 *Id.* at 810 (quoting Romero v. International Terminal Operating Co., 358 U.S. 354, 378 (1959)).

156 *Id.* (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 20 (1983)).

157 *Id.* at 808 (noting that the "vast majority" of cases falling within the general federal statute involve federally-created causes of action that are covered by the *American Well* test). The Court also noted *Smith*'s effect on *American Well*, citing Judge Friendly's famous observation that Justice Holmes' "formula is more useful for inclusion than for the exclusion for which it was intended." *Id.* at 809 n.5; *cf. id.* at 815 n.12 (noting "the usual reliability of the Holmes test as an inclusionary principle").

158 *Id.* at 808.

159 *Id.* at 809 n.5.

Tax Board demonstrates that this statement[160] must be read with caution,"[161] explaining that the Court had denied federal jurisdiction even though the "central issue" in that case "turned on the meaning" of a federal statute.[162] With its warning against unguarded reliance on *Smith* now in place, the Court observed that the case before it did not "pose a federal question of the first kind" (which *American Well* would have brought within the federal question statute)[163] because plaintiffs did not allege that federal law created their causes of action.[164] The Court then acknowledged that this was a closer case involving "the presence of a federal issue in a state-created cause of action."[165] Under more traditional section 1331 analysis, the Court would have next determined whether plaintiffs' right to relief required resolution of a substantial, contested issue of federal law under *Franchise Tax Board* and *Smith*.[166]

The Court, however, swerved sharply from this approach. Rather than analyze whether plaintiffs' alleged right and remedy under state negligence law turned on construction of the FDCA, the Court veered away from section 1331 doctrine towards statutory implication doctrine,[167] stressing the need for

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[160] The statement read: "[A] case may arise under federal law 'where vindication of a right under state law necessarily turned on some construction of federal law.'" *Id.* at 808 (quoting *Franchise Tax Bd.*, 463 U.S. at 9).

[161] *Id.* at 809.

[162] *Id. But see supra* note 150.

[163] The Court seemed to assume that plaintiffs had satisfied the well-pleaded complaint rule, which it clearly delineated as the preliminary federal question requirement, *id.* at 808, but never mentioned again.

[164] *Merrell Dow*, 478 U.S. at 809.

[165] *Id.* at 810.

[166] *See id.* at 809–10.

[167] The Court conceded this novel resort to the implication test as part of its § 1331 inquiry:

> This is the first case in which we have reviewed this type of jurisdictional claim in light of these [*Cort v. Ash* implication] factors. That this is so is not surprising. The development of our framework for determining whether a private cause of action exists has proceeded only in the last 11 years, and its inception represented a significant change in our approach to congressional silence on the provision of federal remedies.

Id. at 811 (footnote omitted). The majority then justified this graft of doctrines by asserting that the reasons giving rise to the Court's modern implied remedy doctrine—the increased complexity of federal laws, the increased volume of federal litigation, and the need for more careful study of congressional intent—were "precisely the kinds of considerations that should inform" § 1331 determinations involving federal issues in state causes of action. *Id.* at 811; *see also infra* note 265. *But see infra* notes 266–73 and accompanying text (discussing the differences between the federal question and implication inquiries).

In some respects, *Moore* presaged *Merrell Dow*'s importation of the implication doctrine, but itself stopped far short of formulating an integrated approach to the implication and federal question inquiries. *Supra* notes 120–26. *Merrell Dow* did not focus on this

"prudence and restraint in the jurisdictional inquiry."[168] Offering no independent analysis of the FDCA, the Court summarily assumed that "Congress did not intend a private federal remedy" or cause of action for FDCA violations, whether express or implied.[169] From this conclusion about remedies, the Court then skipped to a conclusion about jurisdiction, finding that Congress' presumed failure to provide either an express or implied private action or remedy in the FDCA meant that Congress had *already* determined that the federal question presented by the statute as part of plaintiffs' hybrid claim was not substantial enough to sustain section 1331 jurisdiction:

> 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 . . . 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[170] 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 a "rebuttable presumption" or a "proximate cause" under state law, rather than a federal action under federal law. . . . [171]

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aspect of *Moore,* perhaps because the Court's implication doctrine in 1934 differed significantly from its post-*Cort* development. *See infra* notes 230–39 and accompanying text for amplication of Cort v. Ash, 422 U.S. 66 (1975).

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

169 *Id.* at 810–11. The Court simply listed the four factors of the *Cort v. Ash* test for implied statutory causes of action, *see infra* note 238 and accompanying text, stating "[B]oth parties agree with the court of appeals' conclusion that there is no federal cause of action for FDCA violations. For purposes of our decision, we assume that this is a correct interpretation of the FDCA." *Id.* at 810. The two-page court of appeals decision, however, did not analyze the implication issue, but simply noted the parties' agreement "that the FDCA does not create or imply a private right of action for individuals injured as a result of violations of the Act." Thompson v. Merrell Dow Pharmaceuticals, Inc., 766 F.2d 1005, 1006 (6th Cir. 1985), *aff'd*, 478 U.S. 804 (1986); *see also Merrell Dow*, 478 U.S. at 825 n.4 (Brennan, J., dissenting) ("the Court does *not* hold that there is no private cause of action under the FDCA").

170 Professor Luneburg notes that the Court is unclear about "which congressional intent" (that is, § 1331 intent or FDCA intent) this phrase referenced, but safely presumes "the latter, because it is unlikely that Congress in 1875 thought in a specific or general way about the type of case presented for federal adjudication in [*Merrell Dow*] and formed an intent one way or the other." Luneburg, *supra* note 21, at 763.

171 *Merrell Dow*, 478 U.S. at 812 (footnotes omitted). The Court did not address the possibility, as Professor Zeigler points out, that Congress "may have had no intent one way or the other. Consequently, allowing the case to go forward in federal court on a state cause of action does not necessarily contradict congressional intent." Zeigler, *supra* note 21, at 712.

Nor did the Court confront an irony of its own making: While congressional intent is key to the implied right of action analysis, *infra* notes 230–59 and accompanying text, the

> . . . .
> . . . We simply conclude that the 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.[172]

This conclusion significantly recasts the federal question notion of substantiality in the restrictive *American Well* vein. First, it reduces that determination to a mechanical search for a remedy or cause of action in the implicated statute. Second, it defines substantiality almost solely as a product of Congress' substantive remedial objectives, rather than as a product of Congress' section 1331's jurisdictional objectives, and further offers no means of reconciling both legislative directives as part of a cohesive federal question approach.

Lastly, it effectively forfeits judicial control (granted and unchanged by Congress under section 1331) over the substantiality determination concerning the federal question within the hybrid claim by making that finding a direct function of *Congress' unrelated* decision about private enforcement of the implicated substantive statute (here, the FDCA) standing on its own. In other words, the federal question inquiry should ultimately address whether the federal issue embedded in the state claim warrants the protections of federal adjudication, but that question is neither directly nor completely answered by reference to Congress' isolated remedial intent—likely formed without consideration of the complications of state court enforcement—concerning the implicated federal statute.[173] Whether Congress intended private *federal* enforcement of any particular federal statute does not answer the question whether Congress intended to provide federal jurisdiction when the *state* seeks to enforce that standard as part of a state-defined claim.[174] As explored in detail in Part IV(B), the jurisdictional and remedial inquiries are not interchangeable.[175] In short, *Merrell Dow*'s confusion of jurisdictional and

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Court itself did nothing to determine Congress' intent under the FDCA and based its implication finding on the parties' *concession* "that there is no federal cause of action for FDCA violations." *Merrell Dow*, 478 U.S. at 810; *cf.* Finley v. U.S., 490 U.S. 545, 558-59 (1989) (Stevens, J., dissenting) ("If a case is not within one of the specified [article III] categories, neither Congress nor the parties may authorize a federal court to decide it.") (footnote omitted) (overruled by 28 U.S.C.A. § 1367 (West Supp. 1991) on other grounds); *see also* Oliver v. Trunkline Gas Co., 796 F.2d 86, 89-90 (5th Cir. 1986) (the *parties* rather than the state had "incorporated" a federal standard into their contract, and ultimately into plaintiff's claim, amounting to an impermissible private attempt to create federal jurisdiction).

[172] *Merrell Dow*, 478 U.S. at 814 (footnote omitted).

[173] *Infra* notes 271–73 and accompanying text.

[174] *Id.*

[175] *Infra* notes 266–70 and accompanying text.

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 section 1331.[176]

Thus, by predicating the substantiality finding about the implicated federal issue on the legislative decision to provide a cause of action or remedy, the Court unnecessarily relinquished control of that determination without any indication that Congress itself intended such a shift of prerogative. In effect, this shift forces the legislature to make delicate hybrid claim allocations without knowledge of the types of state claims or federal issues involved. Congress' narrow decision to preclude a private remedy under a specific statute cannot be read reliably as a broad preclusion of federal court jurisdiction over any possible state claim implicating that statute. In its decision to ban private enforcement under any given federal law, Congress simply cannot be held to have predicted and accounted for every imaginable state enforcement action that might threaten the federal interest embodied in that law. Thus, to the extent *Merrell Dow* exerts that pressure of prophesy on Congress, the Supreme Court puts a difficult—and unwarranted—burden on the legislature and unfairly abdicates its own responsibility within the jurisdictional collaboration (upon which Congress is entitled to rely) to exercise its general federal question power to make hybrid claim allocations in the enlightened context of particular controversies.[177]

The Court reinforced this troublesome abdication by rejecting arguments defendant advanced to support federal jurisdiction despite the presumed congressional preclusion of private federal enforcement.[178] Significant is that the theories dismissed by the Court advocated a more discretionary approach to section 1331 which would have facilitated the Court's consideration of the importance or predominance of the implicated federal issue in the more traditional manner.[179] Curiously, the Court applauded *Franchise Tax Board*'s

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[176] Indeed, such a strict application of *Merrell Dow*'s remedy requirement leaves a court "no room . . . to make exceptions when the federal interest at stake does warrant federal adjudication." Comment, *supra* note 7, at 567–68.

[177] Congress, of course, could overturn *Merrell Dow* or revise the federal question statute. History reveals, however, that Congress has abstained from tampering with the basic thrust of § 1331 and has left the classic Supreme Court § 1331 decisions untouched. While it is dangerous to draw inferences from this record of inaction, it may well indicate that Congress has depended upon the Supreme Court to refine the ebb and flow of judicial prerogative within the federal question collaboration precisely because jurisdictional judgments can be so case-specific.

[178] *Merrell Dow*, 478 U.S. at 813–17.

[179] For example, in response to defendant's contention that *Franchise Tax Board-Smith* provided jurisdiction because "some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims," *id.* at 813 (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 13 (1983)), the Court warned of *Franchise Tax Board*'s (and therefore *Smith*'s) cautious application, and

recognition that a reflexive jurisdictional test would undermine the judicial discretion needed in this unclear area of the law[180] but then itself adopted a cause of action test that seemed to perfunctorily equate the lack of private remedy with the insubstantiality of the federal issue for federal question purposes.[181]

To be sure, *Merrell Dow* neither discarded entirely the notion of judicial prerogative within the section 1331 collaboration between the courts and Congress nor purported to scrap *Smith*'s case-centered approach.[182] In footnote twelve of the majority opinion, the Court endorsed evaluation of "the *nature* of

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reiterated the "long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Id.* (footnote omitted). And to defendant's argument that this case offered "special circumstances" to justify § 1331 jurisdiction "whatever the general rule" because it involved the novel question concerning the extraterritorial application of the FDCA to sales in Canada and Scotland, *id.* at 816–17, the Court reasoned that federalism concerns "would be ill-served by a rule that made the existence of federal-question jurisdiction depend on the district court's case-by-case appraisal of the novelty of the federal question asserted as an element of the state tort." *Id.* at 817. "The novelty of an FDCA issue," the Court added, "is not sufficient to give it status as a federal cause of action . . . ." *Id.*

The Court also rejected defendant's argument that the federal interest in giving the FDCA a uniform interpretation warranted federal jurisdiction despite the lack of private remedy in the Act, *id.* at 815, noting that preemption, and not federal court review of "state FDCA-based causes of action," might be the more appropriate approach to ensure "the order and stability of the FDCA regime," *id.* at 816, and that the Supreme Court's own "power to review" federal issues in state actions would provide the ultimate check on uniformity. *Id.*

[180] *Merrell Dow* acknowledged:

> Far from creating some kind of automatic test, *Franchise Tax Board* thus candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction. Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system.

Merrell Dow, 478 U.S. at 814.

[181] *Cf.* Luneburg, *supra* note 21, at 770 (*Merrell Dow* may signal that the Supreme Court "will not construe section 1331 to encompass state tort actions based on incorporated federal law, at least where Congress has not created a private federal cause of action, unless Congress clearly says so."); Hirshman, *supra* note 7, at 60 (noting pre-*Merrell Dow* that "requiring that each statute provide explicitly for federal jurisdiction . . . would amend § 1331 to read as follows: 'Congress hereby provides that the federal courts have jurisdiction over cases when Congress provides they do'").

[182] Ironically, the Court's decision to short-circuit its own discretion with respect to the hybrid claim determination was itself an exercise of jurisdictional prerogative. The Court in effect used its own congressionally-condoned power to invite itself out of the case-centered approach to § 1331.

the federal interest at stake" in section 1331 determinations[183] and—far from overruling *Smith*—even attempted to reconcile it with *Moore* as a product of "differences in the nature of the federal issues at stake."[184] Similarly, the Court cited *Shoshone* for the proposition that "formally federal causes of action" are not always indicative of federal question jurisdiction in light of the "overwhelming predominance of state-law issues."[185] But *Smith*'s and *Shoshone*'s precise fates are uncertain. The Court made no express attempt to coordinate either *Smith, Shoshone,* or its "federal interests" concept with its new remedy requirement.[186] In addition, the Court failed to define what it

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[183] *Merrell Dow*, 478 U.S. at 814 n.12 ("Several commentators have suggested that our § 1331 decisions can best be understood as an evaluation of the *nature* of the federal interest at stake."); *see also id.* at 815 n.12 (noting "[t]he importance of the nature of the federal issue in federal-question jurisdiction"); *cf.* Gully v. First Nat'l Bank, 299 U.S. 109, 114 (1936) (noting the importance of evaluating "the federal nature of the right to be established"); *accord* Puerto Rico v. Russell & Co., 288 U.S. 476, 483 (1933). *See also* Shapiro, *supra* note 2, at 570 (*Smith* and *Shoshone* "may be better understood if viewed in terms of the federal interest at stake and the effect on the federal docket") (cited in *Merrell Dow*, 478 U.S. at 814 n.12).

[184] *Id.* at 815 n.12. As the Court put it, *Smith*'s finding of § 1331 jurisdiction rested upon the need to determine "the constitutionality of an *important* federal statute," while *Moore's* rejection of § 1331 jurisdiction merely concerned "the violation of the federal standard as an element of state tort recovery [that] did not fundamentally change the state tort nature of the action." *Id.* (emphasis added). As Professor Doernberg reiterated *Merrell Dow*'s reconciliation: "the federal issue—the constitutionality of a congressional program—was of considerable importance to the federal government, while . . . the use and construction of a federal standard to negate a state-created defense to a state-law action was of insufficient importance to the national government to warrant federal jurisdiction" (footnote omitted). Doernberg, *There's No Reason for It, supra* note 6, at 636; *see also* Doernberg & Mushlin, *supra* note 6, at 539 n.48 (suggesting that *Smith* may be distinguishable from *Merrell Dow* because plaintiff invoked the Constitution, not a federal statute, and congressional intent was not at issue); *accord* Doernberg, *There's No Reason for It, supra* note 6, at 635 n.172.

Thus, *Smith* arguably distinguishes itself as a case which (1) involves a federal constitutional assessment and (2) requires a federal trial forum to assure the supremacy of (or at least extreme sensitivity to) federal law when the continued existence of a federal program is at stake and erroneous or overbroad state court invalidation of that program could cause considerable disruption in the interim between the initial decision and ultimate Supreme Court correction.

[185] *Merrell Dow*, 478 U.S. at 815 n.12. The Court essentially recognized *Shoshone* (and *Shulthis*) as exceptions to the *American Well* cause of action test. *Id.; see also* HART & WECHSLER, *supra* note 5, at 1004.

[186] Here is an interpretation of *Merrell Dow* which gives cohesion to *Smith, Shoshone,* the federal interest standard, and the remedy requirement at the second level of the *Franchise Tax Board* framework (*supra* notes 148–49 and accompanying text):

After *Merrell Dow,* a federal district court may no longer draw upon § 1331 for congressional permission to hear state law claims implicating federal statutes lacking causes of action or remedies *unless* those claims raise significant federal interests or constitutional

meant by "federal interests"[187] or to explain how "the nature of the federal interest at stake" might be fully assessed if the courts have surrendered the

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questions, possibly about "important" federal statutes, whatever those may be (integrating *Smith*). Thus, cases turning on the constitutionality of an important federal statute may activate the court's § 1331 power despite the absence of a federal cause of action or remedy because of the overriding and obvious federal interest in assessing the legitimacy of a congressional enactment, particularly one the court deems of some significance (integrating a federal interest perspective). Conversely, even if Congress provides a cause of action or remedy in the implicated federal statute, a federal court still may not hear the claim under § 1331 if plaintiff's right to relief does not depend upon the statute's construction or state law issues predominate in resolution of plaintiff's claim (integrating *Shoshone*). Thus, cases turning on state law interpretations do not activate the court's § 1331 power even in the presence of a cause of action or remedy because of the diminished federal interest in interpreting state law.

And here is a criticism of this interpretation: To the extent *Merrell Dow* limits *Smith's* application to hybrid state claims raising federal constitutional issues, it should be rejected. There is no less of a need for federal expertise in interpreting a federal question, whether constitutional or purely statutory in nature, particularly given the judiciary's special function as independent guardian of *all* federal rights. Countering legislative improprieties by majoritarian interests and ensuring effectuation of Congress' remedial aims are important parts of that protective charge. In addition, the purported distinctions between *Smith* and *Moore* do not justify *Smith*'s limitation: (1) the *Moore* scenario of statutory incorporation also carries the potential for disruption of the federal scheme (*supra* note 184) to the extent state courts interpret and enforce the federal standard in a manner inconsistent with Congress' intent and (2) *Merrell Dow*'s observation that the nature of the state claim remained unchanged in *Moore* holds equally if not more true in *Smith*. There, the state law's prohibition against investment in unlawful securities made necessary a constitutionality determination as a *preliminary* step in activating that prohibition, which itself remained purely of state origin and definition. In *Moore,* the state voluntarily embedded—indeed, invited—the federal substantive standard into the *heart* of its claim, which consequently took its definition in significant part from federal law.

See M. REDISH, *supra* note 5, at 101–02 (rejecting the constitutional-statutory dichotomy and noting that *Merrell Dow* "has left federal question jurisdiction in an unfortunate state of confusion" in its attempt "to draw a pragmatically unworkable and logically indefensible dichotomy among different federal standards which have been incorporated by reference into state law"); *see also Merrell Dow,* 478 U.S at 821–22 n.1 (Brennan, J., dissenting) (viewing *Smith* and *Moore* as "irreconcilable" and criticizing the majority's reconciliation of the cases on the basis that the federal interest in *Smith* was more important than in *Moore* as "infinitely malleable" and therefore unworkable).

[187] The problems with *Merrell Dow*'s "federal interests" standard have already been well-documented. *Merrell Dow,* 478 U.S. at 821 n.1 (Brennan, J., dissenting) (criticizing the majority's federal interest as "ad hoc" and "infinitely malleable" and questioning "at what point does a federal interest become strong enough to create jurisdiction?"); E. CHEMERINSKY, *supra* note 21, at 240 (criticizing *Merrell Dow*'s federal interests test as without structure, inherently unpredictable, and vesting too much "discretion in the district court to determine the nature of the federal interest and to decide whether that interest merits federal jurisdiction"); M. REDISH, *supra* note 5, at 102 (criticizing *Merrell Dow's* federal interest standard as "vague and subjective" and noting that it "will translate into any

opportunity to make the substantiality determination they would otherwise have made in accordance with their general federal question power.[188] And, to the extent (if any) that the federal interest standard relates to the Court's consideration of Congress' substantive intent in the implicated statute as it bears upon the section 1331 forum determination or to a relative merit ranking of the implicated federal statute or interest,[189] *Merrell Dow* provided no guidance about this assessment (which is more properly within the legislative domain in any event).

Witness, then, *Merrell Dow*'s dual personality: one strand of the Court's analysis focuses on the discrete remedy requirement, while another focuses on the more discretionary need to evaluate the nature of the federal interest at stake. The two approaches seem inconsistent unless (1) the remedy requirement applies to only certain types of hybrid claims, preserving the more discretionary second prong of the *Franchise Tax Board* standard to assess the

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federal issue implicated by a state cause of action that the judge happens to find sufficiently 'important'") (footnote omitted); *cf.* Doernberg, *There's No Reason for It,* supra note 6, at 657-58 (criticizing *Merrell Dow*'s substantiality criterion as pliable and incapable of precise articulation because it "attempts to measure the abstract importance of the issue to the federal system through consideration of the unexpressed interests of the federal government"); *see also* Note, *supra* note 96, at 980 ("A vague, intuitive 'federal interests' test is an escape, not an answer.") (footnote omitted).

As Professor Redish pointed out:

> [T]he fact that the Court in *Merrell Dow* relied in part on Professor Cohen's analysis to justify its extremely vague, all but unworkable "federal interests" test may underscore its weakness: its fundamentally unprincipled and unpredictable nature. Thus, while the pragmatic factors correctly pointed to by Professor Cohen could properly influence adoption of a principled standard, such as the the *Smith* test, *those factors cannot themselves function directly as a standard for determining federal question jurisdiction,* as *Merrell Dow*'s muddled analysis unfortunately illustrates.

M. REDISH, *supra* note 5, at 105 (footnotes omitted) (emphasis added).

188 Indeed, footnote 12 reads like an open-ended savings clause designed to preserve loose ends of sensible precedent (*e.g., Smith* and *Shoshone*) that did not fit snugly in the Court's new approach on the facts before it. *Cf.* M. REDISH, *supra* note 5, at 101, 102 ("[i]t is difficult to glean a coherent, workable standard for the decision of future cases from this muddled analysis" and "the Court has left federal question jurisdiction in an unfortunate state of confusion"); Doernberg, *There's No Reason for It, supra* note 6, at 638 n.187 ("the Court offered no indication of the boundaries of its new theory").

189 The Court's determination that *Smith* involved "the constitutionality of an *important* federal statute," *Merrell Dow*, 478 U.S. at 815 n.12 (emphasis added), suggests that the significance of the statute, in the Court's eyes, helped account for finding federal jurisdiction over a state law claim concerning it. *Merrell Dow* did not explain why it considered the Federal Farm Loan Act to be so important or how courts should gauge the "importance" of other congressional enactments embedded in state law claims.

others[190] or (2) the Court intended to measure the significance of the federal interest by the congressional decision about remedies (or the need for constitutional interpretation). Accordingly, *Merrell Dow* may view Congress' failure to provide a cause of action or remedy in the implicated federal law as the equivalent of a congressional declaration that the federal interest at stake is not important enough to sustain federal question jurisdiction, especially in the absence of a constitutional issue.

In short, *Merrell Dow* obscures—almost to the point of eliminating—an opportunity for a discretionary approach to federal question jurisdiction over state law claims.[191] The Court's adoption of the remedy requirement, its failure to provide standards to assess the federal interest at stake, and its silence about the types of claims subject to the cause of action analysis only take the Court farther from a principled section 1331 test that, consistent with the statute's underlying purposes, determines whether the federal issue at stake warrants the distinctive treatment of federal trial forums.

Thus, while professing to honor the importance of flexibility and practicality in section 1331 determinations, *Merrell Dow* nonetheless adopted a section 1331 test that sacrificed judicial prerogative under the general federal question statute for the "certainty" of a congressional intent that had little to do

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[190] *Merrell Dow* provides little, if any clue, about the types of cases that will trigger the remedy requirement. It certainly seems that state law negligence claims are among them.

[191] Professor Chemerinsky has neatly summarized what may be the state of federal question law with a strict construction of *Merrell Dow*:

> [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, a federal law that creates a cause of action is an essential component of the plaintiff's claim.

E. CHEMERINSKY, *supra* note 21, at 231. He views *Merrell Dow's* remedy requirement as an additional and "important limitation" on the courts' federal question power over hybrid claims:

> The Court held that it is not enough for a federal law to be an essential component of a state law cause of action; federal question jurisdiction exists only if *the federal law* itself creates a cause of action . . . . *Merrell Dow* narrows the *Smith* authorization for federal question jurisdiction for certain state claims. . . .

E. CHEMERINSKY, *supra* note 21, at 240-41. This interpretation of *Merrell Dow* suggests that while the cause of action or remedy within the implicated federal statute is *necessary* for jurisdiction, neither may be *sufficient* for jurisdiction. Accordingly, even if Congress provided a cause of action or remedy, the court must still find that plaintiff's right to relief under state law depends upon resolution of a substantial question of federal law (and, of course, that plaintiff has satisfied the well-pleaded complaint rule); *see supra* note 186.

with the particular state law claim at issue.[192] By reviving *American Well*'s cause of action approach in the context of examining the incorporated federal statute, *Merrell Dow* unwisely rerouted the section 1331 inquiry for hybrid claims through the legislature's jurisdictionally inconclusive remedial intent and embraced *American Well*'s original and exclusionary spirit with renewed vigor at the second level of the federal question analysis.[193] A refortified *American Well* emerged from the Court's majority opinion.[194]

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[192] *But cf.* Luneburg, *supra* note 21, at 759, 761 (the Court in *Merrell Dow* evidenced a "creative exercise of discretion" by construing § 1331 in light of modern implied remedy doctrine rather than by "divination of the original intent of that provision").

[193] Indeed, with its emphasis on cause of action, *Merrell Dow*'s remedy requirement is presumptively pro-state forum. In many hybrid claims, the federal statute involved will not provide a private remedy, or the parties might have chosen to sue directly under the federal statute (in the absence of strategic reasons not to do so). *See* HART & WECHSLER, *supra* note 5, at 1020; *cf.* E. CHEMERINSKY, *supra* note 21, at 240 (government benefit programs and regulatory statutes are "prominent examples" of the numerous federal laws that do not create private causes of action). Accordingly, *Merrell Dow* puts the courts in somewhat of a jurisdictional straightjacket. It weights the jurisdictional finding in favor of state forums while leaving federal courts little discretion to tip the balance towards the federal forum. This confinement is particularly unfortunate when the need for vindicating important federal interests or for national uniformity strongly favors a federal forum despite Congress' failure to designate a federal remedy.

[194] In Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988), Justices Brennan and Stevens had an opportunity after *Merrell Dow* to reiterate the Court's § 1331 doctrine in an analysis of federal patent jurisdiction under § 1338, which looks to federal question precedent for its basic definition. *Supra* note 96. The Court faced the propriety of defendant's appeal to the Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over appeals from a district court whose jurisdiction, in turn, was "based in whole or part" on 28 U.S.C. § 1338. Neither patent law nor state law created the claims at issue, so "the dispute center[ed] around whether patent law 'is a necessary element of one of the well-pleaded [federal antitrust] claims.'" *Christianson*, 486 U.S. at 809.

Speaking for the Court, Justice Brennan (who also announced *Franchise Tax Board* for a unanimous court) skipped over *Merrell Dow*'s remedy requirement and revived *Franchise Tax Board*'s two-step standard, *supra* notes 148–49 and accompanying text, explaining that district court jurisdiction "extends over 'only those cases in which a well-pleaded complaint establishes either [1] that federal law creates the cause of action or [2] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law,' . . . in that 'federal law is a necessary element of one of the well-pleaded . . . claims.'" *Christianson*, 486 U.S. at 808 (quoting *Franchise Tax Bd.*, 463 U.S. at 27–28, 13). Explaining that the well-pleaded complaint rule "focuses on claims, not theories," *id.* at 811, Justice Brennan observed that an "entire" antitrust claim does not arise under the patent law simply because "an element that is essential to a particular theory might be governed by federal patent law." *Id.* He then concluded that the claims before the Court failed to arise under federal patent law because the "patent-law issue, while arguably necessary to at least one theory under each [antitrust] claim, is not necessary to the overall success of either claim." *Id.* at 810. "[A] claim supported by alternative theories in the

D. *Illustrations of the Trouble: Restrictive Judicial Readings of* Merrell Dow

A sizable number of lower federal courts have adopted or endorsed this restrictive reading of *Merrell Dow*.[195] Relying upon the mere absence of an

complaint may not form the basis of § 1338 jurisdiction unless patent law is essential to each of those theories." *Id.*

Not surprisingly, Justice Stevens, in his concurring opinion joined by Justice Blackmun, stressed *Merrell Dow*'s approach to the jurisdictional problem. He reemphasized *American Well,* entertained the implication question, and found that Congress created neither an express nor an implied cause of action to enforce § 112 of the patent law. *Id.* at 821 (Stevens, J., concurring) (footnote omitted). He cited *Merrell Dow* for its narrow ruling that "incorporation of [a] federal standard in [a] state-law private action, when no cause of action, either express or implied, exists for violations of that federal standard, does not make the action one" arising under § 1331. *Id.* at 822 n.2.

Justice Stevens' use of the *Merrell Dow* rationale in a case based not on a state claim, but on a federal (antitrust) claim implicating the federal patent statute portends its expanded application beyond state law hybrid claim cases. On the other hand, the Court's seeming sidestep of *Merrell Dow* (perhaps because no state claims were at issue) with an analysis defaulting to the *Franchise Tax Board* standard suggests that *Merrell Dow* may not state the general rule of federal question jurisdiction. Unfortunately, *Christianson* may be of limited predictive value given its peculiar patent context, its focus on the well-pleaded complaint rule rather than on the "merits" of the § 1331 inquiry, and its analysis of federal, rather than state, claims. In any event, *Christianson* seems to tighten the general federal question test in requiring that federal law must be essential to all theories supporting the claim seeking a federal forum.

[195] *E.g., infra* notes 196–227 and accompanying text (discussing decisions from the District of Columbia, Fifth, Ninth, First, and Fourth Circuit Courts of Appeals, respectively); Emerado Public School Dist. v. Sanford, 750 F. Supp. 418, 419–20 (D.N.D. 1990) (the lack of private action under federal impact aid statutes precludes § 1331 jurisdiction over state claims alleging their violation); Lamson v. Firestone Tire & Rubber Co., 724 F. Supp. 511, 513–14 (N.D. Ohio 1989) (failure to demonstrate a private action under Title VII or relevant EEOC regulation precludes federal jurisdiction over state law negligence claim alleging the federal standard as an element of the claim); Donofry v. Nazareth Hosp., 721 F. Supp. 732, 735 (E.D. Pa. 1989) (the lack of private action under Occupational Safety and Health Act of 1970 § 660(c) precludes removal jurisdiction over state law wrongful termination claim alleging § 660(c)'s violation); MidAmerica Title Co. v. Chicago Title Ins. Co., No. 88C5864 (N.D.Ill. April 18, 1989) (1989 WL 39780) (the lack of private action under the federal Real Estate Settlement Procedures Act and Federal Trade Commission Act precludes removal jurisdiction over state law claims under Illinois consumer fraud and deceptive trade practices statutes alleging the federal violations as elements in the state claims); Scales v. Memorial Medical Center, 690 F. Supp. 1002, 1007–08 (M.D. Fla. 1988) (the lack of private action under federal Risk Retention Act precludes arising under jurisdiction); West Virginia v. Anchor Hocking Corp., 681 F. Supp. 1175, 1176–77 (N.D. W. Va. 1987), *appeal dismissed,* 857 F.2d 1469 (4th Cir. 1988) (the lack of private action under the federal Job Training Partnership Act precludes removal jurisdiction over state law civil action related to federal funds obtained under that

action or remedy in the implicated federal statute in the hybrid claims before them, these circuit and district courts have discussed or dismissed those claims with little or no analysis of the purposes underlying, or the factors related to, section 1331. Instead, following *Merrell Dow*'s lead, they have essentially substituted the remedial inquiry for the jurisdictional inquiry at the expense of a *Smith*-like inquiry or a reasoned exploration of federal question considerations.

The District of Columbia Court of Appeals in *Rogers v. Platt*,[196] for example, announced this view of *Merrell Dow*'s preclusive effect:

> [A] case could "arise under" within the meaning of section 1331 [under *Smith*]—prior to last summer—without regard to whether Congress intended a federal cause of action. But in *Merrell Dow* . . . a closely divided Court held that if Congress affirmatively determines that there should be *no* private federal cause action that is effectively the end of the matter. . . . In that event, it is no longer necessary for federal courts to consider whether a substantial federal question is a necessary element of a state cause of action because congressional intent not to create a federal cause of action is deemed a proxy for the ultimate question whether or not Congress intended to confer federal jurisdiction.[197]

The Fifth Circuit has offered similar views of *Merrell Dow* starting in *Oliver v. Trunkline Gas Co.*[198] Plaintiffs contended that their state contract claim supported federal question jurisdiction because of its reliance on rights created by section 4(a) of the federal Natural Gas Act.[199] Finding *Franchise Tax Board*'s rule that a state claim requiring resolution of a substantial question of federal law might support section 1331 jurisdiction to be but a "narrow exception" to the "general rule" of *American Well*,[200] the court of appeals explained that *Merrell Dow* precluded jurisdiction over state law claims incorporating federal law as the applicable state standard when Congress

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Act); Crouse v. Creanza, 658 F. Supp. 1522, 1528–29 (W.D. Wis. 1987) (the lack of private action under the federal Parental Kidnapping Prevention Act of 1980 precludes jurisdiction over state law custody claim invoking that Act); Geiger v. Cavanaugh, No. H-87-1200 (S.D. Tex. May 21, 1987) (1987 WL 11715) (the lack of private action under the Interstate Common Carrier Act and related Interstate Commerce Commission regulation at issue precludes removal jurisdiction over state law negligence claim alleging the regulation's violation as an element of the claim); Certified Grocers Midwest, Inc. v. Illinois Dep't of Pub. Aid, No. 86C4754 (N.D. Ill. Sept. 11, 1986) (1986 WL 10041) (the lack of private action under the Temporary Emergency Food Assistance Program precludes removal jurisdiction over state law claim alleging violation of Program requirements).

196 814 F.2d 683, 688 (D.C. Cir. 1987) (holding that the Parental Kidnapping Prevention Act did not confer federal question power on the lower federal courts).

197 *Id.* at 688 (citations omitted); *see also id.* at 689.

198 796 F.2d 86 (5th Cir. 1986).

199 *Id.* at 87.

200 *Id.* at 88.

refused to provide a private cause of action in the federal statute.[201] The court expressly reinforced *Oliver*'s view of *Merrell Dow* two years later in *Willy v. Coastal Corp.*[202] It reiterated that *Merrell Dow* "required a federal remedy for the [implicated federal] statute to be a basis for federal jurisdiction"[203] and acknowledged *Merrell Dow*'s holding that "a private, federal remedy was a necessary predicate"[204] or "minimum requirement"[205] for federal question jurisdiction over a state-created claim with a federal element.[206] Neither *Oliver* nor *Willy* examined the claims before them in light of the purposes underlying section 1331.

The Ninth Circuit has also interpreted *Merrell Dow* to mean that the absence of a private cause of action is dispositive of the section 1331 jurisdictional inquiry.[207] *Utley v. Varian Associates, Inc.*,[208] the leading circuit

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[201] *Id.* at 89.

[202] 855 F.2d 1160 (5th Cir. 1988). The *Willy* defendants sought removal of plaintiff's state law wrongful discharge claim, arguing that the federal statutes "that Willy claimed he was fired for refusing to violate formed a necessary element" of his well-pleaded complaint. *Id.* at 1163.

[203] *Id.* at 1168.

[204] *Id.*

[205] *Id.* at 1169.

[206] In *Willy*, the court of appeals noted that defendants did not argue that the federal regulations implicated by plaintiff's claim provided a private federal cause of action for their violation. *Id.* Moreover, the court found that the federal statutes at issue expressly limited relief to administrative remedies, an independent sign from Congress evidencing the inappropriateness of judicial action. *Id.* The court reasoned: "Just as it would 'flout' congressional intent to allow a federal court to exercise federal question jurisdiction over a removed claim for violation of a federal statute that does not provide a private cause of action, it would equally flout congressional intent to give the federal court original (and hence removal) jurisdiction based on statutes that limit the federal remedy to an administrative action." *Id.* (footnote omitted).

See also Griffis v. Gulf Coast Pre-Stress Co., 850 F.2d 1090, 1092 (5th Cir. 1988) (lack of private action under federal Longshore and Harbor Workers' Compensation Act § 905(a) precludes federal jurisdiction over negligence claim implicating that section); Fabrique, Inc. v. Corman, 813 F.2d 725, 726 (5th Cir. 1987) (apparently holding that a claim for damages under state property law cannot support § 1331 jurisdiction if the only federal question involved is insufficiently substantial because it is founded on a section of the Bankruptcy Act which itself provides no federal cause of action).

[207] *E.g.*, Krause v. Santa Fe S. Pac. Corp., 878 F.2d 1193, 1199 n.3 (9th Cir. 1989) ("Because the Supreme Court now treats the existence of a private cause of action as a jurisdictional requirement [citing *Merrell Dow*] our holding that no private cause of action exists under section 11705 [of the Interstate Commerce Act] is dispositive of plaintiff's claims that jurisdiction could also be asserted under [§§ 1331 and 1337] . . . ."), *cert. dismissed*, 493 U.S. 1051 (1990); *see also* Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1394 n.4 (9th Cir. 1988) (explaining *Merrell Dow*'s holding that a state claim does not involve a substantial federal question sufficient for § 1331 purposes unless the federal law incorporated in the state claim provided a private right of action); Utley v. Varian Assocs., Inc., 811 F.2d 1279, 1282 (9th Cir.), *cert. denied*, 484 U.S. 824 (1987)

case, illustrated the restrictive effect of the remedy requirement on section 1331 determinations. Plaintiff Utley brought a state law wrongful termination action in state court against his former employer Varian Associates, a federal government contractor.[209] Among other things, Utley claimed Varian dismissed him because of his race in violation of Varian's affirmative action duties as a federal contractor under a federal executive order and its implementing regulations, which in turn constituted an unlawful employment practice under California statutes.[210]

Varian removed Utley's action to federal district court, which had to decide whether Utley's state law claims arose under section 1331 because they "implicate[d] federal law."[211] The trial court, pre-*Merrell Dow*,[212] applied the *Smith*-like standard developed by the Ninth Circuit and held that the case was "a clear example of 'a substantial dispute over the effect of federal law' where 'the result turns on the federal question.'"[213] The court primarily looked to the fact that Utley's state law claim depended upon the construction and application of federal law.[214]

The Ninth Circuit reversed, relying on the recently released *Merrell Dow* opinion. Unlike the district court, which realistically assessed the centrality of the federal issue to the success of plaintiff's claim, the court of appeals focused solely on the narrow question whether the executive order provided a private right of action against Varian in federal court.[215] The court described its mission simply and strictly: "Under *Merrell Dow,* if a federal law does not provide a private right of action, then a state law action based on its violation

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(explaining that *Merrell Dow* "found that the lack of a private right of action under the FDCA disposed of the issue of whether a state claim based on its violation arose under federal law").

[208] 811 F.2d 1279 (9th Cir.), *cert. denied*, 484 U.S. 824 (1987).

[209] *Id.* at 1281.

[210] *Id.* at 1281-82.

[211] Utley v. Varian Assocs., Inc., 625 F. Supp. 104, 105 (N.D. Cal. 1985), *rev'd*, 811 F.2d 1279 (9th Cir.), *cert. denied,* 484 U.S. 824 (1987).

[212] *Utley*, 811 F.2d at 1283 n.1.

[213] *Utley*, 625 F. Supp. at 106 (quoting Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, 656 F.2d 1364 (9th Cir. 1981), *cert. denied,* 455 U.S. 1020 (1982)).

[214] "[Resolving plaintiff's claim] will require the Court to determine whether federal law created a duty, and it if did, the nature of that federal duty and whether defendant's conduct constituted a breach of that duty." *Id.*; *Utley*, 811 F.2d at 1282.

[215] "Only if the executive order provides Utley with a private right of action against Varian in federal court might his complaint raise a 'substantial' federal question . . . ." *Id.* at 1284. Providing a federal forum in the absence of a private action "would disregard the will of Congress to preclude a private remedy in federal court for the statute's violation." *Id.* at 1283. On the power of this logic, the Court found that federal administrative remedies available to redress affirmative action violations did not meet *Merrell Dow*'s remedy requirement because they did not represent congressional permission to sue employers in federal court. *Id.*

perforce does not raise a 'substantial' federal question."[216] It then applied the implication test set forth in *Cort v. Ash* to the executive order, searching for executive (rather than congressional) intent to provide a private judicial remedy.[217] The court found none, and accordingly concluded that removal was improper given the insubstantiality of the incorporated federal question.[218]

Similarly, the First Circuit adopted a strict reading of *Merrell Dow* in *Nashoba Communications v. Town of Danvers*[219] to support its conclusion that the well-pleaded complaint rule precluded federal question jurisdiction over a declaratory judgment action based on a cable license agreement referencing the federal Cable Communications Policy Act.[220] Noting twice *Merrell Dow*'s

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[216] *Utley*, 811 F.2d at 1283. The court of appeals reached this conclusion in specifically rejecting Varian's argument based on *Franchise Tax Board* that a state law claim may arise under federal law if it raised a substantial question of federal law, here compliance with the federal affirmative action program. *Id.; see also* Hedges v. Legal Servs. Corp., 663 F. Supp. 300, 304–05 (N.D. Cal. 1987) (the district court, faced with a similar argument, stressed that *Franchise Tax Board* must be read with caution and concluded that Congress' determination not to provide a federal remedy for violation of the federal law at issue amounted to a congressional conclusion that alleging that violation as part of a state claim could not confer federal question jurisdiction).

[217] *Utley*, 811 F.2d at 1285–86. For amplification of Cort v. Ash, 422 U.S. 66 (1975), see *infra* notes 234–39 and accompanying text.

[218] *Id.* at 1286. In its zeal to conform its analysis to *Merrell Dow*, the court paid but passing attention to the fact that the *Merrell Dow* rationale is based entirely on judicial deference to congressional, and not executive, intent, which in turn rests upon Congress' unique constitutional power to limit and define lower federal court jurisdiction. *See id.* at 1285 n.4.

Relying on both *Merrell Dow* and *Utley*, the Ninth Circuit in Millers Nat'l Ins. Co. v. Axel's Express, Inc., 851 F.2d 267 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), held that plaintiff's state law indemnification claim, even though predicated upon federal law governing interstate carriers, failed to provide § 1331 jurisdiction because Congress did not intend to provide a private action for the right asserted here. *Id.* at 270-71. The court of appeals did not even perform the *Cort* test to conclude the absence of a private action. *Id.*

Other courts in the Ninth Circuit following *Utley*'s lead include Gaballah v. PG & E, 711 F. Supp. 988, 991–92 (N.D. Cal. 1989) (plaintiff's state law wrongful discharge claim implicating interpretation of federal nuclear energy safety policy under the Energy Reorganization Act did not satisfy *Merrell Dow*'s remedy requirement when Congress intended an administrative remedy under the Act); Bergkamp v. New York Guardian Mortgagee Corp., 667 F. Supp. 719, 722–23 (D. Mont. 1987) (the lack of a private cause of action under the Real Estate Settlement Procedure Act, the federal law implicated in plaintiff's state law tort claim, frustrated removal jurisdiction under § 1331 and 28 U.S.C. § 1441(a), the removal statute); *see also* Hedges v. Legal Servs. Corp., 663 F. Supp. 300, 304–05 (N.D. Cal. 1987) (Congress' failure to provide an express or implied federal cause of action for violation of § 2996(d)(b)(2) of the federal Legal Services Act precluded federal question jurisdiction over plaintiff's state claims alleging those violations as elements).

[219] 893 F.2d 435 (1st Cir. 1990).

[220] Declaratory defendant Town of Danvers had granted a cable television license to declaratory plaintiff Nashoba Communications, a cable operator. The license agreement

temperance of the *Franchise Tax Board-Smith* rule,[221] the court of appeals explained that Congress' failure to provide either an express or implied cause of action in the Cable Act automatically made it insubstantial for section 1331 purposes.[222]

So, too, the Fourth Circuit championed *Merrell Dow*'s remedy requirement in *Clark v. Velsicol Chemical Corp.*[223] Focusing on Congress' failure to provide a federal cause of action under the Hazardous Material Transportation Act and pertinent regulations, the court of appeals refused to exercise section 1331 jurisdiction over a state negligence claim premised upon defendants' violation of those federal standards.[224] Noting that "[t]he decision in *Merrell Dow* turned on the lack of congressional intent to create a private cause of action,"[225] the court measured the jurisdictional substantiality of the federal question within the hybrid claim by reference to Congress' independent substantive conclusion about private actions directly under the Act itself—actions plaintiffs conceded did not exist and did not rely upon to supply the

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provided that changes in the rate schedule would conform to the federal Cable Act. *Id.* at 436. When the town resisted intended rate increases by Nashoba, the operator sued the town in federal district court seeking declaratory and injunctive relief from enforcement of the license's rate freeze. *Id.* at 437. The court of appeals, reversing the district court, held that the well-pleaded complaint rule barred Nashoba's claim because that claim merely anticipated a defense to the town's threatened lawsuit, which would be based on state contract law and, at best, would incidentally implicate federal law. *Id.* at 438.

221 *Id.* at 437–38.

222 The court stated:

> In deciding whether there was present a substantial question of federal law, *Merrell Dow* said that Congress' failure to set out a private remedy for violations of the federal statute at issue 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." . . . Nashoba concedes, as it must, that there is no explicit right to sue to block rate action by a franchising authority set out in the [Cable] Act. And, as we explain below, there is none implied. This makes the federal issue insubstantial.

Id. at 438–39 (citations omitted). Also, consider Rodriguez v. SK & F Co., 833 F.2d 8 (1st Cir. 1987), in which the court of appeals apparently decided that plaintiff's wrongful discharge claim, based on his refusal to do his employer's bidding in violation of the Food, Drug & Cosmetic Act, did not belong in federal court because the FDCA "does not afford a private cause of action," relying in part on *Merrell Dow* and circuit cases denying private actions under the FDCA. *Id.* at 9.

223 944 F.2d 196 (4th Cir. 1991).

224 Plaintiffs, two United Parcel Services employees exposed to toxic insecticide from a leaking package, brought a negligence claim in federal court based upon defendants' failure to meet federal regulations governing the packaging, shipping, and labeling of hazardous materials. *Id.* at 196, 197.

225 *Id.* at 198.

requisite federal law presence to sustain jurisdiction.[226] Predictably, the court attached little, if any, significance to the fact that federal law gave life to plaintiffs' claim of negligence and would be central to resolution of the action.[227]

These circuit opinions illustrate the danger of *Merrell Dow*'s virtually automatic jurisdictional formula and how the remedy requirement works to pull the court away from an examination of the purposes underlying section 1331 and toward the more narrow—and perhaps more nebulous—question of Congress' remedial intent concerning specific statutes. Part IV next shows in more detail how *Merrell Dow*'s blend of federal question and statutory implication doctrines in the remedy requirement works to limit judicial discretion while impairing the viability of the section 1331 inquiry.

IV. UNDOING *MERRELL DOW*'S THREAT TO THE INTEGRITY OF HYBRID CLAIM DETERMINATIONS: SEPARATING THE JURISDICTIONAL AND REMEDIAL INQUIRIES

A. *The Discretion-Restrictive Statutory Implication Inquiry*[228]

Merrell Dow, strictly construed, essentially transforms the section 1331 inquiry for hybrid claims into an implied right of action inquiry by requiring litigants to demonstrate that the implicated federal statute provides either an express or implied cause of action or remedy as a predicate to federal question jurisdiction.[229] The implication test, however, cannot stand in place of the

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[226] *Id.* at 196.

[227] *Id.* at 197, 198 (noting that "resolution of this issue requires a technical examination of federal law" and that "[a]pplication of the particular federal statute . . . would remain but an element in plaintiffs' state negligence action.").

[228] Many federal statutes make express provision for their enforcement, whether by public (*e.g.*, governmental authorities) or by private (*e.g.*, individual citizens) means. The question of judicial implication of private actions arises when Congress does not explicitly provide a private right of recovery on a statute's face, yet private parties seek redress for statutory violations under that law by asking the court to supply the missing right of action. *See* Note, *Implying Civil Remedies from Federal Regulatory Statutes,* 77 HARV. L. REV. 285, 285 (1963) (implied cause of action is "the extension of a civil remedy to one injured by another's breach of a statute or regulation not providing for such relief"); *see also* Cannon v. University of Chicago, 441 U.S. 677, 730 n.1 (1979) (Powell, J., dissenting) (defining private cause of action). Inherent in the implication question, then, is the tension between the legislative and judicial branches over exercise of their remedial powers. Should the federal courts create private remedies or enforcement rights when Congress has not done so in plain words?

[229] *See supra* note 22 and accompanying text; *see also* Comment, *supra* note 7, at 562 (under a literal interpretation of *Merrell Dow,* "the key" to the "jurisdictional analysis is the determination whether a private federal right of action under the federal law exists")

section 1331 test. The considerations for each doctrine overlap, but they are not co-extensive. The next three sections of this Article demonstrate why, starting with an examination of the statutory implication doctrine, which is itself discretion-restrictive.

The Supreme Court's statutory implication doctrine traditionally reflects a fundamental deference to congressional intent about remedies.[230] The intensity of that deference, however, has varied over time. Pre-1975 decisions show a Court more willing to imply rights of action as long they furthered Congress' statutory purposes.[231] Post-1975, however, the Court has required evidence of Congress' intent to provide a private remedy and has essentially abandoned judicial discretion for congressional direction in this area,[232] exhibiting a marked hesitance to create new causes of action.[233]

(footnote omitted); *The Supreme Court—Leading Cases, supra* note 21, at 236 (*Merrell Dow* "may have gone too far" by requiring a federal remedy instead of a substantial federal issue as the prerequisite for federal question jurisdiction).

[230] *Infra* notes 231–59 and accompanying text.

[231] *See* Zeigler, *supra* note 21, at 676. Two classic cases will illustrate this more lenient approach. In Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916), the Court found a "right of private action" residing in the Federal Safety Appliance Act for a railroad worker injured on a defective car ladder in the course of his duties. *Id.* at 36. Paying special heed to the Act's "principal object," the Court required plaintiff to be a member of "the class for whose especial benefit the statute was enacted" in order to merit a recovery right. *Id.* at 39. But the Court did not hesitate to cite—and apply—the common law maxim "where there is a right, there is a remedy" and to state broadly that a "disregard" of a statutory "command" may support an implied recovery right for those protected by the Act. *Id.* at 39–40. As Justice Stevens has described the *Rigsby* approach, "the denial of a remedy [w]as the exception rather than the rule." Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 375 (1982) (footnote omitted). For a view that *Rigsby* was not an implied private right of action case at all, see *Cannon*, 441 U.S. at 732 (Powell, J., dissenting) ("*Rigsby* . . . cannot be taken as authority for the judicial creation of a cause of action not legislated by Congress."); Noyes, *Implied Rights of Action and the Use and Misuse of Precedent*, 56 U. CIN. L. REV. 145 (1987); *see also* Noyes, *supra*, at 146 (noting that *Rigsby*'s "specific result . . . is not followed today") (quoting Crane v. Cedar Rapids & Iowa City Ry., 395 U.S. 194 (1969)).

Similarly, in J.I. Case Co. v. Borak, 377 U.S. 426 (1964), the Court implied a private right of action under § 14(a) of the Securities Act of 1934 in order to protect investors, one of the Act's "chief purposes." *Id.* at 432. Noting the courts' responsibility to provide the "remedies as are necessary to make effective the congressional purpose," *id.* at 433, the Court justified creation of a private remedy as "a necessary supplement" to public enforcement and to eliminate resort to state remedies that might frustrate § 14(a)'s purpose. *Id.* at 432, 434-35.

[232] *See infra* note 257 and accompanying text. *Merrell Dow* is a parallel endorsement of this trend in the context of § 1331 determinations.

[233] Thompson v. Thompson, 484 U.S. 174, 190 (1989) (Scalia, J., concurring) ("this Court has long since abandoned its hospitable attitude towards implied rights of action. . . . The recent history of our holdings is one of repeated rejection of claims of an implied right."); E. CHEMERINSKY, *supra* note 21, at 315.

The Court's 1975 decision in *Cort v. Ash*,[234] featured with approval in *Merrell Dow*,[235] marked the turning point in the Court's movement away from the more flexible emphasis on statutory purpose towards the more reflexive search for congressional intent to provide private remedies.[236] In *Cort*, a unanimous Court announced a new four-factor test that attempted an amalgam of prior implication law[237] and emphasized a more rigorous scrutiny of congressional intent:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. [1] First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? [2] Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . [3] Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And [4] finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[238]

While *Cort*'s multi-factor test may suggest discretionary balancing, cases after *Cort* made its four factors the servants of congressional intent.[239] In *Cannon v. University of Chicago*,[240] the Court found an implied private remedy under section 901(a) of Title IX of the Education Amendments of 1972, but stressed the unusual nature of the case because all four *Cort* factors were satisfied.[241] The Court gave primacy to Congress' intent "to have [a private] remedy available to the persons benefited by its legislation"[242] and viewed the *Cort* factors as merely "indicative of such an intent."[243] The Court concluded with a prod to Congress, noting that "the far better course" is for

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[234] 422 U.S. 66 (1975).

[235] *Merrell Dow*, 478 U.S. at 810-11.

[236] Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 377–78 (1982).

[237] HART & WECHSLER, *supra* note 5, at 945-46.

[238] *Cort*, 422 U.S. at 78 (citations omitted). Applying this test, the Court held that a federal criminal statute prohibiting corporations from making certain electoral contributions could not support an implied private action for damages in favor of a corporate shareholder against corporate directors. *Id.* at 68-69, 77-85.

[239] *Merrell Dow*'s collapse of the federal question inquiry into the remedial determination dependent upon congressional intent parallels the Court's development of its implication doctrine.

[240] 441 U.S. 677 (1979).

[241] *Id.* at 717.

[242] *Id.*

[243] *Id.* at 688 (footnote omitted).

the legislature to "specify" when it intends private enforcement of statutory rights.[244]

Touche Ross & Co. v. Redington[245] continued the Court's active disavowal of federal court remedial prerogatives, even if consistent with Congress' statutory purpose.[246] The Court saw its task as "limited solely to determining whether Congress intended to create the private right of action"[247] and looked to Congress—not the courts—"'to fill any hiatus Congress has left in this area.'"[248] Justice Rehnquist, writing for the Court, stated that the "ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law."[249]

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[244] *Id.* at 717. Justice Rehnquist, in his *Cannon* concurrence, elevated this invitation into notice to Congress that it should no longer rely upon the courts to fill remedial gaps in federal statutes: "Not only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch." *Id.* at 718 (Rehnquist, J., concurring). Justice Powell's forceful *Cannon* dissent fortified this warning. He criticized *Cort* as violating the separation of powers, arguing that "[the *Cort*] factors were meant only as guideposts for answering a single question, namely, whether Congress intended to provide a private cause of action" and concluding that "[a]bsent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action." *Id.* at 731, 740 (Powell, J., dissenting).

[245] 442 U.S. 560 (1979).

[246] E. CHEMERINSKY, *supra* note 21, at 320 (in *Touche Ross,* a Court majority "first articulated" the approach that "the Court will create a private right of action only if there is affirmative evidence of Congress' intent to create a private right of action.").

[247] *Touche Ross*, 442 U.S. at 568.

[248] *Id.* at 579 (quoting Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) (emphasis omitted)). The Court noted that *Cort*

> did not decide that each of [its four factors] is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose . . .—are ones traditionally relied upon in determining legislative intent.

Id. at 575-76.

[249] *Id.* at 578. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), decided five months after *Touche Ross*, reconfirmed this: "The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end." *Id.* at 24. Two years later, California v. Sierra Club, 451 U.S. 287 (1981), echoed these sentiments. While *Cort* supplied the "'criteria through which . . . intent could be discerned,'" *id.* at 293 (quoting Davis v. Passman, 442 U.S. 228, 241) (1979)), "the ultimate issue is whether Congress intended to create a private right of action," *id.* at 293, and "[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Id.* at 297; *see also* Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 91 (1981) (the ultimate

The Court's more recent implication decisions adhere to these principles. In *Thompson v. Thompson*,[250] the Court refused to imply a cause of action under the Parental Kidnapping Prevention Act of 1980, finding congressional intent to be the "focal point" and "ultimate issue."[251] Justice Scalia, while concurring in the Court's judgment, wrote separately to emphasize his disagreement with the Court's "dictum denying the necessity of an actual congressional intent to create a private right of action, and in referring to *Cort v. Ash* . . . as though its analysis had not been effectively overruled by our later opinions."[252] He stressed that the Court had "convert[ed] one of [*Cort*'s] four factors (congressional intent) into *the determinative factor*, with the other three merely indicative of its presence or absence,"[253] observed that the Court had "long since abandoned its hospitable attitude towards implied rights of action,"[254] and concluded by recommending that the Court "should get out of the business of implied private rights of action altogether."[255] By *Karahalios v. National Federation of Federal Employees*,[256] Justice White, writing for a Court denying a private cause of action under Title VII of the Civil Service Reform Act of 1978, held Congress "undoubtedly . . . aware" by this time that the Court had "departed" from its once favorable attitude towards statutory implication and now resolved this issue "by a straightforward inquiry into whether Congress intended to provide a private cause of action."[257]

Whatever the precise status of the *Cort* test,[258] the trend is clear: the Court is loath to imply remedies from silent federal statutes absent some type of discerned congressional authorization.[259] *Merrell Dow*'s incorporation of this

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question is whether Congress intended to create the private remedy and the *Cort* factors are relevant to this inquiry).

250 484 U.S. 174 (1988).

251 *Id.* at 179.

252 *Id.* at 188 (Scalia, J., concurring).

253 *Id.* at 189.

254 *Id.* at 190.

255 *Id.* at 192.

256 489 U.S. 527 (1989).

257 *Id.* at 536.

258 *See* Wilder v. Virginia Hosp. Ass'n, 110 S. Ct. 2510, 2517 n.9 (1990) ("[i]n implied right of action cases, we employ the four-factored *Cort* test to determine 'whether Congress intended to create the private remedy asserted' for the violation of statutory rights.").

259 *Cf.* Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981), where Professor Frankel argued that the Supreme Court has adopted "an extraordinarily restrictive" implication doctrine which "treats the implication of private rights of action as a matter of statutory construction and thereby confines analysis to the question whether Congress, in enacting a particular statute, intended to authorize the private remedies sought." *Id.* at 562 (footnote omitted). Professor Frankel advocates instead an approach which "does not give federal courts license to substitute their judgment for congressional decisions," *id.* at 569, but which nonetheless permits the courts "to supplement[ ] express

narrow implication test into its section 1331 approach in a manner that makes it dispositive of the jurisdictional question is troubling, as a number of lower court decisions illustrate by their virtual substitution of the implication test for the federal question test.[260] As the next section demonstrates, the two doctrines do not blend comfortably because they measure different things—differences *Merrell Dow* ignores.

B. *The Nature and Purpose of the Section 1331 and Implication Inquiries Are Different*

The section 1331 and statutory implication tests might be confused as substitute measures to the extent they are rooted in the same or similar concerns about the distribution of institutional authority in the federal system. Both approaches implicate fundamental principles at the heart of the Constitution's separation and assignment of power between Congress and the federal judiciary.[261] Thus, federal courts deciding whether to exercise section 1331 jurisdiction or whether to imply private actions or remedies might consider whether their determinations will usurp or undermine Congress' substantive objectives,[262] disrupt Congress' federal-state balance of forum options, causes of action, or remedies,[263] or impermissibly expand their own jurisdiction or remedial powers, otherwise limited by Congress, and ultimately,

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remedial schemes if they prove inadequate to accomplish clear congressional purposes" and which acknowledges the "traditional judicial function of compensating the victims of statutory violations." *Id.* at 566-67 (footnote omitted).

[260] *Supra* notes 195-227.

[261] See Korb v. Raytheon Co., 707 F. Supp. 63, 67-68 (D. Mass. 1989), a case in which the court adopted *Merrell Dow*'s thesis that the implication doctrine "provides a useful structure for organizing analysis of the [jurisdictional] question here" because it is "[i]nformed . . . by notions of Congressional allocation of federal judicial power."

[262] *Compare, e.g.*, Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900) (holding that federal forums were not necessary to resolve mining disputes local in character and consequences) *with* Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 97 (1981) (rejecting a private right to contribution under the Equal Pay Act and Title VII, noting "[t]he judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs") (footnote omitted); *see also* Karahalios v. National Fed'n of Fed. Employees, 489 U.S. 527, 533, 529 (1989) (rejecting a private right of action under the Civil Service Reform Act when Congress vested exclusive enforcement authority in the Federal Labor Relations Authority, an administrative body created to enforce the Act's duties).

[263] *E.g.*, Milan Express Co., Inc. v. Western Sur. Co., 886 F.2d 783, 792 (6th Cir. 1989) (McQuade, J., dissenting); *cf.* Sedima S.P.L.R. v. Imrex Co. Inc., 473 U.S. 479, 504 (1985) (Marshall, J., dissenting) (a broad reading of the civil RICO provision federalizes areas of civil litigation once solely in the States' domain and displaces areas of federal law).

by article III of the Constitution.[264] The doctrines also may seem like ready substitutes because both purport to consider, as the *Merrell Dow* majority stressed, "the increased complexity of federal legislation," "the increased volume of federal litigation," and "the desirability of a more careful scrutiny of legislative intent" in accommodating these underlying institutional principles.[265]

But these similarities should not obscure the telling differences between the section 1331 and statutory implication inquiries.[266] Although congressional intent is the ultimate guide for both inquiries, the dispositive intent for each differs. The statutory implication test asks whether Congress intended to create a cause of action or remedy for private litigants, while the section 1331 test asks whether Congress intended to empower federal adjudicators to supervise the conduct of that action or the application of that remedy.[267] Whether Congress intended to provide for private enforcement of federal statutory rights or standards is different from whether Congress intended the federal courts—indeed, any courts—to play a role in that type of enforcement.[268] Thus, the gist

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[264] *Compare supra* notes 24–38 and accompanying text (describing the constitutional and congressional limitations on lower federal court jurisdiction) *with supra* notes 230–59 and accompanying text (describing the Supreme Court's restrictive approach to implication).

[265] See *Merrell Dow,* 478 U.S. at 811 (quoting Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 377 (1982)), where the Court stated that these listed considerations, "the very reasons for the development of the modern [*i.e.* post-1975] implied remedy doctrine . . . are precisely the kind of considerations that should inform the concern for 'practicality and necessity' that *Franchise Tax Board* advised for" § 1331's application to hybrid claims. *But see Merrell Dow,* 478 U.S. at 829 (Brennan, J., dissenting) (arguing that "[t]hese reasons simply do not justify the Court's holding"). *See also supra* note 167.

[266] Underlying the differences between the Court's jurisdictional and implication inquiries is the basic postulate—which *Merrell Dow* seems to devalue—that jurisdiction, cause of action, and remedy are analytically separate concerns. *Supra* note 103.

[267] Put another way, the implication analysis is not, in and of itself, a jurisdictional analysis. The source of the implied right of action or remedy is a substantive provision of the statute containing the right plaintiff seeks to enforce, not a jurisdictional provision. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 32 (1979) (White, J., dissenting); Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979).

[268] Jackson Transit Auth. v. Transit Union, 457 U.S. 15 (1982), illustrates this distinction. There, the Supreme Court had to decide whether an agreement mandated by and made in conformance with § 13(a) of the federal Urban Mass Transportation Act was sufficiently federal in character to merit federal court treatment. The Court declined to classify the case as a private right of action suit, reasoning that Congress expected § 13(a) agreements to be privately enforceable. *Id.* at 20–21. "The issue, then," Justice Blackmun observed, "is not whether Congress intended the union to be able to bring contract actions for breaches . . . , but whether Congress intended such contract actions to set forth federal, rather than state, claims." *Id.* at 21. Examining the language and legislative history of the Act, the Court found that Congress did not intend federal law to govern this area, *id.* at 27,

of the implication query is *whether* a private action or remedy should exist, while the gist of the section 1331 query is *where* that action or remedy could be heard (that is, whether private litigants should have the federal forum option).

Merrell Dow does not address the vital distinction between Congress' substantive and jurisdictional intentions.[269] With its misplaced emphasis on

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and accordingly held that the state courts should apply state law to these agreements. *Id.* at 29. The Court considered the possibility that Congress might have intended federal courts to hear these claims, and to apply state law, but rejected it as inconsistent with the legislative history. *Id.* at 28 n.11. *Cf.* Machinists v. Central Airlines, 372 U.S. 682, 691, 696 (1963) (contracts contemplated by § 204 of the Railway Labor Act are federally enforceable under § 1331 because they are creatures of federal law whose validity and interpretation must be governed by uniform federal law to further the federal statutory scheme).

Justice Powell described the difference between the enforcement right and the enforcing forum in his *Cannon* dissent:

> The Court [here] states that a private cause of action also was implied in *Machinists v. Central Airlines*. . . . A careful reading of that case suggests that it presented a somewhat different question. . . . The cause of action [in *Machinists*] came directly from the agreement, not from any provision of the [federal Railway Labor] Act, and the only issue was whether this already existing private cause of action could be brought in a federal court [citing Mishkin, *supra* note 27, at 166 and *Smith*]. Although as a practical matter this result entails many of the same problems involved in the implication of a private cause of action, see n.17, *infra*, at least analytically the problems are quite different.

Cannon v. University of Chicago, 441 U.S. 677, 734 n.5 (1979) (Powell, J., dissenting); *cf. id.* at 746 n.17 ("[i]t is instructive to compare decisions implying private causes of action to those cases that have found nonfederal causes of action cognizable by a federal court under § 1331. *E.g.*, Smith v. Kansas City Title & Trust Co.").

[269] *Cf.* M. REDISH, *supra* note 5, at 100 (*Merrell Dow* "improperly confused the *substantive* issue of the federal statute's reach with the *jurisdictional* question of whether a state cause of action incorporating federal law gives rise to federal question jurisdiction").

Justice Brennan chided the majority for "nowhere" explaining the basis for its conclusion that no remedy means no jurisdiction. *Merrell Dow*, 478 U.S. at 825 (Brennan, J., dissenting). He then argued that Congress' decision to withhold a federal cause of action should not impact the jurisdictional inquiry unless the reasons for withholding the private remedy are also the reasons for withholding federal jurisdiction:

> 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. Thus, it is necessary to examine the reasons for Congress' decisions to grant or withhold both federal jurisdiction and private remedies, something the Court has not done.

Id. at 825-26; *see also id.* at 830 (noting the Court's failure to "examine[ ] the purposes underlying either the FDCA or § 1331" in reaching its conclusion that the absence of private remedy "withdraw[s] federal jurisdiction over a private state remedy that imposes

Congress' specific private-enforcement intent concerning the FDCA, *Merrell Dow* loses sight of the independent significance of discerning Congress' general forum intent through the discretion Congress accorded the federal courts under section 1331 to determine whether initial federal processing of the claim is warranted. Collectively, the implication factors measure the legislature's remedial intent with respect to a particular substantive statute, while the federal question factors are especially geared to assess the centrality of the federal issue to recovery, and, in turn, the need for expert, sympathetic, and independent adjudicators.[270] Making the statutory implication test the dispositive predicate for section 1331 jurisdiction works to eliminate or at least conceal these forum considerations.

Moreover, any discretionary balancing that the implication analysis invites is limited to the "question [of] whether Congress intended that a particular party be able to bring suit under a *federal statute*"[271] and does not adequately address broader section 1331 concerns that can take into jurisdictional account the distinguishing fact that the federal statute is presented within the context of a state law cause of action. In this way, the implication inquiry's focus on the specific substantive statute warps the jurisdictional inquiry: Any interest-balancing the implication test allows is, at best, incomplete for section 1331 purposes and, at worst, a possible distortion of section 1331 objectives given the different and more narrow congressional intent the test serves.[272] Indeed, the broader, and different, question section 1331 poses is whether the implicated federal statute *as part of a hybrid state claim* provides federal question jurisdiction, not whether the statute on its own is privately

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liability for violating the FDCA"); M. REDISH, *supra* note 5, at 100 ("[A] congressional decision not to provide a federal remedy does not necessarily imply congressional disapproval of the provision of a federal forum for adjudication of a state cause of action turning on the interpretation of that federal statute.") (footnote omitted).

[270] Overlap between the two doctrines is inevitable given that jurisdiction often "arises as a byproduct of substantive interests." *See* L. BRILMAYER, *supra* note 33, at 52. But even factors common to both tests measure different ends (*i.e.*, whether Congress intended to provide private litigants the potential advantages of a federal forum versus whether Congress intended a private remedy under a specific substantive statute).

[271] *Jackson Transit Auth.*, 457 U.S. at 21 (emphasis added); *see* Hirshman, *supra* note 7, at 44 (noting pre-*Merrell Dow* that "[w]hether a federal question is cognizable requires interpretation of the jurisdictional statute" and the decision "to imply a private action from a particular substantive statute is an inquiry directed at the act in question, reduced . . . to the legislative intent in passing the particular act itself").

[272] In any event, the Supreme Court's recent narrowing of the implication test requires almost slavish adherence to congressional intent and does not readily allow for any balancing at all. Moreover, resting § 1331 determinations in any part on the implied right of action analysis is troublesome given the fact that some Supreme Court Justices are avowedly hostile to them. *E.g.*, Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) ("we should get out of the business of implied private rights of action altogether").

enforceable. Thus, Congress' isolated enforcement intent for particular statutes cannot be conclusive as to forum selection for hybrid claims under the general federal question statute.[273] *Merrell Dow*'s compression of the jurisdictional and remedial inquiries, however, obscures these larger considerations and discourages the exercise of reasoned discretion central to principled section 1331 distributions.

Merrell Dow itself demonstrates the danger of this compression. In its conclusory ban of hybrid FDCA-negligence claims from federal courtrooms, the Court attempted deference to Congress' ostensible remedial intent not to provide private remedies to enforce the FDCA.[274] The Court's decision,

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[273] This is particularly true in light of the distinction between jurisdiction, cause of action, and remedy. *Supra* note 103.

[274] Indeed, the weight of authority supports *Merrell Dow*'s assumption that Congress did not intend private enforcement of the FDCA. Section 337 of the Act provides that "[a]ll . . . proceedings for the enforcement, or to restrain violations, of this chapter *shall be by and in the name of the United States.*" (emphasis added). Legislative history confirms this limitation to public enforcement. The original Senate bill contained an express private right of action for damages, S.1944, 73d Cong., 1st & 2d Sess. § 24 (1933) ("A right of action for damages shall accrue to any person for injury or death proximately caused by a violation of this Act."), *reprinted in Food, Drugs, and Cosmetics: Hearings on S. 1944 Before a Subcommittee of the Committee on Commerce, United States Senate,* 73d Cong., 2d Sess. 10 (1933); C.W. DUNN, FEDERAL FOOD, DRUG AND COSMETIC ACT: A STATEMENT OF ITS LEGISLATIVE RECORD 23 (1938) (*reprinted* 1987), but the provision was stricken after being attacked at the Senate Hearings as duplicative of existing state common law remedies. *Hearings, supra,* at 114 (parties injured by fraudulent or improperly labeled medicine can recover full common law damages in state courts), 219 (common law covers the rights of injured citizens), 400 (common law right of action exists), 403 (bill should not attempt to modify or restate the common law of personal injuries), 431 (injured parties are already protected and writing proximate cause into statutory law would encourage a flood of fraudulent cases), 444 (the bill creates no new right) (1933); *see also* Florida *ex. rel.* Broward Cty. v. Eli Lilly Co., 329 F. Supp. 364, 365 & n.2 (S.D. Fla. 1971) ("the terms and legislative history of the statute compel the conclusion that Congress did not intend to allow private rights of action for damages under the" FDCA).

The courts support this conclusion. *E.g.,* Gelley v. Astra Pharmaceutical Products, Inc., 610 F.2d 558, 562 (8th Cir. 1979) (the FDCA "aims to protect the general public, not a particular class of persons"), *aff'g,* 466 F. Supp. 182 (D. Minn. 1979); Pacific Trading Co. v. Wilson, 547 F.2d 367, 368, 370 (7th Cir. 1975) (the FDCA does not "expressly or inferentially permit prosecution of a private action for monetary recovery" and provides that only the United States can enforce or restrain violations); Brinkman v. Shiley, Inc., 732 F. Supp. 33, 35 (M.D. Pa. 1989), *aff'd,* 902 F.2d 1558 (3d Cir. 1990) ("The FDCA does not create or imply a private right of action for individuals injured as a result of violations of the Act."); National Women's Health Network, Inc. v. A.H. Robbins, Inc. 545 F. Supp. 1177, 1178 (D. Mass. 1982) (finding no implied private right of action under the FDCA, a holding which "accords with that reached by every other federal court which has faced the issue."); Keil v. Eli Lilly & Co., 490 F. Supp. 479, 480 (E.D. Mich. 1980) ("The law is clear that there is no private cause of action under the" FDCA); *Eli Lilly Co.,* 329 F. Supp. at 365 (there is no private right of action under the FDCA); Clairol, Inc. v. Suburban

however, raised possible barriers to Congress' broader regulatory aims that a less mechanical analysis of section 1331 considerations might have avoided or at least acknowledged. As shown below, an exploration of those considerations in the context of the FDCA's purpose and scheme—an exploration Justice Brennan endorsed in his *Merrell Dow* dissent[275]—demonstrates both the propriety of federal question jurisdiction in the *Merrell Dow* scenario and the better balance of Congress' general jurisdictional goals under section 1331 with its specific remedial goals under the Act.

The FDCA's complex scheme evidences that Congress, to the extent it provided for the Act's enforcement, had an express preference for federal authorities—ultimately and exclusively the federal courts—to enforce statutory requirements through injunctive and criminal sanctions in order to promote uniform and effective regulation in the specialized national arena.[276] Thus, Congress' failure to provide a private civil remedy for damages under the FDCA is hardly dispositive as to its jurisdictional intent for state-created claims implicating the FDCA. In fact, that failure is persuasive manifestation of Congress' desire to achieve coordinated interpretation and implementation of the Act's intricate regulatory scheme by centralizing the type and nature of enforcement in *federal* hands and precluding random suits by individuals that might disrupt or displace Congress' overriding and consciously chosen regulatory means and objectives.[277]

Given the FDCA's presumption in favor of federal enforcement, it is far from certain that Congress wanted—if it had any vision at all of the *Merrell Dow* scenario—state courts alone to enforce carefully prescribed federal standards through generic state law rules of decision, such as negligence, which have no direct relation to the federal interests Congress wished to serve in passing the highly specialized Act that informs those standards.[278] To the

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Cosmetics & Beauty Supply, Inc., 278 F. Supp. 859, 861 (N.D. Ill. 1968) ("there does not seem to be any case in which . . . a [private civil remedy under the FDCA] has been recognized").

[275] *See Merrell Dow*, 478 U.S. at 826–32 (Brennan, J., dissenting).

[276] As Justice Brennan explained, Congress gave the Food and Drug Administration, the public agency with primary responsibility for supervising the Act's implementation, authority to obtain *ex parte* court orders for seizure of goods, 21 U.S.C. § 334 (1988), to commence federal court proceedings to enjoin FDCA violations, 21 U.S.C. § 332 (1988), and to request a United States Attorney to bring criminal proceedings against Act offenders. 21 U.S.C. § 333 (1988); *Merrell Dow*, 478 U.S. at 830 (Brennan, J., dissenting). The Act placed final and exclusive enforcement authority in the federal courts. *Id.* at 830-31.

[277] *See Merrell Dow*, 478 U.S. at 832 (Brennan, J., dissenting).

[278] The objections to private federal enforcement directed at the original version of the FDCA in light of pre-existing common law fraud or negligence remedies, *supra* note 274, did not necessarily comprehend a *Merrell Dow* situation in which plaintiffs seek to incorporate the federal statutory standard as an element of the fraud or tort rather than to rely wholly upon state-defined concepts of fraud or negligence. Congress may have considerable interest in affording federal judicial supervision over interpretation and

extent any money damages flow from FDCA violations, it is unclear that Congress intended—or even anticipated—that local adjudicators should be solely responsible for making decisions about the nature of relief or compensation for violation of this federal statute. While any such damages award would be a product of state law and the state courts should have the opportunity to adjudicate these matters, enabling the federal courts to hear these types of actions concurrently would help maximize treatment of the federal interest or standard in a manner least inimical to congressional objectives.[279]

In this context, Congress' failure to preempt state jurisdiction or state law is not necessarily indicative of Congress' hostility to concurrent federal jurisdiction. Given the federal presumption against interference with state governance,[280] and the traditional respect accorded state regulation of health

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implementation of finely tailored federal standards transplanted to a state law enforcement context while having little or no interest in providing federal forums for purely state law actions seeking recovery for the same injuries, but without reliance on federal standards.

[279] As Justice Brennan pointed out, precluding federal consideration of FDCA-implicated state claims and leaving the states as the sole interpreters of the Act's standards is "illogical." *Id.* State courts may lack the national perspective and experience that Congress hoped would inform FDCA regulation, increasing the risk of incorrect interpretations of the Act that will force the parties to act in ways Congress never intended. *Cf. id.* at 828. This could result in a large-scale subversion of congressional policy as more and more parties are bound by results Congress never envisioned or are subject to conflicting commands from the federal and state courts about what constitutes lawful behavior under FDCA standards. *Cf.* Matasar & Bruch, *supra* note 2, at 1315 (state courts could develop federal law inconsistent with federal precedents and frustrate federal supremacy if the Supreme Court refuses to review federal issues decided by state courts). Depending upon ultimate Supreme Court review, as the *Merrell Dow* majority does, *Merrell Dow*, 478 U.S. at 816, to remedy incorrect or inconsistent state court treatments of the Act provides little realistic comfort. Obviously, Supreme Court cure may take too long or may never occur. *Id.* at 827 n.6 (Brennan, J., dissenting); *infra* note 336.

[280] *E.g.*, Hillsborough Cty. v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985), in which the Court, in holding that FDCA regulations governing collection of blood plasma from paid donors did not preempt certain local Florida ordinances, stated that "every subject that merits congressional legislation is, by definition . . . of national concern . . . . [But] that cannot mean . . . that every federal statute ousts all related state law." *Id.* at 719; *see also* Maryland v. Louisiana, 451 U.S. 725 (1981), in which the Court explained that unless state law conflicts with or undermines congressional objectives, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Id.* at 746. The Court went on to hold that a Louisiana tax on natural gas was preempted because it was "inconsistent with the federal scheme and must give way." *Id.* at 751; R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 12.1, at 624 (1986) ("In initiating a new regulatory scheme, Congress seldom articulates a specific intent to preempt an entire field of regulation. . . . [T]he judicial branch has shouldered the responsibility for discovering congressional intent and, if necessary, invalidating state laws" subject to congressional reversal.).

and safety matters,[281] Congress may not have preempted state law actions in the field, but left it to the federal courts under section 1331's safety net to decide on a case-by-case basis when and if FDCA hybrid claims warranted federal forum protections.[282] And, finding jurisdiction in the *Merrell Dow* scenario is plaintiff-empowering: Far from precluding state adjudication, it simply creates a federal forum option for plaintiffs (and removing defendants) who, on the basis of their own forum assessment, will select the appropriate court system.

Indeed, unless and until Congress decides to preempt the private enforcement of FDCA standards through state remedies, the federal courts should at least be available as alternative forums to contribute their FDCA expertise to state law development. Federal decisions can provide guidance to the state courts and blunt the effect of incorrect state court precedent.[283] This opportunity for shared expertise will encourage uniform interpretation of the FDCA within the state court system and work to minimize conflicts with federal goals until (and if) Supreme Court clarification occurs.[284] Moreover, the state courts—themselves experts in local matters—can provide the federal courts hearing these claims with the states' perspective on hybrid claim enforcement. This may improve federal understanding of the federalism interests involved, including the intensity of the state's interest in initial adjudication, the extent of any conflict with congressional aims, and the potential impact on state court dockets. Thus, however disruptive the presumption of concurrent jurisdiction to section 1331's expertise and uniformity objectives,[285] both goals are more likely advanced by permitting federal courts to participate in these hybrid claim adjudications.

In addition, the federal courts, as federal law experts, may be better suited to spot and frame potential federal preemption and enforcement problems for appellate or congressional review. Further, the federal courts are better positioned within the system to alert Congress quickly about forum allocations thwarting substantive legislative goals. Moreover, opening an independent, but

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[281] *Hillsborough Cty.*, 471 U.S. at 719 (noting that "the regulation of health and safety matters is primarily, and historically, a matter of local concern").

[282] This analysis is not limited to the FDCA. As the lower court cases strictly construing *Merrell Dow* show, other federal statutes pose the same or similar concerns when incorporated into state law claims. *Supra* notes 195–227 and accompanying text.

[283] *See* Tafflin v. Levitt, 493 U.S. 455, 465 (1990) (with concurrent jurisdiction over RICO claims, federal courts "would not be bound by state court interpretations of the federal offenses constituting RICO's predicate acts" and state courts would "be guided by federal court interpretations of the relevant federal criminal statutes.").

[284] *Cf.* Luneburg, *supra* note 21, at 767 (arguing that coordination of federal and state interpretations of the FDCA, which may differ over what the statute requires of drug manufacturers, may be necessary to prevent confusion or subversion of the statutory scheme).

[285] *See infra* note 342.

sympathetic forum, to private litigants may help alleviate the potential bias for or against large local defendant employers who are subject to regulation or individual plaintiff consumers who are victims of the violation. Ultimately, the Supreme Court will benefit from considered federal court treatment of these issues, cross-fertilized by state court perspectives, should the federal question involved reach the Court on review of the state or federal court decision.[286]

In short, the balance of considerations that section 1331 requires can best be done outside the confines of *Merrell Dow*'s rigid remedy requirement in a more discretionary approach to hybrid claim determinations that respects the jurisdictional prerogative of the federal courts and puts Congress' remedial intent in proper perspective.

C. *The Apparent Advantages of Using a Private Action or Remedy Within the Implicated Federal Statute as a Jurisdictional Prerequisite Are Misplaced*

As shown, the statutory implication test cannot double as a jurisdictional test in the manner *Merrell Dow* attempts because the nature and purpose of the tests differ significantly.[287] This section demonstrates that, above and beyond these doctrinal incompatibilities between the two approaches, the apparent advantages of making a federal action or remedy a jurisdictional prerequisite cannot withstand close scrutiny.

Honoring Congressional Intent? A purported benefit of *Merrell Dow*'s basing the section 1331 inquiry on the implication analysis is maximizing fidelity to congressional intent. In requiring Congress to provide a statutory action or remedy as a prerequisite to federal jurisdiction, *Merrell Dow*, in essence, requires courts to check whether Congress has sanctioned private recovery for violation of the specific substantive statute at issue before exercising their general federal question power under section 1331.[288] What better way to discern whether Congress intended the courts to hear certain,

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[286] Arguments to preclude federal jurisdiction could also be made. Preemption, of course, is Congress' option in the event it concluded state enforcement undermined the federal scheme. Thus, Congress' failure to preempt suggests that it was satisfied with state court treatments of the statute. Further, the states' adoption of federal standards as their own in the context of tort law enforcement in effect localizes those standards and deprives them of their federal character, minimizing the need for or legitimacy of federal supervision. In addition, federal courts should not be determining the contours of state negligence law merely because interpretation of a federal statute might affect a single element of the otherwise state law claim (whose other elements are controlled by state law). Whatever arguments prevail, this Article contends that *Merrell Dow*'s remedy requirement inhibits these kinds of explorations and threatens the integrity of § 1331 determinations.

[287] *Supra* notes 266–73 and accompanying text.

[288] *See supra* note 76 and accompanying text.

statute-specific actions than to test the particular statute itself for clues as to Congress' will? Arguably, the substantive statute carries a more specific and a more recent indication of congressional intent than the older and more general federal question statute. Thus, plaintiffs who would not merit a federal forum had they attempted to file a federal action *directly* under the implicated federal statute (because Congress provided neither an express nor an implied cause of action or remedy) should not attain that forum *indirectly* by invoking that statute as a mere element in a cause of action created by the state.[289]

These points, however, are misdirected. First, they mistakenly conflate or equate cause of action or remedy with jurisdiction.[290] As shown, remedial intent is not the equivalent of forum intent and simply cannot be the sole jurisdictional guide.[291] This is particularly true with hybrid claim dispositions, which involve federalism interests that transcend Congress' intent concerning direct enforcement of the federal statute standing alone.[292] Moreover, congressional "intent" is often difficult to discern. The implication test typically takes the Court on a search for the impossible—the congressional intent beneath the congressional silence. From a doctrinal integrity perspective, it is far better for the federal courts to perform an explicit exploration of time-honored jurisdictional factors rather than to attempt discovery of an elusive or inconclusive legislative intent in hybrid claim cases that call for delicate judgments about forum allocation.[293] Moreover, Congress' silence about remedies in a substantive statute is a slim reason to eclipse, without further

[289] *See* Hirshman, *supra* note 7, at 41 ("Since almost every hybrid case reflects a failure by Congress to commit itself to private enforcement of its acts, allowing the federal courts to entertain as federal a suit where only state law authorizes private enforcement would be allowing the states to create private actions to enforce federal statutes where Congress would not do so.").

[290] *See supra* note 103.

[291] *Supra* notes 266–70 and accompanying text. Interestingly, the *Merrell Dow* plaintiffs had argued to the district court "that jurisdiction is lacking because no private right of action exists under the Act." *In re* Richardson-Merrell, Inc., "Bendectin" Products Liability Litigation, MDL No. 486, slip op. at 7a (S.D. Ohio May 14, 1984). The court rejected this reasoning, stating: "This is not a situation where plaintiffs are seeking some form of relief under the Act itself." *Id.*

[292] *Supra* notes 271–73 and accompanying text.

[293] Indeed, basing jurisdiction on the chimera of an unexpressed congressional intent about remedies hinders the unique authority and ability of the federal courts, within the confines of the § 1331 directive, to adjust their own jurisdiction after close consideration of the legal and factual presentations designed specifically to sharpen the jurisdictional issues before them in particular cases. To the extent that article III's standing requirement ensures that the courts decide live cases and controversies with interested litigants who develop the issues to be decided fully and factually, the courts are peculiarly suited to determine the boundaries of their own jurisdiction in the enlightening context of concrete adverseness.

analysis, as *Merrell Dow* did, resort to federal tribunals for clarification or vindication of federal statutory rights or standards locked in state claims.[294]

Yet another concern is *Merrell Dow*'s failure to address what effect, if any, its remedy requirement has on the pre-existing general federal question grant.[295] Congress, for example, may have reserved the question of federal court access in these hybrid claim situations to the courts themselves under the general statutory grant.[296] What if Congress, obviously aware of section 1331 when it passed a particular substantive statute, assumed that the federal courts had the flexibility to take jurisdiction over state actions relying upon that statute if they saw fit under prevailing section 1331 precedent and therefore felt no urgency to legislate either a federal forum or remedy?[297] By de-emphasizing

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[294] *Cf.* Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366, 1370 (1953) (Congress, by denying remedies, can effectively deny federal forums).

Merrell Dow appears to conclude that making a federal action or remedy a jurisdictional prerequisite evidences respect for congressional relief and enforcement schemes embodying delicate or complex legislative choices designed to achieve calculated legislative purposes. *See Merrell Dow*, 478 U.S. at 811–12. Similarly, *Merrell Dow* implicitly recognizes that Congress has created numerous agencies specifically empowered to enforce statutory violations and they, in notable part, have taken over the courts' once predominant role in interpreting statutes and providing remedies. *Cf.* Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 369 (1989) ("agencies have displaced common-law courts as the primary means by which [social] regulation is effectuated"). But *Merrell Dow*'s deference to congressional remedial objectives again reflects the Court's failure to segregate the jurisdictional from the enforcement issues: Federal courts may well be desirable—even preferable—forums to enforce state-defined remedies which rest upon congressionally-defined standards even if Congress did not provide for federal enforcement of the federal law raised by the hybrid claim.

[295] Justice Brennan faulted the majority for failing to examine the purposes underlying § 1331 and cautioned that any limitations on that statute "must be justified by careful consideration of the reasons underlying the grant of jurisdiction and the need for federal review." *Merrell Dow*, 478 U.S. at 818–19, 830 (Brennan, J., dissenting). *But cf.* Rogers v. Platt, 814 F.2d 683, 688 (D.C. Cir. 1987) ("Congress is certainly free to create federal rights or duties and provide for their enforcement *outside* the federal district courts—in effect to modify section 1331—as long as it stays within any constitutional limits, which are by no means clearly identified.") (footnote omitted).

[296] *See* Shoshone Mining Co. v. Rutter, 177 U.S. 505, 511 (1900); *see also* Althouse, *The Humble and the Treasonous*, *supra* note 2, at 1049 (the courts are "in a better position to fill out some of the details in jurisdictional statutes" because generally termed statutes "cannot anticipate the realities of litigation encountered by judges"); Friedman, *supra* note 2, at 60 (the Court is "simply more competent than Congress in refining jurisdictional decisions . . . [and] Congress is ill-suited to fine-tuning in the first instance"); Shapiro, *supra* note 2, at 547.

[297] In *Shoshone*, 177 U.S. at 505, the Court acknowledged that Congress can legislate with existing jurisdictional statutes in mind. *Id.* at 506–07; *see also* Hirshman, *supra* note 7, at 61 ("[T]he scarcity of separate, explicit jurisdictional provisions strongly suggests that

the potential freedom Congress gave the federal courts to refine their own jurisdiction under section 1331, *Merrell Dow*, in some sense, made it easy for the federal courts to abdicate their responsibility for confronting the close forum allocation questions posed by hybrid claims by endorsing a reflexive test for federal question jurisdiction.

Also problematic is *Merrell Dow*'s tacit and unbounded invitation to Congress to play "some continuous role in the interpretation of federal jurisdictional statutes."[298] Indeed, automatically determining section 1331 jurisdiction through the vehicle of subsequent, substantive acts amounts to jurisdiction by indirection: Congress can indirectly preclude lower federal court section 1331 jurisdiction merely by failing to provide a specific remedy in specific substantive statutes that are not necessarily targeted at jurisdictional concerns.[299] This ad hoc and retrospective amendment of the federal question statute ties the section 1331 hands of the courts to decide whether a federal forum is necessary or desirable *precisely* in some of the most difficult types of cases (*i.e.*, hybrid claims) where federal and state interests may collide most intimately and immediately. Any such restrictions on the federal courts' general

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Congress thought it could rely on section 1331 the general jurisdictional statute to express its intent regarding jurisdictional questions about any federal statute.").

[298] Doernberg, *There's No Reason for It*, *supra* note 6, at 637. As Professor Doernberg put the problem:

> [Under *Merrell Dow*], [i]t is not just Congress' intent at the time that section 1331 was enacted that is important; the Court implicitly stated that any later Congress, even when enacting a statute that does not deal with jurisdiction, may be inferred to have added its own intent as a gloss on the interpretation of the jurisdictional statute. This is strong medicine indeed. The Court did not, however, provide any guidelines for determining when a Congress that fails to mention federal subject matter jurisdiction in a new statute dealing with a different topic nonetheless intends to alter an existing interpretation of federal jurisdiction.

Id.; *see also id.* at 638 (*Merrell Dow* "offered no suggestion about which nonjurisdictional statutes are to be understood to amend § 1331 and which are not"); Doernberg, *You Can Lead a Horse*, *supra* note 46, at 1006 ("it now seems that when a state-created claim incorporates some provision of substantive federal law, one must ask whether the Congress that passed the law simultaneously but silently contemplated a change in the scope of federal question jurisdiction") (footnote omitted); Luneburg, *supra* note 21, at 764 (suggesting that *Merrell Dow* found "an implied congressional negation of the exercise of jurisdiction" to be dispositive).

[299] *See also* HART & WECHSLER, *supra* note 5, at 1040 (*Merrell Dow* "concluded that what might otherwise be a general rule allowing § 1331 jurisdiction is trumped if, in a particular statutory context, the Court discerns a congressional purpose not to give access to the federal courts.").

federal question authority should be carefully considered and clearly stated by Congress.[300]

Simplicity and Enhanced Predictability? After more than a century of Supreme Court experience with section 1331, it is still unclear how sufficient or "substantial" the properly pled federal issue must be before federal question jurisdiction attaches. *Merrell Dow*'s apparent appeal in providing a more mechanical determination of this issue is its relative simplicity and predictability. To the extent *Merrell Dow* reduces the section 1331 inquiry for hybrid claims to the cause of action or remedy finding, it would seem to eliminate some of the vagaries characteristic of federal question tests. Private litigants will be able to research whether the implicated federal statute expressly provides for private actions or remedies or, if not, whether courts have implied rights of action or remedies under specific statutes. This will facilitate educated predictions about a court's section 1331 determinations. Accordingly, litigants would more accurately choose the appropriate forum at the outset of the case and minimize litigation over threshold jurisdictional issues.

Simplicity and predictability, however, are not so easily attained. Even the Supreme Court's implication doctrine, admittedly clear in theory as based on faithful adherence to legislative intent, is often difficult to apply with certainty in the context of particular statutes given the Court's manipulation of the intent concept and its various indicia.[301] Further, a jurisdictional test that turns on an implication analysis applicable only to each statute is inherently unpredictable because that analysis must vary from statute to statute.[302] Thus, *Merrell Dow*'s remedy requirement may increase predictability for any given case or any given statute (particularly if the Supreme Court has spoken with respect to implied remedies under that statute), but there may be little gain in uniformity in the area as a whole. Instead of developing a section 1331 jurisprudence of more general application, courts strictly construing *Merrell Dow* may develop variegated section 1331 precedent based more on the specific statute under scrutiny than more universal federal question concerns.

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[300] Doernberg, *There's No Reason for It, supra* note 6, at 637–38; H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 55, 56 (2d ed. 1987); Luneburg, *supra* note 21, at 763; *cf.* Freer, *A Principled Statutory Approach to Supplemental Jurisdiction,* 1987 DUKE L.J. 34, 59 n.146 (any congressional rejection of the courts' standards for supplemental jurisdiction should be done expressly in legislation limiting those standards).

[301] *See* E. CHEMERINSKY, *supra* note 21, at 317 ("The law in this area [of private rights of action] is difficult to summarize because there are a great many cases that are not completely consistent either in their methodology or in their results.").

[302] *Cf.* Field, *The Uncertain Nature of Federal Jurisdiction, supra* note 101, at 687–88, 691 (The *American Well* cause of action test "provides little certainty because of the great flexibility that exists in determining whether a federal cause of action exists. . . . Once a particular statute . . . is held to embody or not embody a particular federal remedy, we have guidance for the future, but not until then.").

Moreover, the emphasis on efficient disposition of the "threshold" jurisdictional issue too easily overlooks its significance and the corresponding need to treat it seriously and thoroughly. First, the jurisdictional decision embodies important institutional choices about the allocation of judicial authority between the federal and state systems. Sound federal question determinations are necessary to maintain the peaceful coexistence of sovereigns and a limited national judiciary.[303] Second, the jurisdictional decision may itself affect or even determine the outcome of the lawsuit—the very reason for the protective offerings of section 1331 in the first place—and merits close judicial scrutiny.

Of course, leaving the apparent certainty of the more mechanical test throws the federal question analysis back into the apparent murkiness of discretion and interest-weighing that *Merrell Dow* admirably attempted to clarify or minimize. This is, however, an unkind characterization. Discretion does not mean unprincipled decision.[304] Section 1331 often requires the judiciary to make hard choices about whether the implicated federal issue warrants involving the federal judiciary sooner rather than later in interpreting or protecting that interest. Those choices can best be made as products of the considerations that underlie them.[305] The federal courts must be given the

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[303] As then-Professor Frankfurter noted:

> Like all courts, the federal courts are instruments for securing justice through law. But unlike most courts, they also serve a far-reaching political function. They are a means, and an essential one, for achieving the adjustments upon which the life of a federated nation rests. The happy relation of states to nation—our abiding political problem—is in no small measure dependent on the wisdom with which the scope and limits of the federal courts are determined.

Frankfurter, *Distribution of Judicial Power Between United States and State Courts,* 13 CORNELL L.Q. 499, 500 (1928).

[304] *See supra* note 23; *see also* Shapiro, *supra* note 2, at 545 ("discretion need not mean incoherence, indeterminacy, or caprice; nor is discretion at odds with the recognition of responsibility for adjudication of disputes").

[305] Courts must continue to confront the federal question factors explicitly not only to make appropriate claim allocations, but to increase the predictive value of their decisions, to maintain their institutional credibility, and to open their decisions to meaningful review by Congress or the appellate courts. Thus, as Professor Field has observed in discussing discretion and federal question determinations:

> One advantage to making discretion explicit [in federal question decisions] is that you thereby inform litigants, and lower court judges, to talk about the factors that are relevant . . . . Another advantage of starting to discuss the real variables is that such discussion, over time, can help to develop factors that lead to more appropriate, predictable, and uniform results.

Field, *The Uncertain Nature of Federal Jurisdiction, supra* note 101, at 694.

opportunity to face these interpretative challenges, rather than be forced or encouraged to circumvent them with jurisdictional formulas that obscure their enlightened resolution.

Alleviating Docket Overload? Merrell Dow reveals the Supreme Court caught in a jurisdictional quandary: How could the Court refine a section 1331 test that is sufficiently principled and predictive, yet practically responsive to the growing caseload demands placed on the federal and state court systems? Importing the Court's remedy requirement into the federal question area may well make it more difficult to secure a federal forum because of the strictness of that test.[306] Indeed, the Court's jurisdiction denial did serve the important federal interest in relieving federal docket pressures, an interest that probably figured into the Court's rationale. In particular, the Court may have feared that granting federal access in this hybrid claim situation might open the floodgates to, in essence, "state-created" federal question jurisdiction. In these claims, state court litigants or legislatures could, in effect, create federal jurisdiction by pleading or including federal standards or interests as part of otherwise purely state law causes of action. In these days of federal docket crises,[307] there is much to be said for a principled federal question test that may also promote district court caseload management.

Principle, however, is necessary. A virtually automatic test that obscures reasoned forum allocation is unjustifiable regardless of its possible reductive effect.[308] Even *Merrell Dow*'s alleged saving for the federal system as a whole may be smaller than expected if it merely translates into more appeals to the Supreme Court from the state courts.[309] If *Merrell Dow* has the effect of deflecting to the state courts countless hybrid claims seeking private enforcement of federal standards, the potential for the states to render diverse

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[306] In addition, the well-pleaded complaint rule, especially as tightened recently by the Supreme Court, *supra* note 194, will help to eliminate any number of claims from federal court.

[307] *Supra* note 3; *see also* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 408-09 n.17 (1982) (Powell, J., dissenting) ("The escalating recourse to damages suits has placed a severe and growing burden on the lower federal courts."); Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 24–25 (1981) (Stevens, J., concurring and dissenting) ("In recent years, however, a Court that is properly concerned about the burdens imposed upon the federal judiciary, the quality of the work product of Congress, and the sheer bulk of new federal legislation, has been more and more reluctant to open the courthouse door to the injured citizen.").

[308] The fear that opening the federal courts to state common law claims incorporating federal standards would precipitate an avalanche of claims under § 1331 may well be exaggerated. Prerogative works both ways. The federal courts may use their discretion affirmatively to screen out those state law claims that do not warrant the special protections of federal trial forums. Further, docket concerns are important, but should not be determinative when federal interests hang in the balance.

[309] *Cf.* Doernberg, *There's No Reason for It*, *supra* note 6, at 654.

interpretations of those statutes that also conflict with congressional objectives increases accordingly, and with it, the need for Supreme Court review to ensure congressional goals are met. Moreover, a federal court system respectful of the companion state court systems should hesitate before steering whole classes of cases to them without first finding sufficient justification for closing the federal courthouse doors.[310] In any event, whatever docket relief the

[310] The importance to both systems of considered § 1331 determinations is well-illustrated by *Merrell Dow* itself, which was but a small part of an extensive multidistrict Bendectin litigation assigned to District Judge Rubin by the Panel on Multidistrict Litigation in February 1982, a fact which the Supreme Court did not mention in its opinion. *See generally In re* Bendectin Litigation, 624 F. Supp 1212 (S.D. Ohio 1985), *aff'd as modified, In re* Bendectin Litigation, 857 F.2d 290 (6th Cir. 1988), *cert. denied sub nom* Hoffman v. Merrell Dow Pharmaceuticals, Inc., 488 U.S. 1006 (1989). The complaints in these actions were virtually identical to each other and to those in *Merrell Dow,* requesting recovery for common law negligence, breach of warranty, strict liability, fraud, and gross negligence, and alleging a rebuttable presumption of negligence for Merrell Dow's alleged violation of the FDCA's misbranding provisions. *See* In re *Bendectin Litigation,* 857 F.2d at 293–94; *Merrell Dow,* 478 U.S. at 805–06.

In February 1985, months before the Sixth Circuit reversed Judge Rubin's finding of § 1331 jurisdiction and *forum non conveniens* dismissal in *Merrell Dow,* Judge Rubin began a "common issues" trifurcated jury trial solely on the issue of causation of all Bendectin cases filed in Ohio federal court, removed to Ohio federal court, and, upon plaintiffs' voluntary request to "opt in," transferred to Ohio federal court from other districts. In re *Bendectin Litigation,* 857 F.2d at 295–96. By the trial cut-off date, the district court had before it 818 cases subject to the jury's decision, although during the course of proceedings, the court had had "some contact" with a total of 1,186 Bendectin cases, some of which did not opt in or were otherwise disposed of. In re *Bendectin Litigation,* 624 F. Supp. at 1216. After 22 trial days, the jury found that plaintiffs had failed to establish that Bendectin taken in therapeutic doses during pregnancy caused human birth defects, and the court entered judgment for Merrell Dow. In re *Bendectin Litigation,* 857 F.2d at 294.

While the trial court had diversity jurisdiction over most of the cases before it, Judge Rubin faced a more perplexing issue with Ohio plaintiff-cases (given Merrell Dow's Ohio citizenship) after the Sixth Circuit reversed his finding of § 1331 jurisdiction on July 15, 1985. In response, in August 1985, Judge Rubin dismissed without prejudice cases originally filed by Ohio residents in Ohio federal court and remanded to state court cases originally filed there, but which Merrell Dow had removed to federal court. *Id.* On appeal, the Sixth Circuit in August 1988 affirmed Judge Rubin's trifurcation and other challenged trial rulings, but modified his jurisdictional holding, finding *inter alia* that Ohio plaintiffs who originally filed in federal court and tried the causation issue were bound by the jury's adverse verdict. *Id.* The court of appeals reasoned that these plaintiffs, unlike those in the related *Merrell Dow* action who had conceded that there was no private action under the FDCA, "went to trial in federal court intending to take full advantage of any ruling that an implied cause of action existed . . . . Until this court or the Supreme Court holds that there is no implied private right of action under the FDCA [an issue the Court carefully avoided], the opposite position cannot be deemed either frivolous or unsubstantial [for purposes of federal jurisdiction]." *Id.* The Supreme Court denied the petition for certiorari, Hoffman v. Merrell Dow Pharmaceuticals, Inc., 488 U.S. 1006 (1989), which had presented, among

remedy requirement might mean for the federal trial courts, this benefit alone should not override the serious problems it imports into federal question doctrine.[311]

D. Merrell Dow's *Invitation for Reassessment: A Comprehensive* Smith-*Plus Section 1331 Inquiry?*

As shown, *Merrell Dow*'s remedy requirement revives the underinclusiveness problem of *American Well* by overemphasis on federally created actions or remedies,[312] this time at the second level of the federal question analysis. In addition, it undermines the protective flexibility that *Smith*—perhaps an unfortunate casualty of the *Merrell Dow* reassessment[313]—provided in its outcome determinative test. Indeed, for all the difficulties with the Court's federal question doctrine, *Smith*'s requirement that resolution of the state claim turn on federal law interpretation in order to qualify for federal jurisdiction has notable advantages:[314] It ensures both the prominence (*i.e.*, actual contention) *and* importance (*i.e.*, decisiveness) of the federal issue within the lawsuit (whether constitutional or statutory interpretation is required), provides a fairly straightforward test for assessing that role, preserves the judiciary's front-line prerogative in hybrid claim determinations, and liberally

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others, this issue for review. 57 U.S.L.W. 3401 (Dec. 6, 1988) (listing as one question presented for appeal: "Where plaintiff alleges violation of federal statute, which provides no private right of action, in his complaint filed in federal court, does that allegation, alone, impart federal question jurisdiction?")

311 And, as Justice Brennan observed, "while the increased volume of litigation may appropriately be considered in connection with reasoned arguments that justify limiting the reach of § 1331, I do not believe that the day has yet arrived when this Court may trim a statute solely because it thinks that Congress made it too broad." *Merrell Dow*, 478 U.S. at 829 (Brennan, J., dissenting).

312 *See* Hirshman, *supra* note 7, at 37-38 (discussing *American Well*'s underinclusiveness); *see also* Cohen, *supra* note 5, at 899.

313 Even under a strict reading of *Merrell Dow*, *Smith* may still offer the operative rule for hybrid claims when the implicated federal statute (1) though devoid of private actions or remedies, precipitates a federal constitutional inquiry or (2) contains a private action or remedy.

314 As Professor Redish explained in concluding his evaluation of *Merrell Dow*:

> In the close case . . . explication of the pragmatic and conceptual factors cited by jurists and scholars to justify federal question jurisdiction logically leads to adoption of a liberal version of the *Smith* test: even if the cause of action is state-created, federal question jurisdiction should be found if the outcome of the case may turn on construction of federal law.

M. REDISH, *supra* note 5, at 105; *cf.* Doernberg, *There's No Reason for It, supra* note 6, at 658 ("federal jurisdiction should be upheld whenever either party demonstrates the presence of an outcome-determinative issue based upon federal law").

serves the purposes of section 1331 by ensuring (*Moore* aside) that state law claims with dispositive federal issues will receive federal forum protections to help ensure the correct and consistent interpretation of the implicated federal law.[315]

But whatever *Smith*'s future, there is some reason to pause a figurative moment at this juncture over the outcome determinative test despite its relative superiority as a jurisdictional measure. As shown, in reiterating the basic rule that the jurisdictional finding must comport with congressional intent, *Merrell Dow* gave new emphasis to the importance of Congress' substantive objectives as part of that determination—an insight offered by *Shoshone* (though in the context of a hybrid *federal* law claim)[316] at the turn of the century and later, although less expressly, by *Gully*[317] and *Russell*.[318] In this context, *Smith*'s apparent deficiencies surface: Essentially, *Smith* gauges jurisdictional sufficiency by evaluating the role played by the federal element *within* the action, but does so *without* regard to its extrinsic source, nature, or significance. *Merrell Dow* infers that, at least for certain types of claims, this insular perspective may be flawed because it cannot adequately accommodate substantive interests that impact the section 1331 forum determination.

Thus, *Merrell Dow*'s apparent assumption—though mistakenly applied by the majority in its stringent remedy requirement—that a sound jurisdictional formula for hybrid claims should examine the federal statute for congressional clues bearing upon the forum determination, cannot be summarily rejected because it raises a vital issue for the Court's statutory federal question doctrine: How responsive should the section 1331 inquiry for hybrid claims be to Congress' substantive objectives reflected in the implicated federal law? Indeed, Justice Brennan in dissent, although adamant that *Smith* provided jurisdiction over plaintiff's state law FDCA claim in *Merrell Dow*,[319] nonetheless explored the purposes underlying section 1331 as well as the FDCA's statutory enforcement scheme in order to demonstrate the fallacies of the majority's approach.[320] "I certainly subscribe to the proposition," he stated, "that the Court should consider legislative intent in determining whether or not there is

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[315] *See Merrell Dow*, 478 U.S. at 828 (Brennan, J., dissenting) (if made an "essential element of a state-law claim," the implicated federal law "operate[s] to shape behavior" and Congress provided federal forums to ensure "that federal laws would shape behavior in the way that Congress intended.").

[316] *Supra* notes 89–92 and accompanying text.

[317] *Supra* notes 139–44 and accompanying text.

[318] *Supra* notes 117–19 and accompanying text.

[319] Justice Brennan stated: "There is, to my mind, no question that there is federal jurisdiction over the respondents' fourth cause of action under the rule set forth in *Smith* and reaffirmed in *Franchise Tax Board*." *Merrell Dow*, 478 U.S. at 822–23 (Brennan, J., dissenting).

[320] *Id.* at 826–32.

jurisdiction under [section] 1331."[321] Further, he admonished the majority for "not examining the purposes underlying *either* the FDCA or [section] 1331" before concluding that the lack of remedy meant that Congress withdrew jurisdiction over the hybrid claim at issue.[322] Accordingly, *Merrell Dow* invites exploration of the need, not only for restoring judicial prerogative within the section 1331 collaboration, but for contemplating a standard which reflects all pertinent considerations—both jurisdictional and substantive—that bear upon the forum determination in order to maximize principled hybrid claim allocations.[323]

Thus, a comprehensive federal question assessment might attempt to account for both Congress' general jurisdictional directive in section 1331 and its specific substantive goals within the statute triggering the jurisdictional inquiry as they bear upon the forum determination.[324] In this way, the dual congressional messages conveyed by hybrid claims—one general and one specific—will be harmonized so that section 1331 is not rendered superfluous by the subsequent federal enactment (as *Merrell Dow* effectively accomplishes) and the implicated substantive statute is properly accounted for in the jurisdictional analysis (as *Merrell Dow* suggests). In this context, the presence or absence of a cause of action or remedy within the federal statute becomes but one—not necessarily the dispositive—factor for the court to assess in the mix of jurisdictional considerations under section 1331.

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[321] *Id.* at 830.

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

[323] *Cf.* Wells, *Is Disparity a Problem?, supra* note 52, at 286, 324 (arguing that "[t]he availability of two court systems provides an opportunity to take substantive considerations into account in making forum decisions" and that "the capacity to consider substantive interests in allocating cases between court systems is a valuable appurtenance to our legal order"); Wells, *The Impact of Substantive Interests, supra* note 68, at 499, 519 (arguing that "substantive factors exert a powerful and often unrecognized influence over the resolution of jurisdictional issues" and jurisdictional choices may be "a convenient rationalization for results whose true motivation is their substantive impact").

Interestingly, the Supreme Court's inclusive use of the *American Well* rule to provide federal forums for causes of action created by substantive federal law is, itself, a recognition of the twining of jurisdictional and substantive concerns. *See* Cohen, *supra* note 5, at 912 (a federal cause of action may represent a congressional or judicial judgment that a protective federal forum is necessary).

[324] *Shoshone* and *Gully* come closest to illustrating this approach. *Supra* notes 316–17; *see also* L. BRILMAYER, *supra* note 33, at 52 ("The rationale behind the federal question doctrine is the provision of a federal forum to vindicate federal substantive interests. . . . [J]urisdiction is a byproduct of the subject matter of the dispute."). As Professor Luneburg observed: "[I]n interpreting the scope of section 1331, the Court [in *Merrell Dow*] was not legally bound by Congress' later action with regard to a totally different statute, although it might be prudent to take that into account in sketching the parameters of the federal question statute." Luneburg, *supra* note 21, at 763.

Thus, one response to *Merrell Dow*'s invitation for reassessment is to adopt a "*Smith*-plus" standard of jurisdiction, an approach implicit in Justice Brennan's *Merrell Dow* dissent: Federal question jurisdiction may attach to state law claims whose resolution turns on construction of the implicated and action-less federal statute unless "the reasons Congress with[held] a federal remedy are also reasons for withholding federal jurisdiction."[325] This experimental approach has the merit of preserving the well-established outcome determinative test as the presumptive measure of jurisdiction while accounting for Congress' specific substantive remedial intent concerning the federal law at issue as it bears upon the forum determination. It also keeps the locus of the jurisdictional decision (with section 1331's permission) with the courts. Thus, this comprehensive approach to federal question hybrid allocations would attempt to ensure that any jurisdictional finding under the general federal question statute is also consistent with any pertinent congressional intent under the specific substantive act at issue. At the same time, this approach seems to preserve, and accord primacy to, the traditional section 1331 determination as a distinct inquiry—an end the *Merrell Dow* majority failed to accomplish within the compression of its stringent remedy requirement.[326]

What, then, post-*Merrell Dow*, might a discretionary, synoptic *Smith*-plus approach to hybrid claim allocations, consistent with the purposes underlying section 1331 and reflecting the substantive aspect of federal question jurisdiction, include? Here is a suggested list of considerations:

1. *Is the federal question well-pleaded?*[327] To start, the federal issue must be properly presented to the court in accordance with the well-pleaded

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[325] *Merrell Dow*, 478 U.S. at 825 (Brennan, J., dissenting). Justice Brennan addressed the relationship of jurisdictional and substantive interests in demonstrating the flaws of the remedy requirement and offered a two-step analysis of the problem which reconciled the federal question finding with the remedial finding. First, he explored whether the reasons for federal question jurisdiction—expertise, uniformity, and receptivity—justified federal forums for state law claims with essential federal elements, and found that they did. *Id.* at 826–28. Then he examined whether Congress' decision not to provide a private cause of action altered his conclusion that federal question jurisdiction was appropriate for state law claims as the one before the Court. *Id.* at 829. As part of this second step, Justice Brennan explored the FDCA's regulatory enforcement scheme and concluded that its lack of private remedy did not at all signal congressional intent to preclude federal jurisdiction over FDCA-implicated claims. *Id.* at 830–32. "[I]f anything," he wrote, "Congress' decision not to create a private remedy *strengthens* the argument in favor of finding federal jurisdiction over a state remedy that is not pre-empted." *Id.* at 832.

[326] As Justice Brennan stated: "[L]imitations on federal question jurisdiction under § 1331 must be justified by careful consideration of the reasons underlying the grant of jurisdiction and the need for federal review." *Merrell Dow*, 478 U.S. at 818–19 (Brennan, J., dissenting).

[327] *Supra* note 44.

complaint rule.[328] This rule is best seen as governing the location, rather than the evaluation, of the federal issue or interest.[329]

2. *Does case outcome depend upon construction of federal law?* Under the comprehensive approach, a federal court, applying *Smith*, could presumptively assert jurisdiction over a state law claim whose resolution depends upon construction of the implicated federal law. The principled assumption underlying *Smith* is that federal forum safeguards (that is, expertise, sympathy, uniformity, and independent judgment) should be available when the federal law is central to case outcome, regardless of its intrinsic importance in the hierarchy of federal statutes. Any determination of the federal interest's importance or significance for jurisdictional purposes is more a function of legislative, and not judicial, intent. Precisely because Congress, and not the federal courts, should rank the relative importance of federal interests, the judiciary should provide federal forum protections for all claims involving dispositive questions of federal law, unless Congress directs otherwise. Thus, *Smith* saves the federal judiciary from substituting its own jurisdictional judgments for those of the legislature by confining the federal question assessment to the prominence and importance of the federal issue in particular cases, rather than entangling the courts in system-wide policy decisions they should not make.[330]

But to the extent *Merrell Dow* mandates exploration of specific congressional intent bearing upon the forum determination, these additional questions seem pertinent:

3. *Did Congress intend to withdraw federal jurisdiction over the hybrid claim in failing to provide a private cause of action or remedy in the implicated federal statute?* If the implicated federal statute is outcome determinative, but not privately enforceable, the court could next determine whether the congressional reasons for withholding the remedy are also reasons to withhold federal jurisdiction. This affirmative determination is crucial. As demonstrated,[331] even in the absence of private federal enforcement, Congress may still have a keen interest in providing federal forums to ensure that state enforcement of federal standards are consistent with congressional

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[328] *See supra* note 148.

[329] As Professors Doernberg and Mushlin point out, the Supreme Court's federal question inquiry "has not always distinguished cases concerning the importance branch from those involving the placement branch" of that inquiry. Doernberg & Mushlin, *supra* note 6, at 535. Indeed, the well-pleaded complaint rule should not—and cannot—be used to assess the nature of the federal issue at stake. As traditionally defined, the rule ensures the proper positioning of the federal question within the complaint, but provides little assistance in determining whether federal trial protections are warranted in adjudication of that question. In any event, the rule is too mechanical to accommodate the discretionary balancing § 1331 allocations require.

[330] *Supra* note 64.

[331] *Supra* notes 274–86 and accompanying text.

objectives.[332] Congress' remedial intent concerning the isolated federal statute is simply not dispositive or even predictive of its intent concerning the jurisdictional treatment of that statute as part of a state liability scheme.[333] In addition, the fundamental distinctions between jurisdiction, cause of action,[334] and remedies undermine the automatic equation of these concepts.[335]

As part of this analysis, the court may wish to consider whether state enforcement threatens the congressional scheme or federal interest. A denial of section 1331 jurisdiction is tantamount to a declaration of exclusive state court jurisdiction over the claim at issue. The only federal safeguard for protecting the implicated federal interest within the state law scheme may be the uncertain prospect of Supreme Court review.[336] Thus, the court might examine

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[332] As Justice Brennan observed in explaining why hybrid claim cases like the one before the Court in *Merrell Dow* arose under federal law within the meaning of § 1331:

> [A] federal law expresses Congress' determination that there is a federal interest in having individuals or other entities conform their action to a particular norm established by that law. Because all laws are imprecise to some degree, disputes inevitably arise over what specifically Congress intended to require or permit. It is the duty of courts to interpret these laws and apply them in such a way that the congressional purpose is realized.

Merrell Dow, 478 U.S. at 828 (Brennan, J., dissenting). And in evaluating the jurisdictional significance of Congress' failure to provide a cause of action, Professor Redish explained:

> [I]t is by no means clear that merely because Congress does not choose to provide its own remedy, it would not want a federal forum available to adjudicate a state remedy for violation of the federal standard. It is one thing to have no enforcement at all; it is quite another to have enforcement that is adjudicated only in state court. . . . [O]nce the state is allowed to enforce the federal statute, state court misinterpretation of the federal statute could give rise to several potentially harmful results. . . . Moreover, Congress may have a legitimate interest in preventing precedential confusion caused by the dramatic increase in the number of interpreting courts.

M. REDISH, *supra* note 5, at 100–01.

[333] *Supra* notes 271–73 and accompanying text.

[334] Viewing "cause of action" as an enforceable right to legal relief, *see* C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 130 (2d ed. 1947), or in the Supreme Court's formulation, as a "question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court," Davis v. Passman, 442 U.S. 228, 240 n.18 (1979), helps to distinguish "cause of action" from "jurisdiction," which, as the Supreme Court has noted, is "a question whether a federal court has the power . . . to hear a case" in the first place whether or not it is appropriately invoked by any particular litigant. *See id.* at 239 n.18.

[335] *Supra* note 103.

[336] The Supreme Court, of course, is the ultimate check on incorrect or inconsistent state court interpretations of federal questions, but it simply "cannot do the whole job" because of docket pressures, limited appellate fact review, debilitating delays, and deference

Congress' statutory plan for effectuation of that interest and decide whether its enforcement by the less specialized, more localized, and possibly indifferent and vastly differing state courts might endanger the legislative scheme.[337] The court might also assess any priority the state may have in hearing these claims and consider what, if any, friction or suspicion is generated by providing a federal forum option.[338]

4. Did Congress provide any other indications in the statutory scheme that might bear upon the jurisdictional determination? The implicated statute might contain other substantive provisions to aid the forum assessment. The court might determine whether the federal statute's overall scheme and purpose provides jurisdictional insight,[339] including whether Congress intended state law to govern disposition of the federal rights or duties contained in the statute.[340] Also pertinent is any indication from Congress that federal law

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to adequate state grounds. D. CURRIE, FEDERAL COURTS 160 (3d ed. 1982). Justice Brennan has observed in agreement that "having served on this Court for 30 years, it is clear to me that, realistically, [the Court] cannot even come close to 'doing the whole job' and that § 1331 is essential if federal rights are to be adequately protected." *Merrell Dow*, 478 U.S. at 827 n.6 (citing D. CURRIE).

337 As Professor Wechsler cautioned: "Initial state adjudication . . . tends . . . to give the states the final voice on any federal questions, for review by the Supreme Court . . . can never function on a quantitative basis. . . . The problem is . . . to determine when relatively final state determination involves least risk of error upon federal matters, or when such risk as it involves is counterbalanced by the disadvantages of an original jurisdiction in the federal courts." Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 218 (1948).

338 *E.g.*, Mishkin, *supra* note 27, at 159 (permitting initial federal question adjudication by the state courts subject to Supreme Court review "may avoid friction and wasted effort . . . without sacrificing national authority"); *see also* Shapiro, *supra* note 2, at 583 (the federalism and comity considerations in jurisdictional determinations "convey a sense of the need for mutual respect" between the federal and state sovereigns).

339 *E.g.*, Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900). Obviously absent from the *Merrell Dow* majority opinion is any analysis of the FDCA itself. In contrast, Justice Brennan dissected the statute's enforcement scheme in search of clues of Congress' forum intent. *Merrell Dow*, 478 U.S. at 829–32 (Brennan, J., dissenting).

340 *Cf.* Cohen, *supra* note 5, at 916 (noting that "a pragmatic limit upon federal jurisdiction" will involve assessment of "the extent to which cases of this class will, in practice, turn on issues of state or federal law"); *Shoshone*, 177 U.S. at 505 (noting the jurisdictional significance of Congress' intent that local rules should govern resolution of the disputes at issue despite congressionally authorized cause of action); Romero v. International Terminal Operating Co., 358 U.S. 354, 375 (1959) ("If jurisdiction of maritime claims were allowed to be invoked under § 1331, it would become necessary for courts to decide whether the action 'arises under federal law,' and this jurisdictional decision would largely depend on whether the governing law is state or federal.").

preempts state law[341] or that the states are precluded from hearing claims that seek to enforce or interpret the implicated federal statute.[342]

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[341] *See* M. REDISH, *supra* note 5, at 100 (while "Congress' failure to provide a private remedy for violation of a federal statute [might] act to preempt a state's provision of a private remedy, . . . Congress' decision not to create a private damage remedy in no way automatically implies any congressional judgment about adjudication of the state cause of action" unless "traditional preemption analysis" requires displacement). As the Court explained that analysis in Northwest Central Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 509 (1989):

> Congress has the power under the Supremacy Clause . . . to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.

(citations omitted).

Necessary to consider at this point in the comprehensive inquiry is the complete preemption doctrine. Under this theory, a court may find that even a purely state law cause of action is retroactively transformed into one supporting federal question jurisdiction if the preemptive power of a federal statute (pled, perhaps, in defense) is so "extraordinary" that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987). Any claim allegedly based on that completely preempted state law "is considered, from its inception, a federal claim, and therefore 'arises under' federal law." Caterpillar Inc. v. Williams, 482 U.S. 386, 392–93 (1987); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 (1983) ("if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law"); *see also Franchise Tax Bd.*, 463 U.S. at 23 (the entirely displaced state suit is "purely a creature of federal law"). The doctrine, therefore, refines the well-pleaded complaint rule and the rule that plaintiff is the master of his or her claim. *See Caterpillar,* 482 U.S. at 392–93. It also stands as an exception to the rule that federal preemption is typically a defensive issue that cannot support federal question jurisdiction on removal. *Id.*; *see also Franchise Tax Bd.*, 463 U.S. at 12, 14. The Supreme Court, however, has invoked this exception sparingly. *Caterpillar,* 482 U.S. at 393 (noting the Supreme Court's occasional use of this doctrine). *See generally* Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts,* 54 GEO. WASH. L. REV. 812, 814 (1986) (arguing that the courts have failed to develop an integrated approach to federal question jurisdiction and preemption and have instead "compartmentalized" the inquiries without reconciling them).

[342] *Cf. Merrell Dow*, 478 U.S. at 816 (noting that to the extent Merrell Dow feared that state court interpretation of the FDCA threatened the Act's scheme, it should have argued that "the FDCA pre-empts state-court jurisdiction over the issue in dispute") (footnote omitted). While the presumption for concurrent state court jurisdiction is "deeply rooted" and our system of "dual sovereignty" recognizes that the "state courts have inherent

5. *How will providing federal jurisdiction affect federal dockets?* Once the court determines that the hybrid claim warrants the special protections of a federal forum, the court might then assess the impact that accepting jurisdiction over these types of cases will have on federal resources and dockets.[343] While docket impact should not in and of itself be sufficient reason to disqualify federal courts from hearing claims enforcing federal rights or standards, it is a factor that may help weight the balance of considerations.[344]

Pros and Cons. To the extent *Merrell Dow* signals that the Supreme Court is moving federal question doctrine in the discretion-restrictive direction its implication doctrine has taken, it may be wise to assess alternative approaches to section 1331 allocations, such as the comprehensive *Smith*-plus inquiry, that do less damage to judicial prerogative than *Merrell Dow*'s remedy requirement, but nonetheless account for substantive intent in the context of jurisdictional determinations, as *Merrell Dow* may require. Unlike *Smith*'s pure outcome determinative test, this comprehensive federal question inquiry attempts an explicit accounting for the jurisdictional significance of implicated substantive federal interests—all in the context of satisfying the purposes of federal question jurisdiction. In this way, the comprehensive section 1331 approach may appear to strike a satisfying balance of power in the federal question collaboration: It at once accords due deference to general and specific congressional intent bearing upon the forum determination while preserving the

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authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States," Tafflin v. Levitt, 493 U.S. 455, 458, 459 (1990), the supremacy clause empowers Congress to "affirmatively oust[ ] the state courts of jurisdiction over . . . particular federal claim[s]," *id.* at 459, and "confine jurisdiction to the federal courts either explicitly or implicitly." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981); *accord* Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 823 (1990) ("To give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its power under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction."). Accordingly, Congress can rebut the presumption of concurrence "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Tafflin*, 493 U.S. at 459-60 (quoting *Gulf Offshore*, 453 U.S. at 478).

Of course, Congress' failure to preempt state court jurisdiction is not necessarily indicative of its intent to preclude federal court jurisdiction given the compromise of concurrent jurisdiction, which permits federal presence in the interpretative chain without a blanket ban on state involvement. Plaintiff (or defendant upon removal) may then decide whether the potential protections of federal adjudication are necessary in light of the case particulars.

343 *E.g.*, Shulthis v. McDougal, 225 U.S. 561, 569-70 (1912); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900).

344 *See Merrell Dow*, 478 U.S. at 829 & n.7 (Brennan, J., dissenting) (increased caseloads might be appropriately considered in a reasoned limitation of § 1331, but it "would be wholly illegitimate . . . for this Court to determine that there was no jurisdiction over a class of cases simply because the Court thought that there were too many cases in the federal courts").

judiciary's prerogative to assess this intent and other pertinent forum considerations in the context of particular hybrid controversies. While the simplicity of *Smith* may be lost in this approach, gained may be the added congressional "insight" on the forum determination without the discretion-restrictive onus of *Merrell Dow*'s remedy requirement as the cause of action or remedy becomes one among several jurisdictional considerations.

But despite these apparent advantages, the comprehensive approach to state law hybrid claim allocations has serious flaws. Requiring the federal courts, in essence, to confirm their preliminary section 1331 determinations against specific statutory schemes effectively nullifies the general federal question statute, which would no longer operate on its own power (when the implicated federal law lacks private remedies). Such a radical change to the flow of authority between Congress and the courts in the federal question collaboration should be explicit, and Congress has not altered section 1331.

Further, asking the federal courts to divine what, if any, significance they should attribute to Congress' substantive intent in hybrid claim allocations—even that intent which the court, on its own, decides may bear upon the forum determination, as the comprehensive inquiry suggests—might embroil the judiciary in speculative forum assessments based upon Congress' *non*-jurisdictional intent.[345] In fact, there may be no jurisdictional signals to be derived from Congress' substantive scheme, and the courts should be loath to create any. Congress may have purposely defaulted on the jurisdictional designation in reliance on its residual forum intent contained in the general federal question statute. The judicial discretion that section 1331 has sanctioned becomes especially important and appropriate in close hybrid state law claims where case-specific judgments by the courts may be necessary—judgments which Congress did not address in the substantive statute, and which Congress has traditionally delegated to the courts in enlisting their assistance to protect federal law through forum selection. Moreover, tying the courts' jurisdictional decisions to Congress' substantive intent will undermine the presumption of federal law protection that *Smith* provides by confining section 1331 considerations to case-centered determinations about the dispositive nature of the implicated federal issue within the lawsuit.

Indeed, putting an affirmative burden on the federal courts to show that their exercise of section 1331 power is proper despite the absence of private remedies in the implicated act is an exercise of supreme futility given the impropriety, in the first instance, of basing hybrid claim determinations on Congress' enforcement intent for the statute standing alone.[346] And, to the extent the comprehensive inquiry would in any way require the courts to assess

[345] Of course, Congress' intent to preempt state court jurisdiction is a valid consideration even under the pure *Smith* approach, as are other traditional, jurisdictional factors, such as docket concerns.

[346] *Supra* notes 266–73 and accompanying text.

the significance of the substantive federal interest at stake, it would be difficult and unwise for the judiciary to delineate standards for that assessment, which arguably should be performed by the legislature in any event. Of course, Congress, if it wishes, could provide for federal jurisdiction over subject-specific claims in the substantive statute itself.

Thus, *Smith,* in its principled simplicity, grows in stature as the federal question test most likely to fulfill the general mandate of section 1331 to provide federal forums protections for the construction of federal law most efficiently and effectively consistent with the proper role of the judiciary in the federal question collaboration. Its inherent operating premise is still sound: If a primary purpose of the federal court system is to ensure the vindication of federal law, and by definition, the congressional objectives they embody, all national enactments, regardless of substantive content, should merit federal interpretation absent congressional directive otherwise once their construction affects disposition of the state law claim and is therefore central enough to the relief requested to justify sharing adjudicative authority with the state courts.

Because *Merrell Dow*'s remedy requirement and, to a lesser extent, the comprehensive inquiry, unduly restrict the courts' delegated and as yet congressionally sanctioned section 1331 authority to make hybrid claim decisions based on the dispositive nature of the implicated federal issue, they are of questionable merit. Both demonstrate that *Smith,* even in its narrowed focus on the case before it, most effectively maximizes the protective purpose of the general federal question statute consistent with the roles Congress has long ordained for both section 1331 collaborators.

V. CONCLUSION

In the absence of specific forum directives, Congress has empowered the lower federal courts to make certain forum allocations in accordance with the general federal question statute. *Merrell Dow,* however, endorsed a federal question test that undermines the judiciary's rightful authority to make those determinations as the legislature's case-specific delegate. The Court's emphasis on a congressional cause of action or remedy as the predicate for jurisdiction in state law hybrid claims suggests a troubling direction for federal question determinations that elides judicial discretion and enervates section 1331. The courts' ability to explore and weight section 1331 considerations may be lost, limited, or distorted if they unduly focus on the restrictive and jurisdictionally inconclusive question of whether Congress provided a private action or remedy in the implicated federal statute.

The federal courts should not take forum cues that Congress did not send. The traditional case-centered approach to state law hybrid claim allocations that rests upon the court's discretionary assessment of the centrality of the federal issue to the claim's disposition is most likely to keep the legislature's

jurisdictional and substantive signals straight while maximizing the federal forum option consistent with Congress' general jurisdictional directive. In concluding that Congress' remedial intent has primary jurisdictional significance in hybrid claim allocations, *Merrell Dow* based the forum analysis—at the expense of judicial discretion and the integrity of a free-standing section 1331 analysis—on a congressional substantive intent that cannot and should not direct the jurisdictional inquiry.