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The Road Forward from Grable: Separation of Powers and the Limits of "Arising Under" Jurisdiction

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The Road Forward from *Grable*: Separation of Powers and the Limits of "Arising Under" Jurisdiction

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One of the most challenging procedural issues for the United States Supreme Court has been defining the limits of federal question jurisdiction over state law claims that necessarily raise issues of federal law (the incorporation doctrine). In two recent decisions, the Court has tied the limits of the incorporation doctrine to the presence or absence of a parallel federal private right of action. First, in *Merrell Dow v. Thompson*,[1] the Supreme Court seemingly concluded that the federal courts lacked federal question jurisdiction under the incorporation doctrine if the federal law at issue did not provide the plaintiffs with a private right of action. More recently, in *Grable v. Darue Engineering*,[2] the Court held that the absence of a parallel federal right of action did not conclusively preclude federal question jurisdiction through the incorporation doctrine in all cases. However, the Court concluded that the absence of a parallel federal right of action could preclude incorporation jurisdiction in some situations.

This Article builds on the seminal works of commentators like Professors Mishkin and Merrell in the area of the *Erie* doctrine. It argues that the Court's current efforts to define the limits of the federal courts' jurisdiction fail to account for the separation of powers and embedded federalism issues in Article I's grant of exclusive federal lawmaking power to Congress. When federal courts exercise jurisdiction over state law claims that both replicate federal rights and provide for their private enforcement where federal law fails to do so, federal courts effectively imply a private federal remedy where Congress chose to leave private enforcement to the state courts. In so doing, courts interfere with Article I's grant of federal lawmaking power to Congress. This Article proposes to modify the unified balancing test enunciated in *Grable* with a two-step inquiry. Under this two-step inquiry, courts would

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1. Merrell Dow Pharm. v. Thompson, 478 U.S. 804 (1986).

2. Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).

first examine the nature of the relationship between a state claim and the would-be federal claim. For those cases in which the state and federal claims touch on the same central concern, the absence of a private right of action under federal law would preclude federal jurisdiction over the state claim. For those cases in which the state and federal laws do not touch on the same central concern but merely intersect coincidentally, courts should perform the balancing of state law and federal law interests envisioned by the Court in *Grable*. In essence, the analysis should resemble a reverse complete preemption analysis. The more closely the state law claims mirror the would-be parallel federal claims, the more likely that the absence of a private right of action should preclude incorporation jurisdiction.

I. THE FEDERAL QUESTION JURISDICTION OF THE FEDERAL COURTS

A. The Limits on the Federal Question Jurisdiction of the Federal Courts

Article III provides that the federal judicial power shall extend "to all Cases, in Law or Equity, arising under the Constitution, the Laws of the United States, and Treaties made or which shall be made."[3] The federal judicial power conferred by Article III is not self-executing. Thus, federal courts lack the power recognized under Article III unless specifically granted by an Act of Congress.[4] However, since 1875, Congress has consistently granted the federal district courts the power to hear cases "arising under the Constitution, laws or treaties of the United States."[5]

At least since 1900, the Supreme Court has interpreted this Congressional grant of power more narrowly than the power recognized under Article III.[6] To this end, the Court has recognized

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3. U.S. CONST. art. III, § 2, cl. 1.

4. John B. Oakley, *Federal Jurisdiction and the Problem of the Litigation Unit: When Does What "Arise Under" Federal Law?*, 76 TEX. L. REV. 1829, 1833 (1998). Professor Oakley notes that some commentators have argued that at least some degree of Article III's judicial power is self-executing but that the weight of authority is to the contrary. To this end, Professor Oakley notes that in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), the Supreme Court implicitly recognized that inferior federal courts could not exercise jurisdiction under Article III absent a congressional statute granting jurisdiction. Oakley, *supra*, at 1832–33.

5. Judiciary Act of 1875, ch. 137, 18 Stat. 470 (current version at 28 U.S.C. § 1331). *See* Oakley, *supra* note 4, at 1833 (recognizing the "enduring grant of statutory federal-question jurisdiction enacted in 1875").

6. *See* Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L. J. 309 (2007). Professor

three limits on the federal question jurisdiction of the federal courts. First, the federal issue must arise on the face of the plaintiff's well-pleaded complaint.[7] In other words, the federal issue must bear on an element of the plaintiff's claim rather than an anticipated or asserted defense. Second, the federal issue must be substantial or central to the plaintiff's claim.[8] Third, the federal issue must be asserted in good faith and cannot be patently frivolous.[9]

The substantiality or centrality limitation is the focus of this Article and is the limitation that has proven the most troublesome for the Court to define. For nearly 100 years, the Court has recognized that a state law claim could give rise to federal question jurisdiction if the resolution of the claim necessarily raised an issue of federal law.[10] In other words, an action to enforce state created rights could give rise to federal question jurisdiction if an issue of federal law was incorporated into the state claim. However, the Court also implicitly recognized that not all state claims raising embedded federal issues gave rise to federal question

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Freer notes that the Court initially interpreted the grant of jurisdiction under section 1331 to be coextensive with the limits of Article III, but that the Court and Congress retreated from this interpretation. *Id.* at 314–16. In *Snowshoe Mining Co. v. Rutter*, the Court expressly recognized that the statutory grant of jurisdiction was not coextensive with the constitutional grant of jurisdiction in Article III. 177 U.S. 505, 507 (1900).

7. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) ("It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough to show that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution of the United States.").

8. Commentators and the Court have used several terms to describe this requirement. For example, some have asserted that the plaintiff's claim must "directly" invoke federal law. *See, e.g.*, William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967); Paul J. Mishkin, *The Federal "Question" in the District Court*, 53 COLUM. L. REV. 157, 165 (1953). Others have asserted that the federal issue must be "central" to the plaintiff's claim. *See, e.g.*, Empire Healthchoice Assurance v. McVeigh, 547 U.S. 677, 699 n.5 (2006); Freer, *supra* note 6, at 30 n. 4. Still others have characterized the requirement as a substantiality requirement. *See, e.g.*, Merrell Dow Pharm. v. Thompson, 478 U.S. 804, 814 (1986); Mishkin, *supra*, at 165; Oakley, *supra* note 4, at 1840.

9. *See* Bell v. Hood, 327 U.S. 678, 682–83 (1946).

10. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005).

jurisdiction.[11] Defining which claims raised substantial or central enough federal issues to give rise to federal question jurisdiction (the incorporation doctrine) has provoked a vigorous scholarly debate.[12] It also has proven to be a troublesome issue for the Court.[13]

B. Merrell Dow *and the Introduction of the Private Right of Action*

After a relatively lengthy absence, the Court returned to the incorporation doctrine in a series of recent decisions. First, in *Merrell Dow v. Thompson*,[14] the Supreme Court refused to recognize federal question jurisdiction over the plaintiffs' state law products liability claims even though their negligence claims raised an issue under the Federal Food, Drug and Cosmetic Act ("FDCA"). In one of the counts of their complaint, the plaintiffs alleged that the defendant had violated the FDCA and that the defendants' violation of the Act gave rise to a rebuttable presumption of negligence.[15]

The Court re-affirmed the principle that a state law claim could give rise to federal question jurisdiction where the vindication of the state law right "necessarily turned on some construction of federal law."[16] However, the Court ultimately concluded that the issues arising under the FDCA in the plaintiffs' claims were not substantial enough to give rise to jurisdiction.[17] In reaching this

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11. *Id.* at 313. ("As early as 1912, this Court had confined federal-question jurisdiction over state-law claims to those that 'really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law.'") (quoting Shulthis v. McDougal, 225 U.S. 561, 569 (1912)).

12. *See, e.g.*, Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After Merrell Dow*, 52 OHIO ST. L. J. 1477 (1991); Pauline E. Calande, *State Incorporation of Federal Law: A Response to the Demise of the Implied Federal Rights of Action*, 94 YALE L. J. 1144 (1985); Cohen, *supra* note 8; Ronald J. Greene, *Hybrid State Law in Federal Courts*, 83 HARV. L. REV. 289 (1969); Freer, *supra* note 6; Linda R. Hirshman, *Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction Over Cases of Mixed State and Federal Law*, 60 IND. L. J. 17 (1985); Alan D. Hornstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 IND. L. J. 563 (1980–81); Mishkin, *supra* note 8; Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction Over State Law Claims Post-Merrell Dow*, 115 HARV. L. REV. 2272 (2002) [hereinafter *Mr. Smith*]; Oakley, *supra* note 4.

13. *See infra* notes 14–42 and accompanying text.

14. 478 U.S. 804 (1986).

15. *Id.* at 805–06.

16. *Id.* at 809 (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9 (1983)).

17. *Id.* at 814.

conclusion, the Court first noted that the parties all conceded that the FDCA did not provide the plaintiffs a private right of action.[18] The Court relied heavily on the absence of a private right of action under the FDCA. The Court explained that:

> The significance of the necessary assumption that there is no federal 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 federal remedy for the violation of the federal statute. We think it would similarly flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal question jurisdiction and provide remedies for violations of the 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.[19]

The Court continued:

> 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 the congressional purposes and the federal system . . . . We simply conclude that the congressional determination that there should be no federal remedy for the violation is tantamount to a congressional conclusion that the presence of the claimed violation of an element of the state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.[20]

Relying on this expansive language in the majority's opinion, several lower courts and commentators concluded that *Merrell Dow* barred federal courts from exercising federal question jurisdiction over a state law claim if the incorporated federal law

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18. *Id.* at 810.
19. *Id.* at 812.
20. *Id.* at 814.

did not grant a private right of action.[21] However, other courts limited *Merrell Dow* to its facts.[22]

C. Grable*: Private Right of Action as a Congressional Veto*

The Supreme Court granted certiorari in *Grable & Sons Metal Products v. Darue Engineering & Manufacturing* to resolve this split among the lower courts regarding whether *Merrell Dow* required a federal cause of action for exercising federal question jurisdiction.[23] The Court's answer was mixed. The Court concluded that federal question jurisdiction did not require a parallel federal cause of action. However, the Court also recognized that the absence of a parallel federal cause of action would preclude federal question jurisdiction in some cases.[24]

In *Grable*, the IRS seized property belonging to the plaintiff, Grable & Sons Metal Products, to satisfy a federal tax deficiency.[25] The IRS then sold the property to a third party. Grable sued the tax sale purchaser in state court, seeking to quiet title to the property.[26] Grable alleged that the tax sale purchaser did not acquire good title to the property under state law because the IRS violated federal law when it seized Grable's property. Specifically, Grable alleged that the Internal Revenue Code required the IRS to provide notice of a tax sale by personal service and that the IRS provided service to Grable by certified mail rather than personal service.[27] The tax purchaser removed the case to federal court on the ground that the claim raised a federal issue about the interpretation of the Internal Revenue Code and, hence, raised a federal question within the meaning of section 1331.[28] The district court denied Grable's

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21. *See, e.g.*, Zubi v. AT&T Corp., 219 F.3d 220, 223 n.5 (3d Cir. 2000); TCG Detroit v. City of Dearborn, 206 F.3d 618, 622 n.2 (6th Cir. 2000); RCS 2000 LP v. Romulus Telecomms., Inc., 148 F.3d 32, 35 (1st Cir. 1998); Seinfeld v. Austen, 39 F.3d 761, 764 (7th Cir. 1994); Alleva, *supra* note 12, at 1538; *Mr. Smith*, *supra* note 12, at 2289–90 (criticizing *Merrell Dow's* parallel right of action requirement).

22. *See, e.g.*, McNeil v. Franke, 171 F.3d 561, 563–64 (8th Cir. 1999); Ormet Corp. v. Ohio Power, 98 F.3d 799, 806 (4th Cir. 1996). Indeed, one commentator concluded that the circuits were evenly split. *Mr. Smith*, *supra* note 12, at 2281–82.

23. 545 U.S. 308, 311–12 (2005).

24. *Id.* at 318 ("*Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relative to, but not dispositive of [the existence of federal question jurisdiction].").

25. *Id.* at 310.

26. *Id.* at 311.

27. *Id.*

28. *Id.*

motion to remand, and the Supreme Court upheld federal question jurisdiction over Grable's claim even though the relevant portions of the Internal Revenue Code did not afford Grable a private right of action.[29]

In reaching its conclusion, the Court laid out a multi-factor test for evaluating whether the federal courts have federal question jurisdiction over a state law claim that incorporates federal issues. The Court concluded that a state law claim gives rise to federal question jurisdiction if: (1) the state law claim necessarily raises a federal issue; (2) the federal issue is actually disputed; and (3) the federal issue is substantial.[30] Even if a state claim met these three requirements, the Court concluded that a federal court could not exercise jurisdiction unless the exercise of jurisdiction would not "disturb[] any congressionally approved balance of federal and state judicial responsibilities."[31] It is with respect to this last factor—congressional intent to allocate jurisdiction between state and federal courts—that the Court concluded that the presence or absence of a parallel federal private right of action was relevant. The Court explained that the absence of a federal private right of action might, but did not necessarily, indicate that Congress intended to foreclose federal jurisdiction over state claims implicating these federal statutes.[32]

In applying its framework to the case before it, the Court concluded that the issue of whether the Code required personal service was essential to Grable's claim because it was the sole basis upon which Grable claimed superior title.[33] The Court also noted that the proper interpretation of the Code was the only disputed issue in the case.[34] Finally, the Court concluded that issue was substantial for a number of reasons. First, the IRS had a "strong interest" in the prompt and certain collection of taxes, and the resolution of the federal issue in the case could interfere with the IRS's ability to collect taxes through seizure and sale of real property. Second, the Court noted that the IRS and tax sale purchasers "may find it valuable" to have federal judges who are more familiar with federal tax law resolve this issue. Finally, the Court noted that only a small number of quiet title cases would raise federal issues.[35]

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29. *Id.* at 311–12.
30. *Id.* at 314.
31. *Id.*
32. *Id.* at 318–19.
33. *Id.* at 314–15.
34. *Id.* at 315.
35. *Id.*

In turning to the absence of a parallel right of action under the Internal Revenue Code, the Court sought to distinguish Grable's claim from the plaintiffs' claim in *Merrell Dow*. In so doing, the Court explained that the combination of two factors rather than the simple absence of a parallel private right of action led the Court to find jurisdiction lacking over the plaintiffs' state law claims incorporating the FDCA in *Merrell Dow*. The Court explained that the combination of both the congressional failure to preempt state remedies for product misbranding and the congressional failure to provide a private federal remedy for misbranding demonstrated a congressional desire to preclude federal question jurisdiction over state claims incorporating the FDCA.[36] The Court reasoned that by failing to preempt state remedies for misbranding, Congress envisioned that states would provide remedies for violations of the federal misbranding requirements and that state remedies for misbranding would lead to a large number of lawsuits. Exercising incorporation jurisdiction over state claims for misbranding would thus result in the removal of a large number of state claims to federal court.[37] Because of the potential for a large number of state misbranding claims, entertaining jurisdiction over such claims would work a significant shift in the balance of jurisdiction between state and federal courts.[38] Because Congress failed to effect such a significant shift in judicial power by directly opening the federal courthouse door through parallel federal suits for misbranding, the Court reasoned that Congress could not have intended to work such a shift in power indirectly by extending use of the incorporation doctrine to include jurisdiction over state claims for misbranding.[39] Thus, the Court reasoned that exercising federal question jurisdiction over the case would have upset the allocation of cases between state and federal courts.

In contrast, although Congress failed to provide a parallel right of action for plaintiffs such as Grable under the Internal Revenue Code, the Court did not see the same implications from that failure. Unlike the federal misbranding regulations at issue in *Merrell Dow*, the Court did not think it likely that states would provide private remedies for violations of Internal Revenue Code notice requirements.[40] As such, exercising jurisdiction over claims incorporating the Code notice provisions would work a rather insignificant shift on the balance of judicial power between state

36. *Id.* at 318.
37. *Id.* at 319.
38. *Id.*
39. *Id.*
40. *Id.*

and federal courts.[41] The Court was less willing to infer an intent to foreclose such a small shift in judicial power from Congress's failure to directly provide for federal jurisdiction through a parallel federal right of action.[42] In short, the Court viewed the potential number of claims as dispositive. The Court reasoned, in essence, that where the incorporation doctrine would create jurisdiction over a large number of state claims, it was unreasonable to believe that Congress would authorize jurisdiction without expressly creating jurisdiction through a private remedy.

II. THE SCHOLARLY ACCOUNT OF INCORPORATION JURISDICTION

Commentators have argued that three different principles place limits on the scope of the federal courts' incorporation jurisdiction. Some commentators have viewed the incorporation doctrine as a doctrine of federalism. Others have viewed the doctrine as a struggle over the proper allocation of power between Congress and the Court in determining the jurisdiction of the lower federal courts. Finally, commentators have argued that prudential and practical concerns about controlling the workload of the federal courts animate the doctrine. None of these theories are exclusive, nor are they inconsistent with each other. Instead, commentators have relied on different aspects of each of the theories in offering limits for the incorporation doctrine. Likewise, strains of each of these theories underlie the Court's reasoning in *Grable*.

A. The Federalism Account

Courts and commentators historically have viewed limits on the incorporation doctrine as a matter of federalism. Under this account, federal jurisdiction over state claims interferes with the ability of states to develop their own regulatory policies through their own court systems.[43] Some of the strength of this objection to federal court jurisdiction is undercut by the *Erie* doctrine. Under *Erie*, the federal court will apply state substantive law to resolve a state claim. However, even under *Erie*, concerns persist that federal court application of state law will be less accurate than

41. *Id.*
42. *Id.* at 319–20.
43. *See, e.g.*, Freer, *supra* note 6, at 312 ("At the same time, there must be appropriate limits to ensure that federal question jurisdiction does not threaten to inundate the federal courts or, importantly, to rob the state courts of their legitimate authority to shape state law.").

state court application of state law.[44] Additionally, while a federal court will apply state substantive law under *Erie*, the federal court will continue to apply its own procedural law. Differences in federal and state procedural law will have an indirect effect on the outcome of a case and, hence, have an indirect effect on the scope of the rights and obligations at issue in the state claim. For example, more liberal federal discovery or the ready availability of summary judgment in federal court may affect the outcome in a given case.

On the other hand, when a state law claim raises issues of federal law, state court jurisdiction over these federal issues interferes with the development of federal law in a similar manner. Even though a state court will apply federal law to resolve the federal issue, concerns persist that federal courts can better interpret and apply federal law. Indeed, the desire for a better interpretation of federal law is frequently cited as one of the reasons for the grant of federal question jurisdiction.[45] For example, commentators note that claims arising under federal law constitute a larger portion of the federal docket than the state docket and, hence, a federal judge is more likely to spend a larger portion of her time interpreting federal laws. Thus, federal courts are perceived to have a greater expertise in federal law.[46] This expertise, in turn, is perceived to lead to a better interpretation of federal law. Commentators also note that federal courts are better able to perceive and consider the federal interest as support for the notion that federal courts can provide a better interpretation of

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44. For example, in a related context—defining the limits of the federal courts' jurisdiction to hear state law claims that are pendent to federal claims, the Court has recognized a desire for a better interpretation of state law as a reason for declining to exercise federal jurisdiction over such state law claims. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (noting the desire to obtain a "surer-footed" reading of state law as a reason for declining the exercise of jurisdiction over pendent state claims). The supplemental jurisdiction statute retains this principle in that it authorizes a federal court to decline to exercise supplemental jurisdiction over a supplemental claim if it raises a novel question of state law or if the state law claims predominate over federal claims. 28 U.S.C. § 1367(c) (2000).

45. *See, e.g.*, Merrell Dow Pharm. v. Thompson, 478 U.S. 804, 826–27 (1986) (Brennan, J., dissenting) ("The reasons Congress found it necessary to add this [federal question] jurisdiction to the district courts are well known . . . . In addition, § 1331 has provided for adjudication in a forum that specializes in federal law and that is therefore more likely to apply that law correctly.").

46. MARTIN REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 2 (2d ed. 1990); STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164–65 (Amer. Law Inst. 1969).

federal law.[47] Finally, state court interpretation of federal law is less likely to result in uniform interpretation of federal law and, hence, more likely to interfere with the federal interests underlying the federal provisions.[48]

Thus, under the federalism account, the incorporation doctrine is seen as an attempt to balance the states' interest in the development of state law through accurate interpretation of state law in state court against the federal interest in uniform and accurate interpretation of federal law. This federalism concern is clearly at work in *Grable*. For example, one of the reasons the Court offers for extending jurisdiction to the claim in *Grable* is the strength of the federal interest in a uniform and expert interpretation of the Internal Revenue Code.[49] The Court weighs this against the "microscopic effect" jurisdiction will have on "the federal-state division of labor" and emphasizes the central role that federal law issues, as opposed to state law issues, will play in resolving the dispute.[50] The federalism account, likewise, is evident in many of the Court's other efforts to articulate the limits of the incorporation doctrine.[51]

B. The Article III Account

Some commentators argue that efforts to formulate limits on the incorporation jurisdiction of the federal courts raise issues concerning congressional power to create the lower federal courts

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47. *See, e.g.*, Alleva, *supra* note 12, at 1495–96.

48. *Id. See also* Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PENN. L. REV. 537, 542 (2007) (identifying securing uniform interpretation of federal law as a core purpose behind conferring federal question jurisdiction on the federal courts and advocating reformulated version of the complete preemption doctrine centered around concerns about uniformity).

49. Grable & Sons Metal Prods., Inc v. Darue Eng'g & Mfg., 545 U.S. 308, 315 (2005) (citing the Government's "strong interest in the "prompt and certain collection of taxes" as a reason why Grable's claim "sensibly belongs in federal court" and noting that "buyers (as well as tax delinquents) may find it valuable to come before judges used to federal tax matters"). *See also id.* at 319–20 (weighing the "clear interest the Government, its buyers, and its delinquents have in the availability of a federal forum" against the absence of "threatening structural consequences" and emphasizing that the interpretation of the Code is the "dispositive and contested federal issue at the heart of the state-law title claim" in finding jurisdiction).

50. *Id.* at 315.

51. *See, e.g.*, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8 (1983) (explaining that a determination about whether to exercise incorporation jurisdiction requires consideration of the "*welter of issues regarding the interrelation of federal and state authority* and the proper management of the federal judicial system" (emphasis added)).

and to implicitly control the jurisdiction of those lower federal courts under Article III.[52] Under this account, standards that allow the Court greater discretion in formulating the limits of incorporation jurisdiction interfere with congressional power to define the jurisdiction of the lower courts. Thus, efforts to formulate limits on incorporation jurisdiction must focus on the language of section 1331 and the congressional intent behind the grant of jurisdiction in section 1331. Under this view, federalism and prudential concerns can animate limits on incorporation jurisdiction only if such concerns are evidenced in congressional intent.[53]

C. The Prudential Account

Finally, commentators also note that two prudential concerns animate efforts to limit incorporation jurisdiction. First, limits on the incorporation jurisdiction of the federal courts stem from a desire to manage the workload of the federal courts. Exercising incorporation jurisdiction over any case that raised a federal issue or even any case that raised a federal issue on the face of a well-pleaded complaint would threaten to inundate the federal courts with state claims.[54] Indeed, the Court itself has expressly cited concerns about managing the workload of the federal courts as a consideration in determining whether to extend incorporation jurisdiction. For example, in *Franchise Tax Board*, the Court explained, "the phrase 'arising under' masks a welter of issues

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52. *See* Alleva, *supra* note 12, at 1494 (observing that "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.").

53. *See, e.g.*, Martin Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. L. REV. 761, 785 (1989) (a court may not use statutory construction as a "mere guise for substitution of its own policy choices, in derogation of those made by the representative branches" and instead must interpret a statute "in the manner most consistent with the policy choices made by the representative branches"). *See* John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CINN. L. REV. 145, 147 n.1 (2006) (noting the debate among commentators regarding the authority of the courts to define the scope of federal jurisdiction but arguing that concerns about functionality should also animate the debate).

54. *See, e.g.*, Freer, *supra* note 6, at 315 ("Permitting every case in which a federal issue might be raised to invoke federal question jurisdiction would do far more than create a workload problem necessitating some means of docket control. The sheer volume of cases would imperil the lower courts' ability even to function."). *See also* Seinfeld, *supra* note 48, at 545–46 (advancing docket control as a justification for the well-pleaded complaint rule).

regarding the interrelation of federal and state authority and *the proper management of the federal judicial system.*"[55]

On several occasions, the Court has declined to extend incorporation jurisdiction out of this concern that incorporation jurisdiction would open the federal courts to an excessive number of claims. For instance, in distinguishing *Grable* from *Merrell Dow*, the Court relied on the fact that only a relatively small number of quiet title suits would raise federal issues while a large number of negligence suits would raise federal issues.[56] Likewise, in *Snowshoe Mining Company v. Rutter*, the Court declined to extend jurisdiction to the constitutional limits because of the potentially large number of cases that would fall within such jurisdiction. The Court noted that if jurisdiction extended to every case which raised a federal issue, "every action to establish title to real estate (at least in the newer states) would invoke federal question jurisdiction."[57] Under this account, the limits on incorporation jurisdiction seek to balance a desire for federal resolution of federal issues against a desire to keep the workload of the federal courts manageable and, hence, try to weed out the cases implicating less significant federal interests.

Second, the desire to have certain and predictable jurisdiction rules also animates limits on incorporation jurisdiction.[58] As jurisdictional rules become more case-sensitive and introduce more judicial discretion, parties are less able to predict whether jurisdiction is proper in federal court. This may increase the cost of litigation by increasing the likelihood of litigation over jurisdiction. Uncertainty may also dissuade litigants from availing themselves of a potential federal forum, because litigants may desire to avoid the expense and delay involved in jurisdictional litigation. For these reasons, commentators note that the efforts to define the limits of incorporation jurisdiction involve a struggle between the desire, on one hand, to extend jurisdiction to all cases implicating significant federal issues and, on the other hand, the desire to provide a rule that is predictable and workable for litigants.[59] Indeed, this concern is central to Justice Thomas's

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55. 463 U.S. at 8 (emphasis added).

56. *See* 545 U.S. 308, 319 (2006). *See also supra* notes 36–39 and accompanying text.

57. Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900).

58. *See, e.g.*, Freer, *supra* note 6, at 342 ("Certainly jurisdictional rules should be as clear as possible; no litigation seems as wasteful as that aimed at whether the parties are in the right court.").

59. *See, e.g.*, *Mr. Smith*, *supra* note 12, at 2292 (advocating a comity approach to incorporation jurisdiction, in part, because the rule "fosters jurisdictional clarity").

concurring opinion in *Grable*. Justice Thomas ultimately concurred in the majority's opinion in *Grable*, because the majority "faithfully" applied Supreme Court precedent.[60] However, Justice Thomas acknowledged that he would be willing to reconsider the propriety of incorporation jurisdiction in a case in which one of the parties expressly challenged it.[61] Justice Thomas's primary criticism of the incorporation doctrine was its lack of certain limits. He wrote, "Jurisdictional rules should be clear. Whatever the virtues of the *Smith* standard, it is anything but clear . . . . Whatever the vices of the *American Well Works* rule, it is clear."[62]

III. THE *ERIE* DOCTRINE AND THE LIMITS OF FEDERAL JUDICIAL COMMON LAW POWERS

The *Erie* doctrine dictates that federal courts, when sitting in diversity, have no power to promulgate their own federal common law. Instead, federal courts are obligated to apply state substantive law. The *Erie* doctrine has been universally recognized as a product of federalism. However, the nature and origins of these federalism limits have been the subject of scholarly debate.

Some early commentators and courts have embraced the "state enclave" theory in explaining the federalist underpinnings of *Erie*. These courts and commentators reason that either the Tenth Amendment, general constitutional design, or both carve out a field or enclave of local affairs that are committed solely to state regulation.[63] In turn, the federal courts' act of promulgating "general common law" prior to *Erie* intruded upon these areas relegated exclusively to state legislative authority.[64] Implicit in this reasoning is the assumption that the federal power to displace state choices about substantive social policy is coextensive among the branches of the federal government.

However, building on John Hart Ely's seminal work, *The Irrepressible Myth of* Erie,[65] some commentators have suggested that the limits on federal judicial power recognized in *Erie* are derived as much, if not more, from separation of powers

60. 545 U.S. 308, 320 (Thomas, J., concurring).

61. *Id.* at 321–22.

62. *Id.* at 321.

63. *See generally* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 700–06 (1974) (describing the "state enclave theory" and citing examples of its use the Supreme Court).

64. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 474–75 (1965) (Harlan, J., concurring).

65. Ely, *supra* note 63.

principles.[66] They reason that the federalism at work in *Erie* is not the overt federalism underlying the allocation of limited powers to the federal government. Rather, they contend that the federalism at work in *Erie* is the nuanced or embedded federalism that underlies Article I's exclusive grant of lawmaking authority to Congress. These commentators reason that the lawmaking power of the federal courts is not coextensive with Congress. Rather, the Constitution through separation of powers imposes an additional limit of the lawmaking power of the federal judiciary.

Professors Mishkin and Merrill, for example, use the facts of *Erie* to demonstrate that the lawmaking powers of Congress and the judiciary are not coextensive. The underlying issue in *Erie* concerned what duty, if any, a railroad owed to a person injured in the railroad's right-of-way. Even as construed in 1938, the year in which *Erie* was decided, Professors Mishkin and Merrill reason that Congress would have had the power under the Interstate Commerce Clause to regulate this issue.[67] Thus, had the federal courts promulgated federal law on this issue, federal courts would not have invaded an area left to the regulatory power of the states exclusive of the federal government. However, they reason it was universally accepted that federal courts lacked the power to regulate in this area.[68]

Both Professors Mishkin and Merrill attribute the difference in the limits of congressional and judicial lawmaking power to the more democratic nature of Congress. Because states and their interests are represented in an elected Congress but not in an appointed federal judiciary, these commentators reason that Congress has broader powers to displace state choices about social policy through lawmaking than the federal judiciary.[69] Thus, while Congress may have the authority to legislate nationally uniform standards in certain areas of substantive regulation, the federal judiciary cannot use their common law powers to regulate in those same areas because of the lack of representation of state interest in the formulation of those policies.

In this light, *Erie* can be viewed as an Article I limitation on the power of the federal courts to use their common law powers.[70]

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66. *See, e.g.*, Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 14–15 (1985); Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682 (1974).

67. Merrill, *supra* note 66, at 14–15; Mishkin, *supra* note 66, at 1684 n.10.

68. Merrill, *supra* note 66, at 15–16; Mishkin, *supra* note 66, at 1684.

69. Merrill, *supra* note 66, at 17; Mishkin, *supra* note 66, at 1685–86.

70. *See* Mishkin, *supra* note 66, at 1683 ("Principles related to separation of powers impose an additional limit on the authority of federal courts to engage in lawmaking on their own (unauthorized by Congress). Or, to put the thought in

When federal courts have promulgated general common law in areas in which Congress had not chosen to regulate either concurrently with or preemptively to the states, federal courts have interfered with congressional lawmaking power under Article I. Implicit in that power is the choice to regulate or not to regulate and the choice to regulate concurrently with the states or to preempt state regulation. Thus, when federal courts promulgate law in an area which Congress has not regulated, such as the liability of railroads for accidents in their rights-of-way, the affront is to congressional preemptive powers—or more precisely, Congress's choice not to exercise its preemptive powers. Viewed in this light, the *Erie* doctrine, which prohibits courts from acting when Congress has not acted, is a doctrine of separation of powers and the indirect principles of federalism embedded in separation of powers rather than a doctrine of direct federalism.

IV. *MERRELL DOW* AS AN ARTICLE I LIMITATION

This idea of embedded or indirect federalism can also shed light on the scope of the federal courts' jurisdiction to hear cases arising under federal law under section 1331. Courts and commentators historically have viewed incorporation jurisdiction solely as an interference with direct federalism principles and Article III principles akin to the state enclave theory criticized by commentators like Mishkin and Merrell. Namely, courts and commentators have argued that the federal court's exercise of jurisdiction over state law claims unduly interferes with the states' ability to develop regulatory policies in an area reserved to the states.[71] Additionally, courts and commentators have suggested that it is an interference with congressional power under Article III to create and define the limits of federal court jurisdiction.

These concerns over federalism miss the mark with respect to a certain class of state claims.[72] When federal courts exercise jurisdiction over this class of state claims, federal courts do not impermissibly interject the federal government into an area

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terms used by Ely, aside from any limits on Congress' lawmaking, there are state "enclaves" against intrusion by the federal judiciary.").

71. *See, e.g.*, Freer, *supra* note 6, at 312 ("At the same time, there must be appropriate limits to ensure that federal question jurisdiction does not threaten to inundate the federal courts or to rob the state courts of their legitimate authority to shape state law.").

72. *See* Hirshman, *supra* note 12, at 18–19 (recognizing cases in which federal law prescribes a standard of behavior but fails to provide a private remedy as one of the two classes of hybrid cases).

reserved to the states' regulatory power. Instead, federal courts impermissibly interfere with a Congressional choice not to regulate in an area within its ambit and not to preempt state regulation in the area. First, this Part will attempt to define this class of state claims. Next, it will explain why such claims raise separation of power and indirect federalism claims. Finally, this Part will describe a standard for arising under jurisdiction that accommodates these separation of power and indirect federalism concerns.

A. The Two Classes of Incorporation Claims

Part of the Court's difficulty in articulating clear limits on the federal courts' incorporation jurisdiction stems from a failure to distinguish between the types of state law claims that incorporate federal law. In some cases, state law touches on the same core concern as federal law and creates a right or obligation that mirrors or incorporates a federal right or obligation. Expressed another way, the state law describes the state right or obligation by reference to federal law. In the language of the Court, the subject of the state right or obligation is "of central concern to the federal statute."[73] The state law then provides an alternative remedy, usually a private remedy, for enforcement of that federal right or obligation. In other words, the state law provides a container or vehicle for the private enforcement of federal rights and obligations.

The state law at issue in *Moore v. Chesapeake & Ohio Railway*[74] provides an example of this type of incorporated claim. A federal statute prescribed certain safety standards for railroads. It also provided a private remedy for railroad employees injured by a violation of one of these safety standards, but only if the injured employee was engaged in interstate commerce. A Kentucky employers' liability act touched on the same core concern. Namely, the Kentucky Act regulated the circumstances under which employers could be liable for workplace accidents. The Kentucky Act incorporated the federal safety standard by making violation of any federal safety standard a breach of Kentucky law.[75] Unlike the federal statute, Kentucky law allowed intrastate employees as well as interstate employees to maintain a private action to enforce the safety standard. Thus, it provided a private remedy where federal law had failed to provide one. However, it

73. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 25–26 (1983).

74. 291 U.S. 205 (1934).

75. *Id.* at 212–13.

provided this remedy for what effectively amounted to a breach of a federal obligation.

The state provision at issue in *Merrell Dow* can be viewed in this light as well. The Federal Food, Drug and Cosmetic Act imposed standards for the labeling and distribution of drugs.[76] Ohio law provided that breach of one of those federally created standards constituted negligence.[77] Both the federal Act and Ohio law touched on the same central concern—the desire to regulate the manner in which pharmaceutical manufacturers labeled and marketed drugs to consumers. The Ohio law, by making breach of the federal standard evidence of negligence, imposed an identical obligation on manufacturers. However, unlike the federal statute, the Ohio law provided for private enforcement of the federal obligation. Federal jurisdiction over these state law "container claims" poses potential separation of powers problems.

In contrast, in some cases the state claim and the incorporated federal law do not share a central concern. Rather, the state law creates rights and obligations that federal law concerns only coincidentally or indirectly. Whereas in container claims Congress has legislated in an area without preempting state regulation of the same concern, in non-container claims no such decision is apparent, or perhaps even applicable. *Grable* presents a good example of this. The plaintiff's state law claim to quiet title concerned property rights and title to real property.[78] In contrast, the incorporated federal law, the Internal Revenue Code, concerned the method for collection of federal tax deficiencies.[79] The federal tax code did not attempt to define the scope of property rights or the indicia of ownership of real property. The two laws intersected coincidentally or indirectly.

Smith v. Kansas City Title & Trust presents another example.[80] In *Smith*, a shareholder brought suit against Kansas City Title & Trust to enjoin the company from investing in farm loan bonds on the grounds that investing in the bonds would be a breach of fiduciary duty.[81] The shareholder alleged that investing in the bonds would be a breach of fiduciary duty under Missouri law, because the issuance of the bonds was not validly authorized by law. The shareholder acknowledged that the bonds were issued by

76. 21 U.S.C. § 331 (2000).
77. *See* Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 805–06 (1986).
78. *See* Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 315–16 (2005).
79. 26 U.S.C. § 6335 (2000).
80. 255 U.S. 180 (1921).
81. *Id.* at 195.

the Federal Land Bank pursuant to the Federal Farm Loan Act and that the Federal Farm Loan Act authorized the Federal Land Bank to issue the bonds.[82] However, the shareholder claimed that the federal Act was unconstitutional and, hence, that the bonds had not been validly authorized.[83] In *Smith*, the state law at issue governed the obligations that the corporation owed to its shareholders. In contrast, the Federal Farm Loan Act did not concern corporate governance. Instead, it concerned emergency measures aimed at stabilizing the market for farm mortgages and making farm mortgages more readily accessible to increase capital available for agricultural development.[84] It was relevant to the shareholders claim, coincidentally, because the bank sought to invest in bonds issued pursuant to the Act and the purported unconstitutionality of the act gave rise to a breach of fiduciary duty. Federal question jurisdiction over these coincidental claims raises more traditional federalism and prudential concerns.

Indeed, courts and commentators have recognized this distinction between indirect and direct conflicts in the area of preemption doctrine. For example, the FDA most recently argued that the Medical Device Amendments to the Federal Food Drug and Cosmetic Act preempted state common law product liability claims based on defects in the design or manufacture of medical devices because those state common law duties touched on the same central concern as the Medical Device Amendments—namely, the safety of the design and manufacture of the device. In contrast, the FDA noted the Medical Device Amendment did not preempt generally applicable state laws such as the UCC or general electrical codes that only incidentally pertained to the design of medical devices.[85]

B. The Nature of the Federal Interests in State Law Container Claims

Federal jurisdiction over state container claims does not raise the types of federalism and Article III prudential concerns underlying the traditional federalism account of incorporation jurisdiction. Contrary to the traditional federalism account of the incorporation doctrine, when federal courts exercise jurisdiction

82. *Id.* at 198.
83. *Id.*
84. *Id.* at 202.
85. Brief for the United States as Amici Curiae Supporting Respondent, Riegel v. Medtronic, Inc., 28 S.Ct. 999 (2008) (No. 06-179), 2007 WL 3231418 at *27–28.

over state container claims, federal courts do not impermissibly interject the federal government into an area reserved to the state's regulatory power. Indeed, the fact that the state claim replicates federal rights or obligations demonstrates that the area falls within the purview of federal regulation. Not only could Congress act to create rights and obligations in the area, Congress, in fact, has so acted. As part of that power to regulate in the area, Congress could have provided a private federal remedy under the statute. Congress, likewise, could have delegated to the federal courts the power to develop a federal common law to resolve disputes under the statute.[86] Finally, Congress could have precluded state remedies and regulations in the area.[87] Clearly, none of these actions would be an undue encroachment of federal power on state regulation. Similarly, federal interpretation of state law—even if it is a less accurate interpretation of state law—could not result in an undue federal encroachment on state regulation. Indeed, federal courts supplanting state law with federal law would not be a direct encroachment on state regulation.

In fact, as some commentators have recognized, the traditional federalism and prudential accounts of arising under jurisdiction would seem to support federal jurisdiction most strongly in state container claims.[88] As state claims come closer to merely replicating federal rights and obligations, the claims appear to come closer to requiring interpretation of federal law predominately, if not exclusively, and would appear to entangle the federal courts in much less interpretation of state law than other incorporated claims might involve. Where a state law merely provides a private remedy for breach of a federal safety standard, as is the case in a state container claim, the only legal issues to be resolved in a dispute arising under state law would seem to center around the interpretation and application of the federal safety standard. Namely, the only issue likely to arise in the lawsuit

86. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (recognizing that Congress delegated the power to federal courts to develop a common law for resolving labor disputes under the Labor and Management Relations Act).

87. *See, e.g.*, Air Transportation Safety and System Stabilization Act §408(b), 49 U.S.C. § 40101 (2000) (creating a "[f]ederal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001" and providing that "this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights").

88. *See* BABCOCK, MASSARO & SPAULDING, CASES AND PROBLEMS ON CIVIL PROCEDURE 247 (2d ed. 2006).

would appear to be whether the defendant's conduct breached the federal safety standard.

For example, consider a state law that makes it unlawful to terminate an employee for engaging in conduct protected by a federal, state, or local law and provides a private right of action to any employee terminated in violation of this law. If a terminated employee sues under the law alleging that she was fired for engaging in conduct protected by federal law, the central issue pertaining to liability would seem to be whether her conduct was protected under the federal law, which requires a determination of the law's meaning. A case such as this would most strongly fit the purposes for arising under jurisdiction as explained by the traditional federalism account. Federal issues will most certainly arise in resolving the dispute. Extending federal jurisdiction would seem to ensure a more expert and, hence, more accurate resolution of these federal issues. Likewise, federal jurisdiction would ensure greater uniformity in the resolution of the federal issues. In contrast, because the issues surrounding liability are predominantly, if not exclusively, federal issues extending federal jurisdiction would not create the risk of an inaccurate resolution of state law issues. Thus, the balance of federal and state concerns central to the traditional federalism account would seem to warrant federal jurisdiction. Further, adopting the assumption made by the Supreme Court in *Grable*, state law claims alleging breach of a federal regulatory standard are likely to arise frequently. As the Supreme Court notes in *Grable*, extending federal jurisdiction over these claims will shift a large volume of cases from state to federal court. However, it is precisely because such a large volume of cases will be affected that federal jurisdiction is most needed. Because these federal issues will arise in a large number of cases, federal jurisdiction is most needed to promote uniformity.[89]

This misplaced emphasis on the direct conflict between state and federal lawmaking causes courts and commentators to fail to account for the more nuanced federalism embedded in Article I and misconceives the nature of the "federal" issues in these state container cases. As Professors Mishkin, Merrill, and others recognized in the context of the *Erie* doctrine, the lawmaking powers of Congress and the federal judiciary are not coextensive. Rather, Article I grants Congress broader lawmaking powers and restricts the lawmaking powers of the federal courts. In acting to regulate in the field in these cases where federal and state rights overlap, Congress has defined the scope of these federally created rights and obligations. Part of the Congressional power to regulate

89. *See id.*

includes the power to prescribe a manner for their enforcement which excludes private enforcement. When federal courts entertain jurisdiction over these state law container claims that seek private enforcement of these federally-created rights, federal courts unduly encroach on Congressional lawmaking power under Article I to dictate the manner of enforcement and remedies available for congressionally created rights and obligations.

Because the forum which resolves a dispute will apply its own procedures to do so, the forum in which a dispute is resolved will affect the ultimate outcome in the dispute.[90] In simple terms, procedure affects substance. Thus, when courts choose to provide a federal forum to vindicate disputes, necessarily that choice will affect the scope of the obligations and rights at issue in those disputes and, as such, interfere with Congressional choices about the scope of the rights and obligations at issue. When state claims merely replicate or incorporate federal rights for which Congress has not provided a federal cause of action, as they do in state container claims, the potential interference is compounded. As the state claim comes closer to merely replicating the federal right, the only essential difference between the state and federal claim seemingly becomes the availability of a federal forum to enforce the rights. Thus, when federal courts exercise incorporation jurisdiction over these state claims, federal courts effectively provide a private federal remedy. In so doing, courts expand the scope of those federally created rights. Indeed, in the context of direct implied remedies, courts and commentators have long recognized that judicial implication of private remedies encroaches on the Congressional authority to regulate and amounts to judicial lawmaking.[91] When federal courts indirectly imply private federal remedies through the federal enforcement of overlapping state rights, courts likewise engage in the same impermissible judicial lawmaking.

Moreover, by promoting a uniform federal interpretation of the seemingly federal issues in these state container claims, federal jurisdiction strips these claims of the essential state nature that congressional choices about private enforcement and preemption would have otherwise preserved. When Congress declines to provide private enforcement of federally created rights but also

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90. *See supra* notes 44–45 and accompanying text.

91. *See, e.g.*, RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 830 (5th ed. 2003) (characterizing the role of federal courts in implying private remedies for violations of federal statutes as "federal common lawmaking").

declines to preempt state regulation in the area, Congress leaves open the possibility of private remedies in the regulatory field. However, by failing to provide for private enforcement of the federal right, Congress makes any private remedies exclusively state remedies by nature. To demand uniform interpretation of the federal issue in state container claims misperceives the state nature of these claims. When states create state container claims, they reference federal law merely as a shorthand for the rights and obligations at issue. However, the rights and obligations at issue in the state container claims remain quintessentially state created rights and obligations. There is no need for a uniform federal interpretation of the rights and obligations at issue in these state container claims because they are not uniform claims. Rather, each container claim is a creature of the state which created it and, hence, open to differing interpretations from state to state.

Indeed, the potential for non-uniform interpretation of the rights and obligations at issue could be an intentional part of congressional design. A congressional choice to forgo federal private remedies but leave an area open to state regulation may reflect a desire to capture local sensitivities in the interpretation and private enforcement of the rights and obligations at issue or a desire to use the states as laboratories for the development of novel solutions to complex legal problems.[92] As discussed above, federal jurisdiction may interfere with those efforts to capture local sensitivities.[93] For example, federal jurisdiction may remove a case from politically accountable and more locally sensitive state courts and the interpretations that those politically accountable courts may provide.[94]

As Professors Mishkin and Merrell observed, one explanation for the greater lawmaking power granted to Congress under Article I is the states' representation in Congress.[95] Because states had representation in the legislative bodies, states' interests would be adequately protected through the legislative process.[96] Thus, the legislative branch should be granted broader power to encroach on state interests. The *Erie* doctrine protects this embedded federalism by ensuring federal courts do not supplant state law with federal

92. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

93. *See supra* notes 44–45 and accompanying text.

94. *See* REDISH, *supra* note 46.

95. *See* Merrill, *supra* note 66, at 17; Mishkin, *supra* note 66, at 1685.

96. *See id.* This was particularly true at the time the Constitution was ratified because states appointed senators directly. This remains true even after direct elections of senators because representation remains apportioned along state lines.

common law in areas where Congress has chosen not to exercise its lawmaking powers. In the same way, limits on arising under jurisdiction should preserve this embedded federalism. Because choices about whether and in what manner to provide for enforcement of federally created rights and obligations invariably affect the scope of those rights and obligations, these choices affect the extent to which federal regulation overlaps with and, hence, interferes with state regulation. Limits on the arising under jurisdiction of the federal courts should ensure that federal courts do not exercise their jurisdiction to supplant state law remedies with federal law remedies in areas where Congress has expressly left private enforcement to state law.

C. A New Theory of Incorporation Jurisdiction

What, then, would an arising under doctrine that focuses on these Article I federalism concerns as well as traditional federalism and prudential concerns look like? Such a doctrine would look similar to the standard announced in *Grable,* with some modifications. First, rather than creating a single balancing test for all incorporation claims, an Article I standard would involve a two-step analysis. Additionally, the role of the private right of action inquiry under such an Article I approach would differ from the Court's approach in *Grable.*

In *Grable*, the Court promulgated a single balancing test for all incorporation claims that sought to balance the federal interest in a uniform interpretation of federal law against the state interest in a more accurate interpretation of state law.[97] Under the Court's approach in *Grable*, the private right of action inquiry served a prudential purpose, with the absence of a private right of action weighing against the exercise of jurisdiction in those cases where federal jurisdiction would shift a large number of cases from state to federal court.[98] Under an Article I approach, a court would engage in a two-step process. First, the court would determine the nature of the incorporation claim by examining the relationship between the state claim and the would-be federal private right of action. When the state claim touches on the same central concern as the would-be federal claim and merely provides for private enforcement of the federal right or obligation, as it does in a state container claim, the absence of a parallel federal private right of action would prove dispositive. When instead state law coincidentally intersects with the federal law at issue, the absence

97. *See supra* notes 30–34 and accompanying text.
98. *See id.*

of a private right of action under federal law would not decide the issue. In this way, an Article I approach to incorporation jurisdiction alters only the relevance of the absence of a private right of action and, consequently, the focus of the private right of action analysis. The focus becomes not on whether incorporation jurisdiction will shift a large number of state cases to the federal courts—an inquiry premised on the traditional federalism account of incorporation jurisdiction—but instead on the relationship between the state right and the incorporated federal right.

On the other hand, in those cases where federal law arises coincidentally in a state law claim such as *Smith* and *Grable*, the absence of a federal private right of action would not interfere with the congressional definition of federal rights and obligations and, hence, would not preclude incorporation jurisdiction. In those cases, a principle of inclusion that sought to balance the competing interests in uniform and accurate interpretation of federal law and state interest in accurate interpretation of state law would appropriately define the limits of incorporation jurisdiction. Indeed, this is exactly the approach that the Court took in *Grable* when it sought to assess the substantiality of the federal issue by weighing the federal interest in uniform interpretation of the Internal Revenue Code against the likelihood that the federal issue would actually arise in the litigation and the likelihood that any issues of state law would actually arise in the claim.[99]

One common criticism of the Court's decision in *Merrell Dow* is that it implicitly makes a parallel federal private right of action a necessary condition for the exercise of incorporation jurisdiction.[100] In so doing, critics contend the Court effectively eliminates incorporation jurisdiction because in only a rare case will a plaintiff forgo an available federal remedy. Critics contend that this prevents federal courts from lending their expertise and receptivity to claims that, although ostensibly cloaked in the mantle of state law, raise important and substantial federal claims. Viewing *Merrell Dow* as an Article I limitation on jurisdiction, however, will not yield such a sweeping exclusion of incorporation jurisdiction. The absence of a parallel right of action operates as an exclusionary principle in only a certain class of incorporation cases: state container claims. Thus, incorporation jurisdiction would be excluded in cases such as *Merrell Dow* where the practical effect of incorporation jurisdiction would be to create a

99. *See* Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 315 (noting that the federal issue is actually contested and appears to be the only contested issue).

100. *See* Alleva, *supra* note 12, at 1530–31; Freer, *supra* note 6, at 329.

private federal remedy. However, federal courts will be free to balance the competing federal and state interests in those cases in which federal and state law coincidentally intersect. Under such a balancing test, federal courts will retain jurisdiction over state law claims that raise important and substantial questions of federal law.

V. CONCLUSION

Current limits on the arising under jurisdiction of the federal courts fail to account for the Article I federalism concerns underlying a Congressional choice to forgo private enforcement of federally created rights and obligations. Where Congress has chosen to create federal rights and obligations but has not chosen to provide a private federal remedy for enforcement of those rights, federal courts should not provide an indirect federal remedy by providing a federal forum for state law claims which merely replicate federal rights but provide for private enforcement. In all other cases, federal courts should remain open to exercise jurisdiction over claims that raise substantial and central issues of federal law even when those claims arise cloaked in the mantle of a state claim.