Washington Law Review

Volume 88 | Number 3

10-1-2013

A Modified Theory of the Law of Federal Courts: The Case of Arising-under Jurisdiction

Simona Grossi

A MODIFIED THEORY OF THE LAW OF FEDERAL COURTS: THE CASE OF ARISING-UNDER JURISDICTION

Simona Grossi*

To my Civil Procedure Team 2012-2013

Abstract: This Article examines and evaluates the legal process method as a perspective from which to assess the law of federal courts. It then offers a modified approach to legal process that encompasses the full range of considerations that ought to inform modern judicial decision-making in this context. With that modified approach in mind, the article describes and critiques the Supreme Court's statutory arising-under jurisprudence, both as originally developed and as currently practiced. The article shows that while the Court's early "arising-under" jurisprudence was founded on durable principles and on the reasoned application of those principles, more recent decisions by the Court have strayed from that approach in service of a more mechanical jurisprudence. This approach seems to be premised more on case-management concerns than on the congressionally endorsed value of providing a federal forum for the interpretation and application of federal law. The article ends by examining the Court's decision in *Gunn v. Minton*. As the article explains, Gunn offered the Court an opportunity to redirect the arising-under analysis back toward a perspective that would more closely reflect the legitimate and enduring principles of federal question jurisdiction. The Court, however, missed that opportunity and instead endorsed a mechanical, four-part test as a substitute for reasoned analysis.

---

* © 2013 Simona Grossi. Associate Professor of Law, Loyola Law School, Los Angeles, J.S.D., U.C. Berkeley School of Law, LL.M., U.C. Berkeley School of Law, J.D., L.U.I.S.S. Guido Carli, Rome, Italy. Allan . . . seriously man! Special thanks to Chris May for his illuminating thoughts, his dedication, his friendship, and his invaluable support. I also want to thank my colleagues Sam Pillsbury and Georgene Vairo for their insightful comments on this article, and for their invaluable ideas on teaching and writing. Additional thanks go to Lonny Hoffman and his students of the Colloquium at the University of Houston, for the wonderful exchange we had in April 2013. I would also like to thank James Wendell, the Editor in Chief of the Washington Law Review during the year 2012/2013 for his support and encouragement. Finally, this article is dedicated to my Civil Procedure Class 2012/2013, who brought me joy day after day and who inspired this article.

INTRODUCTION

On February 20, 2013, the Supreme Court announced its decision in *Gunn v. Minton*.[1] There the Court revisited the scope of the federal courts' statutory "arising-under" jurisdiction in the context of a legal malpractice suit premised on alleged attorney errors committed in a prior patent litigation.[2] The significance of the decision transcends the specific context in which it arose. Although *Gunn* involved patent law arising-under jurisdiction, 28 U.S.C. § 1338,[3] that jurisdictional standard is interpreted in precisely the same manner as the similarly worded § 1331 standard.[4] Hence, the decision in *Gunn* applies to a full range of federal question cases in which a federal issue is embedded in a state-law claim. In addition, and of equal importance, an assessment of *Gunn* and the law of arising-under jurisdiction provides an opportunity to revisit and reexamine the theoretical foundation of the law of federal courts.[5]

1. __U.S.__, 133 S. Ct. 1059 (2013).
2. *Id.* at 1062–63.
3. *Id.* at 1062.
4. *Id.* at 1064.
5. *See* Simona Grossi, *Forum Non Conveniens Reconsidered*, 75 U. PITT. L. REV. (forthcoming

The *Gunn* opinion was highly anticipated by the legal community because three decades of prior decisions by the Court had generated considerable confusion as to the scope of arising-under jurisdiction. This was particularly so in cases where the jurisdictionally relevant federal ingredient was embedded in a state law claim—so called "federal ingredient" cases. Some commentators hoped that the Court would adopt the Holmes "creation test"[6] as the exclusive measure of arising-under jurisdiction.[7] Others hoped for a clarification of the federal-ingredient test.[8] Still others, like this author, hoped that the Court would redirect the jurisdictional analysis back to the fundamental principles that once animated the Court's arising-under jurisprudence.[9]

With the decision now in hand, everyone should be disappointed. The Court did little to clarify the underlying doctrine and virtually nothing to develop a coherent theoretical approach to jurisdictional questions. As I will show, *Gunn* runs afoul of foundational theoretical principles at the heart of the law of federal courts[10] and retains the Court's misdirected jurisdictional focus on an untenable distinction between what constitutes a cause of action and what constitutes an enforceable right.

The specific jurisdictional issue in *Gunn* focused on what had come to be known as the third and fourth prongs of the "*Grable* test,"[11] a four-part test[12] designed to measure the scope of federal-ingredient jurisdiction. Thus, the critical questions in *Gunn* were whether the federal ingredient embedded in the plaintiff's state-law claim was substantial[13]—the third prong—and whether the exercise of jurisdiction over that claim would upset the congressionally mandated balance between federal and state courts[14]—the fourth prong. Lower courts considering *Grable*'s four-part test had been struggling with the interpretation and application of both of these prongs. Some had adopted

---

2014); Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth With No Exit*, 47 AKRON L. REV. (forthcoming 2014).

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

7. *Amicus Curiae* Brief of Law Professors in Support of Petitioners at 1–2, 25, Gunn v. Minton, __U.S.__, 133 S. Ct. 1059 (2013) (No. 11-1118).

8. *See, e.g.*, Elizabeth Y. McCuskey, *Clarity & Clarification: Grable Federal Questions in the Eyes of Their Beholders*, 91 NEB. L. REV. 387, 388–89, 451–52 (2012).

9. *See infra* text accompanying notes 137–145.

10. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

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

12. *Id.* at 314.

13. Gunn v. Minton, __U.S.__, 133 S. Ct. 1059, 1066–69 (2013).

14. *Id.* at 1068–69.

detailed and highly technical doctrinal tests that led to counterintuitive results where jurisdiction was denied over concededly "significant" federal questions.[15] Others had adopted a more conceptual approach, seemingly designed to apply the *Grable* test and, at the same time, avoid that test's obvious strictures.[16] Some lower courts actually confessed that the jurisdictional determination was subjective and speculative and that, under similar circumstances, different judges might reach different conclusions.[17] While the *Gunn* Court did address the third and fourth prongs of the *Grable* test, it did little other than endorse its previous iterations of those elements, providing neither a defense for them nor a principled method through which they might be applied in the future. Thus, much of the confusion over federal jurisdictional standards that preceded *Gunn* remains unresolved, and will remain so until the Court adopts a principled, theoretically grounded approach to federal question jurisdiction.

In Part I.A, I revisit and critique the philosophy of the legal process school as applicable to the specific context of federal courts, and I offer a modified approach to the school's foundational method. In Part I.B, I identify the core principles at the heart of arising-under jurisdiction and suggest an analytical model that is premised on those principles and capable of yielding predictable, nonsubjective conclusions. In Part II, I offer Justice Cardozo's opinion in *Gully v. First National Bank*[18] as an exemplar of the theoretical and analytical model developed in Part I. Part III examines more recent arising-under cases and shows that, beginning in the 1980s, *Gully*'s approach to jurisdiction was abandoned and replaced by a maze of increasingly complex doctrinal tests that are inconsistent with the fundamental principles that animated *Gully*. Part IV presents a case study of *Gunn v. Minton*,[19] describing the basic controversy and the lower courts' decisions. In Part V, I offer a *Gully*-based solution to the arising-under issue in *Gunn*, and in Part VI, I present and critique the Supreme Court's resolution of the same case. Finally, in Part VII, I offer concluding remarks regarding the future direction of federal question jurisdiction.

---

15. *See, e.g.*, Mikulski v. Centerior Energy Corp., 501 F.3d 555 (6th Cir. 2007) (en banc), *cert. denied*, 553 U.S. 1031 (2008).

16. *See, e.g.*, Immunocept, LLC v. Fulbright & Jaworski, LLP, 504 F.3d 1281 (Fed. Cir. 2007); Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262 (Fed. Cir. 2007).

17. *E.g.*, *Mikulski*, 501 F.3d at 561.

18. 299 U.S. 109 (1936).

19. __U.S.__, 133 S. Ct. 1059 (2013).

I. TOWARD A THEORY OF FEDERAL JURISDICTION

Gunn offered the Supreme Court an opportunity to return to *Gully*'s principled approach or, at the very least, to provide a comprehensible map that would assist lower federal courts in navigating the current doctrinal maze. The Court, regrettably, missed that opportunity. Instead, the Court endorsed a formulaic approach that disserves well-established principles of jurisdiction and does little to allay the confusion. Regrettably, this test also invites results inconsistent with the congressionally mandated goal of providing a federal forum for the interpretation and application of federal law.

In the early twentieth century, Roscoe Pound lamented what he saw as an increasing reliance on "mechanical" jurisprudence, a form of judicial decision-making that proceeds through structured formulas and uses conceptions as ultimate solutions rather than premises from which to reason.[20] As Pound saw it, this type of jurisprudence offers narrow rules that confine judicial discretion, leading judges to try to fit the case to the rule rather than the rule to the case.[21]

It is true that the common law method proceeds through case law, and judicial opinions give contour and content to the applied principles and rules. This is, indeed, the beauty and strength of the common law system. However, in articulating and applying principles and rules, judges should not fail to link the resulting doctrines and formulas to the underlying principles and ideas from which those doctrines and formulas are derived.[22] When they fail to do so, their "mechanical" jurisprudence disserves the ends of justice.

Over a century ago, Pound sensed that the common law method was increasingly exposed to the risks of mechanical jurisprudence, and thus encouraged legal thinkers to revisit the relevant conceptions at the heart of legal doctrine and thereby lay a sure foundation for legal analysis.[23] Thus, in an effort to unearth the principles that originally guided the arising-under jurisdictional analysis, I turn to the theory of federal courts as developed by the legal process school and suggest a model that might return the current jurisprudence to a method of legal analysis that is more faithful to the underlying arising-under principles and conceptions.

---

20. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 620–21 (1908).

21. Roscoe Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361, 365 (1913).

22. Pound, *supra* note 20, at 622–23.

23. *Id.*

A. Legal Process and Beyond

In an article written in 1994, Richard Fallon lamented a former teacher's observation that the study of federal courts had become an "intellectual backwater."[24] Fallon mounted a hearty defense to this charge, and in so doing endorsed the continuing vitality of the legal process school, from which the scholarly discipline of "Federal Courts" emerged in the 1950s.[25] Despite this endorsement, Fallon noted that legal process theory was born of a different era—post-*Lochner* and pre-*Warren* Court—and that modern circumstances and perceptions of the law and of the role of federal courts might require some modification of the animating principles and methodology.[26] He also called for future federal courts scholarship that would, among other things, use the legal process method to provide "critical analysis of cases and doctrines, . . . proposals for law reform, . . . [and] efforts to identify immanent values or purposes in light of which bodies of law might be rationalized . . . ."[27]

I agree with Fallon that legal process remains a worthy perspective from which to examine the law of federal courts, and my article falls within the scholarly agenda identified by him. But as Fallon and others have recognized, legal process theory needs to be revitalized in light of current jurisprudential developments and insights.[28] I have some thoughts on the direction that a new theory of federal courts should take, an approach that both borrows and diverges from the legal process model.

B. Classic Legal Process Theory

As is well known, the legal process school is directly traceable to the work of Professors Henry Hart and Albert Sacks.[29] And while the influence of Hart and Sacks may have waned during the 1960s, their

---

24. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 955 (1994).

25. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

26. Fallon, *supra* note 24, at 959–60.

27. *Id.* at 977.

28. *E.g.*, Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397 (2005); Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319 (2010).

29. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958).

basic ideas have been woven into the law of federal courts and have remained persistently influential.

Professor Philip Frickey, a modern proponent of legal process, described the Hart and Sacks theory as one that viewed all law, "including the legislature's role in statutory creation and the administrative and judicial roles of statutory implementation and application" as part of a "purposive endeavor designed to promote social utility."[30] Frickey noted that Hart and Sacks "assumed the legislature to be made up of reasonable persons pursuing reasonable purposes reasonably, and the judges interpreting statutes to be engaged in the reasoned elaboration of those purposes as they could be made to fit within the broader legal fabric."[31] Thus, as Frickey saw Hart and Sacks' view, "it was simply unacceptable to conclude that a statute lacked a sensible purpose."[32] Further, "unless it was impossible to conclude otherwise, courts were to avoid the perspective of cynical observers who might see only short-term political compromise rather than the embrace of reasonable public policy purposes."[33]

More specifically, legal process theory can be seen as premised on five interrelated elements: institutional settlement, anti-formalism, rule of law, reasoned elaboration, and neutral principles.[34]

1. Institutional Settlement

The principle of institutional settlement posits that "decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding . . . ."[35] In this sense, institutional settlement determines what the law "is." That determination is legitimized by reference to institutional allocations and institutionally-relevant procedures and practices through which the determination is made. Consistent with this principle, both legislatures and courts make law, each within their own assigned sphere and each according to its own established procedures.[36]

---

30. Frickey, *supra* note 28, at 405.

31. *Id.*

32. *Id.*

33. *Id.*

34. *See* Fallon, *supra* note 24, at 963–70. Fallon also identifies a sixth principle, structural interpretation. *Id.* at 965. For reasons I will explain in the text, I treat that principle separately. *See infra* text accompanying notes 73–81.

35. HART & SACKS, *supra* note 29, at 4.

36. Similarly, decades before Hart & Sacks, Benjamin Cardozo noted that judges must legislate "interstitially," where there are gaps in the law and, when they do so, their decisions are legitimate.

In the words of Hart and Sacks, "these procedures and their accompanying doctrines and practices will come to be seen as the most significant and enduring part of the whole legal system, because they are the matrix of everything else."[37] One could say that from a legal process perspective, the way things are done will determine, to a large extent, what will and can be done.[38]

2. Anti-Formalism

The anti-formalism principle rejects rigid interpretations of the law and posits instead that the law should be read in accord with evolving circumstances and a pluralistic range of norms and interests. As Hart put it, the law should be considered as "a continuous process of *becoming*. If morality [for example] has a place in the 'becoming,' it has a place in the 'is.'"[39] The anti-formalism principle does not embrace legal realism, but attempts to stake out a middle ground between realism and positivism.[40] This approach to judicial decision-making is sometimes described as "purposive."[41] It also strongly suggests that the judicial decision-making process consists of something more than merely finding and applying the law. Indeed, it recognizes that judges do, indeed, make law.[42]

BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 69–70 (1921). The gaps in the law where judges are required to "legislate" are essential to any legal system, and when a legislature overplays its hand by imposing too much detail it runs against the spirit of the law.

37. HART & SACKS, *supra* note 29, at 6.

38. *See id.*

39. Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 930 (1951) (emphasis in original).

40. *See* Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 619 (1991) (describing the distinction between Legal Realism and the Legal Process school in terms of the limits imposed on the adjudictory role by Legal Process).

41. Post, *supra* note 28, at 1332–36. Cardozo also thought that judges made law and, therefore, operated within the "legislator's wisdom." CARDOZO, *supra* note 36, at 115. He also saw a commonality in the methods used by judges and legislators: "The choice of methods, the appraisement of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence." *Id.* at 113.

42. Cardozo also believed law had to be conceived as something fluid and in a continuous process of becoming in order to reflect and properly respond to human needs. In his words, "Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless 'becoming.'" CARDOZO, *supra* note 36, at 28.

3. Rule of Law

As Fallon observes, the rule of law "implies courts,"[43] and "requires the availability of judicial remedies sufficient to vindicate fundamental legal principles."[44] Thus, although legal process recognizes the authority of Congress to limit the jurisdiction of federal courts, the theory also recognizes that "the power to regulate jurisdiction is actually a power to regulate rights—rights to judicial process, whatever those are, and substantive rights . . . ."[45] As such, the power to regulate jurisdiction is subject to the rule of law principle that ensures the availability of courts to enforce substantive rights.[46] As the foregoing makes clear, the rule of law principle is neither the "law of rules"[47] nor an invitation to embrace formalism.

4. Reasoned Elaboration

The principle of reasoned elaboration means exactly what it suggests. For a judicial decision to be legitimate, it must be supported by a principled and logical explanation. It is this "role of reason" that distinguishes a legitimate judicial judgment from a non-judicial political choice. This distinction is, in essence, one between the "exercise of reason" and an "an act of willfulness,"[48] with only the former being properly characterized as judicial in nature.[49]

5. Neutral Principles

Finally, the principle of consistency with the broader legal fabric, which is closely related to the principle of reasoned elaboration, requires that judicial decisions be premised on a legal principle that transcends the immediate facts of the case, the particulars before the court. In his

---

43. Fallon, *supra* note 24, at 965.

44. *Id.*

45. *See* HART & WECHSLER, *supra* note 25, at 317.

46. *Id.* at 318.

47. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

48. Wechsler, *supra* note 10, at 11.

49. *See id.* at 31–35 (discussing the lack of reasoned analysis in the Equal Protection cases decided by per curiam opinions after *Brown v. Board of Education*, 347 U.S. 483 (1954)). The idea of reasoned elaboration was fully embraced by Cardozo, who saw both deductive and inductive reasoning as essential to the process of judicial decision-making. It was also, in his view, important to know "why and how the choice was made between one logic and another." CARDOZO, *supra* note 36, at 41. He further observed, "[i]n law, as in every other branch of knowledge, the truths given by induction tend to form the premises for new deductions." *Id.* at 47.

famous article, *Toward Neutral Principles of Constitutional Law*,[50] Herbert Wechsler explained that a "principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[51] This has become known as the principle of "neutrality." As I will explain below, I believe that the adjective "durable" more accurately describes this principle.[52]

C. Criticism of the Classic Theory

I accept most of the above postulates of the classic legal process method, and particularly agree with the principles of reasoned elaboration and neutrality as further explained below. An opinion that is not consistent with these principles naturally leads to the suspicion that the decision is not legitimate.[53] Of course, I recognize that when deciding cases, judges will necessarily draw from their own personal experience and opinions.[54] However, the principles of reasoned elaboration and neutrality, sensibly applied, provide a framework through which the legitimacy of a judicial decision can be measured from a shared perspective of legal principles and logic that should transcend the individual judge's policy preferences in a particular case. Moreover, these principles may help a judge check her personal instincts in a way that will bring greater consistency and fairness to the law.

Professor Robert Post has criticized the principle of reasoned elaboration to the extent that it is premised on the dichotomy between "reason" and "will." According to Post, this dichotomy is "far too crude to capture the difference between law and politics. Reason exists in politics, just as will exists in law."[55]

At a descriptive and empirical level, I agree with Post. Reason and will play a role in both judicial and political decision-making. Legal process theorists do not deny that. They do however insist that a judicial decision be *justified* by reasoned elaboration, and recognize that there is no such requirement that a political decision do so. In a sense, reasoned

---

50. Wechsler, *supra* note 10.

51. *Id.* at 19. Like Wechsler, Cardozo believed in the value of principles generated from the transitory particulars through a process of "free decision" and "generalizations." CARDOZO, *supra* note 36, at 17–25.

52. *See infra* text accompanying notes 57–64.

53. Fallon, *supra* note 24, at 964, 969–70.

54. *See* Wells, *supra* note 40, at 642–43. *But see* Fallon, *supra* note 24, at 973 n.85 (responding to Wells).

55. Post, *supra* note 28, at 1328.

elaboration is an institutional requirement imposed on the judicial branch, while majority rule is the institutional requirement of the political process. In stating this disagreement with Post, I am not drawing a bright line between the judicial and the political processes, but only recognizing the requirement that a judicial decision be justified in terms other than will, even if that judicial opinion is the product of a five-to-four vote.

Post has also criticized the neutrality principle as being either trivial (i.e., the magistrate must be neutral as between the parties), incoherent (i.e., a "neutral principle" is an oxymoron), or an improper endorsement of non-consequentialism (i.e., the notion that a judge should ignore the consequences of her decisions).[56]

I appreciate Post's critique, but I do not fully agree with it. The problem, as I see it, can be traced to Wechsler's unfortunate word choice ("neutral principles") and to his somewhat incomplete and short-sighted defense of the principle. As to "neutrality," the word itself is an easy target. If it is reduced to a call for a neutral magistrate, it states the obvious; if it is meant to "neuter" values, as Post suggests it might,[57] it is pernicious. On the other hand, if it suggests no more than a non-discriminatory application of a legal standard to a general pattern, then it might be entitled to more weight. I would read Wechsler's neutrality principle in this latter fashion. As such, I understand him to be saying that a "neutral principle" is one that must be durable and capable of application to a wide range of similarly situated cases. Neutrality here does not relate to magistrates or values, but to applications. Professor Kent Greenawalt captured this idea well when he observed that "[a] person gives a neutral reason, in Wechsler's sense, if he states a basis for a decision that he would be willing to follow in other situations to which it applies."[58]

This same idea of durability was expressed by Benjamin Cardozo when he observed, "[g]iven a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize."[59] He further explained, such a durable principle, "has the primacy that comes

56. *Id.* at 1330–31.

57. *Id.* at 1330.

58. Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 985 (1978).

59. CARDOZO, *supra* note 36, at 31.

from natural and orderly and logical succession."[60]

Post's non-consequentialist critique of neutrality is more troubling. Certainly, a judge must attend to both the long- and short-term consequences of her decision, and the anti-formalist principle fully supports this proposition. As Post amply demonstrates, a decision cannot be "purposive" and at the same time oblivious to consequences.[61] As with neutrality, I would read Wechsler's admonition that judges should be aloof from the immediate consequences to mean that a judge should not alter a durable principle simply to avoid a result that is averse to her individual preferences. As Greenawalt puts it, "[t]he principles that support a decision must be . . . adequately general as well as neutral. They must reach out beyond the narrow circumstances of the case."[62]

That Wechsler can be interpreted as Post suggests may be a product of Wechsler's inability to discover a durable principle that would "reach out beyond the narrow circumstances"[63] of *Brown v. Board of Education*[64] and justify the series of per curiam anti-apartheid decisions that applied *Brown* in contexts other than public school education.[65] Wechsler's failure to discover such a durable principle may have tainted "neutrality" as a persuasive ground from which to assess judicial decision-making.

I strongly agree with Post that one should not adopt a vision of judicial decision-making solely based on the judicial craft or on the ability of a judge to discover and apply the law. Rather, courts must recognize the long-term political and social consequences of their decisions and sometimes act as lawmaking statesmen, as the Court did in *Brown*. I also believe that Post and Frickey are correct when they assert that the classic legal process theory invites precisely this type of purposive statesmanship in appropriate and limited circumstances.[66] In short, I would interpret Wechsler's neutrality principle in a manner that avoids Post's non-consequentialist criticism.

Some of the other legal process postulates also require closer examination. For example, the principle of institutional settlement exalts the primacy of procedure over substantive rights. It is true that without procedure there would be no enforceable substantive rights other than

60. *Id.*

61. Post, *supra* note 28, at 1329.

62. Greenawalt, *supra* note 58, at 987.

63. *Id.*

64. 347 U.S. 483 (1954).

65. *See* Wechsler, *supra* note 10, at 31–35.

66. *See* Frickey, *supra* note 28, at 454, 461; Post, *supra* note 28, at 1323, 1332–36.

through the non-judicial will of the sovereign. It is equally true, however, that without substantive rights there would be no point in having a system of procedure. Procedure is instrumental. It exists to ensure the fair and efficient delivery of justice, and the ends of justice necessarily include the vindication of substantive rights. Hence, a fully realized theory of legal process ought to factor in the extent to which procedure accomplishes this ultimately substantive goal, namely, the protection of individual claims of right.

D. Legal Process and the Law of Federal Courts

In their path-breaking casebook, *The Federal Courts and the Federal System*,[67] Hart and Wechsler added a sixth principle to the legal process method, namely, the principle of structural interpretation. Structural interpretation requires federal courts to take principles of federalism and separation of powers into account when creating, interpreting, or applying the law of federal courts.[68] In fact, the very first sentence in the preface to their casebook references the importance of "our federalism" to the study of federal courts.[69] On the next page the authors offer a similar, albeit less insistent, respect to the principle of separation of powers.[70] The principle of structural interpretation is now often regarded as an essential component of the legal process method in the context of the law of federal courts.[71] Thus, in determining the allocation of powers between federal courts and state courts, and between federal courts and the political branches of the federal government, federalism and separation of powers should, according to this expanded version of legal process theory, play a critical role.

In my view, the principle of structural interpretation is premised on a limited vision of constitutional values in that it emphasizes only two aspects of our constitutional system—federalism and separation of powers—at the expense of other equally weighty constitutional considerations, including the structural role of the federal judiciary in the vindication of individual claims of right. As the Court recognized in *Marbury v. Madison*:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever

67. HART & WECHSLER, *supra* note 25.

68. *See id.* at xi.

69. *Id.*

70. *Id.* at xii.

71. Fallon, *supra* note 24, at 965.

> he receives an injury. One of the first duties of government is to afford that protection . . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[72]

The principle of structural interpretation thus needs to be more broadly conceived. Federalism means something more than "states' rights."[73] It reflects a principle that defers to the states in matters constitutionally pertinent to the states, while recognizing the paramount interest of the national sovereign in matters pertinent to it. Similarly, separation of powers is not merely a limit on the scope of judicial authority; rather it also imposes an affirmative responsibility on the judicial branch to act as a check on the political branches.

Finally, any complete theory of the law of federal courts must incorporate the system of individual rights into the structural equation. Federalism and separation of powers can themselves indirectly protect individual rights by decentralizing the exercise of power. However, they do not necessarily operate in that fashion, and the founding generation in adopting the Bill of Rights eventually concluded that specific protections for individual rights were an essential component of the constitutional structure. Of course, we can see this same balancing of principles in the individual rights component of constitutional structure as we do with federalism and separation of powers. Individual rights are always subject to countervailing constitutional interests. It is for this reason that no right is absolute. But individual rights are, emphatically, part of the constitutional structure. Hence, properly understood, the principle of structural interpretation ought to take into account the full dimension of constitutional considerations. Certainly, there is no case for making a one-sided vision of "our federalism" the primary focus of a jurisprudence of federal courts.[74]

---

72. 5 U.S. 137, 163 (1803). Of course, famously, Mr. Marbury received no remedy from the Supreme Court. *Id.* at 138. But this outcome was not because the law did not afford him a remedy, but because Mr. Marbury sought his remedy in a constitutionally impermissible tribunal. *Id.* The outcome, therefore, does not undermine the principle.

73. In *Bond v. United States*, __U.S.__, 131 S. Ct. 2355 (2011), the Supreme Court asserted that the principle of federalism embodied in the Tenth Amendment is also intended to protect the rights of the individuals. *Id.* at 2364. But any such protection is at best indirect and surely does not encompass the full range of individual rights protections embodied in the Constitution and in federal statutes.

74. We can see the "our federalism" principle's dominance at work in the related contexts of the *Younger* doctrine, *see* Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619 (1986); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987); Samuels v. Mackell, 401 U.S. 66

In addition, the principle of structural interpretation potentially runs afoul of at least two other legal process principles: anti-formalism and rule of law. As indicated above, the anti-formalism principle provides that judicial interpretation should take into account a pluralistic array of interests in interpreting the law.[75] Yet, the principle of structural interpretation appears to give singular and dominant weight to a narrow vision of structure over a vast array of other considerations, some of which have a constitutional dimension. In this sense, the principle of structural interpretation can be seen as a product of legal formalism, for it introduces a rigid hierarchy into the interpretive metrics. The clash with the rule of law principle is even more striking. That principle implies the availability of federal courts to vindicate federal rights.[76] However, Hart and Wechsler's law of federal courts is premised more on power arrangements than it is on individual claims of right. In this way, the principle of structural interpretation may illegitimately dominate the rule of law principle.

E. Modified Model of Legal Process

Drawing from legal process theory and the above-described critiques and responses, I offer the following model to measure the legitimacy of judicial decision-making in the context of the law of federal courts.

In measuring the legitimacy of any judicial decision pertaining to the law of federal courts, one must: (1) take into account the respective institutional roles of Congress and the judiciary; (2) accept the purposive role of judicial decision-making, including both the craft and the statesmen aspect of that role; (3) examine the consistency of the decision with the rule of law and that principle's insistence on a judicial forum for the vindication of individual claims of right; and (4) measure the decision based on its fidelity to durable legal principles articulated through a reasoned elaboration. In addition, any such decision should reflect the full range of structural concerns that animate the Constitution, including a balanced approach to federalism, separation of powers, and individual rights.

I have selected this model to test the legitimacy of judicial opinions in the context of the law of federal courts because it is comprehensive,

---

(1971); Younger v. Harris, 401 U.S. 37 (1971), and the Eleventh Amendment, *see* Seminole Tribe v. Florida, 517 U.S. 44 (1996); Alden v. Maine, 527 U.S. 706 (1999)—all cases in which access to the federal courts was denied, thus forcing litigants to take their federal claims to state court.

75. *See supra* text accompanying notes 39–42.

76. *See supra* text accompanying notes 43–47.

takes into account the full range of constitutional considerations, and places courts within the legitimate and recognized bounds of the judicial function. This model repels "the mechanistic and transcendental nonsense of legal formalism"[77] and, at the same time, avoids an unrestricted endorsement of legal realism by inviting results that are premised on "predictable and nonsubjective conclusions."[78]

F. A Claim-Centered, Fundamental Principles Approach to Arising-Under Jurisdiction

I turn now to the specific context of arising-under jurisdiction and identify its core principles. I then suggest an approach to arising-under jurisdiction that is consistent with those principles and with my modified approach to legal process and that avoids the trap of a formalistic or mechanical formula.

The generally accepted model of arising-under jurisdiction begins with the "Holmes creation test," so named as a product of Oliver Wendell Holmes's dissenting declaration that "a suit cannot be said to arise under any other law than that which creates the cause of action."[79] This model presumes that the Holmes creation test represents the primary vehicle for determining jurisdiction.[80] According to this view, there are two limited exceptions to the creation test, one that extends jurisdiction to some non-federal claims that include an essential federal ingredient, and one that excludes jurisdiction over federally created claims that are essentially governed by state or local law or in which the presumed intent of Congress to create jurisdiction is otherwise rebutted.[81] For several reasons that I will explain below, I believe this standard view is misguided.

While it is sometimes thought that the creation test represents the earliest approach to arising-under jurisdiction, this is by no means clear. In their recent study, Professors Ann Woolhandler and Michael Collins show that federal courts in the nineteenth century exercised jurisdiction in numerous federal question cases well beyond the contours of the

---

77. Post, *supra* note 28, at 1320 (internal quotation marks and citation omitted).

78. Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1090 (1995).

79. Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 214 (1921) (Holmes, J., dissenting).

80. *See* Gunn v. Minton, __U.S.__, 133 S. Ct. 1059, 1064–65 (2013); Grable & Sons Metal Prods., Inc., v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005).

81. *Gunn*, 133 S. Ct. at 1064–65; Mims v. Arrow Financial Servs., LLC, __U.S.__, 132 S. Ct. 740, 744 (2012); *Grable*, 545 U.S. at 311–13, 317 n.5; 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 103.31[3] (2013); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3562 (3d ed. 1998).

creation test.[82] This phenomenon occurred both before and after the adoption of the Act of 1875, in which Congress vested federal courts with general federal question jurisdiction.[83] Indeed, not a single case references anything akin to a creation test prior to 1916, when the Supreme Court's opinion in *American Well Works Co. v. Layne & Bowler Co.*[84] made a cryptic allusion to such a possibility.[85] Rather, the vast body of early cases adopted a more inclusive and holistic approach to arising-under jurisdiction, one that in no way depended on the source of the claim or right asserted. As I will show below, even the decision in *American Well Works* fits well within that established jurisprudence.

The 1900 decision in *Shoshone Mining Co. v. Rutter*[86] provides an apt example of the holistic approach to arising-under jurisdiction. *Shoshone* involved a dispute over the entitlement to a mining claim on federally owned lands.[87] A federal statute required any person who disputed another party's application for a mining claim to file an "adverse suit" in "a court of competent jurisdiction" within thirty days of having filed the adverse claim with the register of land.[88] Either local custom or state property law would usually determine entitlement to the property.[89] At best, any potential federal issue remained in the background. As a consequence, the Supreme Court concluded that such adverse claims did not necessarily arise under federal law.[90]

Shoshone is often described as an exception to the creation test,[91] but that description is inaccurate. At the time *Shoshone* was decided, there was no creation test—*American Well Works* was still sixteen years in the future. It is also not clear that the federal statute at issue in *Shoshone* created a cause of action because that statute is worded more as a statute of limitations than as a cause of action.[92] Most importantly, however, the

82. Ann Woolhandler & Michael G. Collins, *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151 (2009).

83. *Id.* at 2157–70.

84. 241 U.S. 257 (1916).

85. *See infra* text accompanying notes 102–108.

86. 177 U.S. 505 (1900).

87. Shoshone Mining Co. v. Rutter, 87 F. 801, 801–02 (9th Cir. 1898).

88. *Shoshone*, 177 U.S. at 506 (internal quotation marks omitted).

89. *Id.* at 508.

90. *Id.* at 509.

91. *See supra* text accompanying notes 79–81.

92. The congressional statute at issue in *Shoshone* provided:

> It shall be the *duty* of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.

rationale adopted by the *Shoshone* Court did not focus on the source of the plaintiff's right to sue, but rather on whether the adverse suit called for the "construction or effect" of federal law.[93] As such, *Shoshone* does not represent an exception to a rule, but an application of a rule.

The Court took a similar principled approach in *Shulthis v. McDougal*.[94] There, the plaintiff filed a lawsuit in a federal circuit court seeking to quiet title to a tract of land located on an Indian reservation.[95] The defendants filed a motion to dismiss the action for lack of subject matter jurisdiction.[96] In response, plaintiff argued that the case was one arising under federal law because the ownership of the tract was ultimately traceable to a grant from the federal government.[97] In resolving the jurisdictional question, the Court explained that "[a] suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws."[98] Rather, in the Court's view, a case arises under federal law only if "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."[99] Applying that principle, the Court rejected plaintiff's attempt to premise jurisdiction solely on the federal source of his claimed right of ownership.[100] Instead, the Court explained that for a case to fall within the scope of statutory arising-under jurisdiction, it was not enough that federal law be the source of the rights sought to be enforced.[101]

We now come to *American Well Works*.[102] The notion that the *American Well Works* Court endorsed the creation test as the true measure of arising-under jurisdiction is erroneous. *American Well Works* involved a suit by an individual who claimed that his business had been damaged by the defendant's disparagement of his patent and by the

---

Act of May 10, 1872, ch. 152, § 7, 17 Stat. 93 (codified as amended at 30 U.S.C. §§ 29–30 (2006)) (emphasis added). Clearly, the language of the statute speaks in terms of a duty to file a claim and not in terms suggesting the creation of any such claim.

93. 177 U.S. at 507 (internal quotation marks omitted).

94. 225 U.S. 561 (1912).

95. *Id.* at 565.

96. *Id.* at 568.

97. *Id.* at 569–70.

98. *Id.* at 569.

99. *Id.*

100. *Id.* at 569–70.

101. *Id.* at 568–69.

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

defendant's threat to sue him and his customers for patent infringement.[103] The Court explained that plaintiff's claim involved no controversy over a question of federal law, including patent law.[104] The fact that the narrative of the case somehow involved a patent was not enough to make the case one arising under patent law.[105] Rather, the case involved no more than a state-created disparagement of business claim in which patent law played no role. Hence, federal question jurisdiction was lacking.[106]

This result in *American Well Works* was fully consistent with *Shoshone* and *Shulthis*, since the case did not involve a "controversy respecting the validity, construction, or effect of" federal law.[107] However, Justice Holmes, writing for the *American Well Works* Court, wrapped his conclusion in an epigram: "[a] suit arises under the law that creates the cause of action."[108] Given the precedents then extant, this pithy statement was both too broad and too narrow, for it substituted a mechanical test for the careful consideration of the role that a federal issue might play within the context of the pending case.

That *American Well Works* had not endorsed a "creation test" was made clear five years later, in *Smith v. Kansas City Title & Trust Co.*[109] There, the plaintiff, a shareholder in the defendant trust company, sued the trust seeking to enjoin it from purchasing bonds that had been issued under the terms of a federal statute that the plaintiff claimed to be unconstitutional.[110] Because the trust was only authorized to purchase "legal" bonds, the plaintiff claimed that the planned purchase of the federal bonds represented a breach of fiduciary duty, a claim created by state law.[111] Notwithstanding, the Court held that the case was one arising under federal law because the directors were proceeding to purchase the bonds and because the shareholder objected to that purpose on the ground that the bonds "were issued under an unconstitutional law."[112] Thus, in the Court's view the case arose under federal law because "the constitutional validity of an act of Congress . . . is directly

103. *Id.* at 258–59.

104. *Id.* at 259–60.

105. *Id.* at 260.

106. *Id.*

107. Shulthis v. McDougal, 225 U.S. 561, 569 (1912).

108. 241 U.S. at 260; *see also* Woolhandler & Collins, *supra* note 82, at 2171–78.

109. 255 U.S. 180 (1921).

110. *Id.* at 195–96.

111. *Id.* at 197–98.

112. *Id.* at 201.

drawn in question."[113]

The decision in *Smith* did not create a novel approach to jurisdiction. In fact, as Woolhandler and Collins have amply demonstrated, *Smith* reflected a standard exercise of federal question jurisdiction that was well recognized in the nineteenth and early twentieth centuries.[114]

Justice Holmes dissented, and took his epigram a step further by insisting on the exclusivity of the creation principle: "a suit cannot be said to arise under any other law than that which creates the cause of action."[115] But the majority, following the standard line of jurisprudence, clearly rejected this view. In fact, the majority neither referenced *American Well Works* nor responded to Justice Holmes's solo dissent.[116]

The *American Well Works* majority was not alone in overlooking the creation test. In the ensuing years, that test played virtually no role in the Court's arising under jurisprudence.[117] Indeed, it did not rise to prominence in that jurisprudence until the Court's decision in *Franchise Tax Board v. Construction Laborers Vacation Trust* in 1983.[118]

According to Woolhandler and Collins, Holmes's creation test formula might have been the result of "[Holmes's] collapsing of the concepts of primary and remedial rights as part of his predictive view of law."[119] Similarly, Professor Lumen Mulligan argues that Holmes's position stemmed "from his famous 'bad man' theory of law—the view that law is best understood not from a moral vantage point, but from that of the bad man who cares only to know the predictable judicial responses to his conduct."[120] In other words, according to Mulligan,

---

113. *Id.*

114. *See* Woolhandler & Collins, *supra* note 82, at 2171–78.

115. *Smith*, 255 U.S. at 214 (Holmes, J., dissenting).

116. *See id.* at 195–213.

117. Prior to 1983, only four Supreme Court majority opinions cited *American Well Works*, and none of those citations endorsed the creation test or suggested that any such test was the exclusive or even primary method through which to establish arising-under jurisdiction. *See* Hathorn v. Lovorn, 457 U.S. 255, 266 n.18 (1981) (state courts may decide a variety of questions involving patent law); Int'l Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc., 372 U.S. 682, 696 (1963) (included in string cite pertaining to jurisdiction); Freeman v. Bee Mach. Co., 319 U.S. 448, 451 n.4 (1943) (defects in state court jurisdiction not cured by removal); Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co., 258 U.S. 377, 382 (1922) (same).

118. 463 U.S. 1 (1983). The creation test did, however, hold a prominent position in the first edition of Hart & Wechsler's casebook, perhaps paving the way to its eventual inclusion in the Court's arising-under jurisprudence. *See* HART & WECHSLER, *supra* note 25, at 752.

119. *See* Woolhandler & Collins, *supra* note 82, at 2187.

120. Lumen N. Mulligan, *You Can't Go Holmes Again*, 107 NW. U. L. REV. 237, 240 (2012); *see also* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459–60 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds

Holmes's jurisdictional theory "focused solely upon the enforcement aspect of law, which in the civil context corresponds to causes of action and not rights per se."[121] Mulligan's view is that Holmes's endorsement of a cause-of-action-centric test was both out of step with the then-current jurisprudential developments in cases such as *Shoshone* and *Smith*,[122] and insufficient to fully embrace the full range of jurisdictional possibilities that had been and continued to be recognized by the Court.[123] Mulligan's solution is to include "rights" as part of the jurisdictional equation and, in so doing, his goal is to create a presumption in favor of the exercise of arising-under jurisdiction.[124]

I agree with Mulligan's conclusion but not with his solution. Holmes may have indeed adopted the creation test to conform to his bad-man theory of law, and his creation-centric approach to jurisdiction is certainly inconsistent with the full range of jurisdictional possibilities. The true mistake Holmes made, however, was in assuming that the cause-of-action component of his equation somehow defined the scope of jurisdiction, which is not necessarily so. Mulligan's solution is simply to add the component of "rights" to the jurisdictional equation, but this solution invites a similar mechanical approach to jurisdiction by adding yet another incomplete test to the inquiry.

---

his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience . . . . [The bad man] does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind.").

121. Mulligan, *supra* note 120, at 240.

122. *Id.* at 244–50. The core principle that guided the analysis in cases like *Shoshone* and *Shulthis* did not focus on the distinction between causes of action and rights, but rather on the claim, which is a composite of rights and remedies.

123. *Id.* Mulligan's analysis was prompted by the Supreme Court's recent decision in *Mims v. Arrow Financial Services, LLC*, __U.S.__, 132 S. Ct. 740 (2012). Mulligan praises that opinion for breaking with the Holmes cause-of-action-centric tradition and for recasting the standard §1331 test as one that looks to both the cause of action and the right. Although Mulligan's interpretation of the *Mims* decision is attractive, I don't think that that opinion can carry the weight of his conclusions. The distinction between causes of action and rights was certainly not necessary to the holding in *Mims* and the decision in *Mims* is just as consistent with the Holmes creation test as it is with Mulligan's more inclusive approach to federal arising-under jurisdiction. At most, the *Mims* decision supports the proposition that when federal law creates the cause of action and establishes the rule of decision, there is a strong presumption in favor of federal jurisdiction, but in a sense this is really a reiteration of the creation test. In addition, the language from *Mims* that Mulligan relies on is, by his own admission, "inconsistent," suggesting that the Court was not aware that it was making the sophisticated move that Mulligan attributes to it. *See* Mulligan, *supra* note 120, at 280. Further evidence that *Mims* did not change the jurisprudential landscape can be found in *Gunn v. Minton*, __U.S.__, 133 S. Ct. 1059 (2013), where the Court returned to the cause-of-action-centric position, treating it as the primary vehicle for establishing arising-under jurisdiction. *Id.* at 1064.

124. *See* Mulligan, *supra* note 120, at 287.

My approach is different. I would rather focus the jurisdictional inquiry on what constitutes a "claim." Such an approach, as I have shown, is both principled and consistent with the traditional approach to arising-under jurisdiction, and is also consistent with the modern understanding of what constitutes a litigation unit. Under the Federal Rules of Civil Procedure (and under the modern law of res judicata or preclusion), a claim is defined by reference to the facts that establish a legal right to relief.[125] To paraphrase Holmes, a claim arises only under the sovereign law that creates it. But some claims are hybrid, their component parts being created by more than one sovereign. Such claims arise under the laws of all contributing sovereigns, regardless of which created the cause of action, which created the right, or which created the controlling legal principle. The Holmesian error was not in Holmes's collapse of causes of action and rights into a single concept—which is essentially to say "a claim upon which relief can be granted"—but in his failure to see that the unification did not dictate the narrow jurisdictional test he ultimately endorsed.

Mulligan falls into a similar trap by drawing a bright line between causes of action and rights. Unlike Holmes, Mulligan would allow jurisdiction in cases falling on either side of the line.[126] And such an approach can be used to validate a wider range of the Court's arising-under jurisprudence. But it also invites a mechanical distinction between claims created by federal law and claims that merely include a federal ingredient. In fact, Mulligan's test would not validate decisions such as *Smith*, where neither the cause of action nor the right was a creature of federal law. Rather, federal law was simply an element of the plaintiff's state-created claim. Yet, despite the absence of both a federal cause of action and a federal right, the Court nonetheless found jurisdiction because the plaintiff's claim turned on a question of federal law.

With a proper reading of the foundational arising-under cases—e.g., *Shoshone*, *Shulthis*, *Smith*, and *American Well Works*—and with a clearer understanding of what constitutes a claim upon which a relief can be granted, the approach I endorse in Part II focuses on the nature of the plaintiff's claim, asking whether the resolution of that claim depends on the validity, construction, or effect of federal law.

---

125. *See, e.g.*, FED. R. CIV. P. 13(a) (same transaction test for purposes of compulsory counterclaims); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) (same transaction test for purposes of claim preclusion).

126. Mulligan, *supra* note 120, at 248–50.

II. *GULLY* REDISCOVERED

Congress first vested the lower federal courts with general "arising-under" jurisdiction in the Act of March 3, 1875 (Act of 1875),[127] thereby giving them "the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[128] The available evidence suggests that Congress, in passing the Act of 1875, thought that it was vesting lower federal courts with the complete range of Article III arising-under jurisdiction.[129] As one sponsor of the measure explained, the Act gives the federal judiciary "precisely the power which the Constitution confers—nothing more, nothing less."[130] Significantly, at that time, the enforcement of federal rights was often dependent on common law and state-created remedies.[131] Hence, hybrid "federal-ingredient" claims would not have been considered unusual or even distinct from a jurisdictional perspective.

By the first half of the twentieth century, the fundamental principles of statutory arising-under jurisdiction were sufficiently familiar and so well-settled that in 1936 the Court in *Gully v. First National Bank*[132] could describe them with confident clarity:

How and when a case arises "under the Constitution or laws of the United States" has been much considered in the books. Some tests are well established. To bring a case within the statute, 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. The right

---

127. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875).

128. FELIX FRANKFURTER & JAMES MCCAULEY LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 (1928).

129. In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), the Court observed:

> The statute's "arising under" language tracks similar language in art. III, § 2, of the Constitution, which has been construed as permitting Congress to extend federal jurisdiction to any case of which federal law potentially "forms an ingredient," see *Osborn v. Bank of the United States*, 9 Wheat. 738, 823, 6 L.Ed. 204 (1824), and its limited legislative history suggests that the 44th Congress may have meant to "confer the whole power which the Constitution conferred."

Id. at 8 n.8 (citation omitted); *see also* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 723, 723 n.32–34 (1986) (citing sources).

130. 2 Cong. Rec. 4987 (1874) (remarks of Sen. Carpenter).

131. *See* Woolhandler & Collins, *supra* note 82, at 2157–70.

132. 299 U.S. 109 (1936).

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. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense.[133]

As the *Gully* Court recognized, it was established early on that a federal court could not exercise original or removal arising-under jurisdiction unless the plaintiff's complaint revealed a claim that required resolution of a federal question.[134] A federal defense raised by the defendant would not suffice.[135] Nor would it be sufficient for the plaintiff to anticipate such a defense.[136] The explanation for this rule was that a federal court should be able to assess jurisdiction at the outset by examining the pleadings then before it.[137]

Beyond this "well-pleaded complaint" rule, the approach to federal jurisdiction was directed more toward a flexible assessment of the nature of the federal issue presented and the role that issue played as an element of the jurisdiction-invoking claim. As noted above, this jurisdictional formula had deep roots in the nineteenth century[138] and was also fully supported by precedent from the early twentieth century.

The facts of *Gully* were simple and informative. First National Bank agreed to assume the debts of an insolvent national banking association.[139] Among those debts were taxes owed to the State of Mississippi.[140] When Gully, the state tax collector, sued First National Bank in state court to collect those debts, First National Bank removed the case to federal court on the theory that it was one arising under federal law since federal law authorized states to tax national banking

133. *Id.* at 112–13 (citations omitted).

134. *Id.* at 197–98; *see also* Metcalf v. City of Watertown, 128 U.S. 586, 589 (1888).

135. Tennessee v. Union & Planters' Bank, 152 U.S. 454, 459 (1894).

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

137. *Metcalf*, 128 U.S. at 589–90.

138. *See* McCain v. City of Des Moines, 174 U.S. 168 (1899); St. Joseph & G.I.R. Co. v. Steele, 167 U.S. 659, 662 (1897); Walker v. Collins, 167 U.S. 57, 59 (1897); *Ex parte* Lennon, 166 U.S. 548, 553–54 (1897); Starin v. City of New York, 115 U.S. 248, 257 (1885); *see also* Woolhandler & Collins, *supra* note 82, at 2171–78.

139. Gully v. First Nat'l Bank, 299 U.S. 109, 111 (1936).

140. *Id.*

associations.[141] In concluding that federal jurisdiction did not exist, the Supreme Court first explained that Gully's claim was built on a contract that was governed by Mississippi law.[142] While defendant argued that a federal controversy existed because the validity of a tax imposed on a nationally chartered bank was ultimately a question of federal law, the Court disagreed, explaining that federal law played absolutely no role in the resolution of the plaintiff's claim.[143]

The *Gully* Court noted that the key element in the federal question jurisdiction analysis was the nature of the claim presented:

> This Court 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 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 which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.[144]

---

141. *Id.* at 112.

142. *Id.* at 114.

143. *Id.* at 115–16.

144. *Id*. 117–18 (internal citations omitted). Years before his decision in *Gully*, Cardozo had expressed similar views on legal analysis, when he observed:

> There is the constant need, as every law student knows, to separate the accidental and the non-essential from the essential and inherent . . . . Only half or less than half of the work has yet been done. The problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways. The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; this I will call the method of sociology.

CARDOZO, *supra* note 36, at 30–31.

Thus, until the decision in *Gully*, the only jurisdictional bright-line rule the Court had endorsed was the well-pleaded complaint rule, and the Court's jurisprudence drew no distinction between claims created by federal law and state-law claims that included an essential federal ingredient. That aside, the law of federal question jurisdiction was governed by a claim-centered, arising-under jurisdictional theory that focused on the nature of the claim and the role that federal law played within that claim.

Given the lyrical language of the *Gully* opinion, one might be tempted to think that the standard is open-ended and indeterminate. But that is far from the case. In fact, *Gully* offers clear guidance as to the key question that should inform the arising-under jurisdiction analysis. That question asks whether the "right or immunity [is] 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."[145] In other words, the goal is to determine whether resolution of the plaintiff's claim turns on a question of federal law. This test, although precise in its focus, is not mechanical since it realistically acknowledges the kaleidoscopic range of possibilities in which such a federal question might arise.

Gully can be seen as a nearly perfect exemplar of both the classic and modified versions of legal process as previously described. In terms of the principle of institutional settlement, the opinion assigns courts a role that is appropriate and consistent with congressional intent, namely the determination of whether a particular claim falls within the broad sweep of jurisdiction vested in the federal courts by the Constitution and by Congress. Certainly one gets no sense that *Gully* invites the judiciary to engage in anything but a legitimate judicial function. Further, *Gully* cannot be described as formalistic in any sense. Rather, it invites a flexible but principled assessment of jurisdiction that cannot be measured by any simple bright-line or mechanical rule, but that should nonetheless lead to results that are premised on predictable and nonsubjective questions and conclusions. By focusing its attention on the claim, the *Gully* Court establishes a principle that respects the individual claims of right. This approach is consistent with the full range of structural concerns that animate the Constitution, including a balanced approach to federalism, separation of powers, and individual rights. Finally, the analysis is premised on a rational explanation of a durable legal principle—one that had been used effectively for at least sixty years before *Gully*—that focuses on the nature of the claim.

145. *Gully*, 299 U.S. at 112.

III. THE MECHANICAL APPROACH TO ARISING-UNDER JURISDICTION

As explained earlier, one of the critical factors in the legal process method is the requirement of reasoned elaboration.[146] And as Professor Fallon pointed out, the legal process scholarly agenda requires a careful examination and critique of doctrine.[147] Thus, the following discussion provides a relatively detailed examination of five major cases, all of which stray from the legal process path in one way or another, and all of which suffer from a lack of reasoned elaboration.

A. Franchise Tax Board v. Construction Laborers Vacation Trust

Gully remained the foundational federal question case for several decades, without any apparent deviation from the approach it endorsed.[148] Indeed, it has been cited and relied on by the Supreme Court and lower courts up to the present time.[149] However, the Supreme Court's approach to federal question jurisdiction began to diverge from *Gully*'s path in 1983 with the decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*.[150] There, the California Franchise Tax Board sought a levy on funds held in trust for three construction workers by the Construction Laborers Vacation Trust (CLVT).[151] The Tax Board claimed a right to the funds based on the members' failure to pay the state income tax.[152] When the trustee refused to meet the Tax Board's demands, the Tax Board filed an action in California state court seeking damages for the amount of the taxes owed and a declaration that its right to those funds was not preempted by the federal Employment Retirement Income Security Act of 1974

146. *See supra* text accompanying notes 47–48.

147. Fallon, *supra* note 24, at 977.

148. *See, e.g.*, Phillips Petrol. Co. v. Texaco, Inc., 415 U.S. 125, 128 (1974); Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 675 (1974); Skelly Oil Co. v. Phillips Petrol. Co., 339 U.S. 667, 672 (1950); *see also* PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, HART AND WECHSLER'S THE FEDERAL COURT AND THE FEDERAL SYSTEM 884 (2d ed. 1973); JOHN J. COUND, JACK H. FRIEDENTHAL & ARTHUR R. MILLER, CIVIL PROCEDURE CASES AND MATERIALS 190 (2d ed. 1974).

149. *E.g.*, Vaden v. Discover Bank, 556 U.S. 49, 78 (2009); Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 321 (2005); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808 (1988); Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 820 (1986) (Brennan, J., dissenting).

150. 463 U.S. 1 (1983).

151. *Id.* at 5–6.

152. *Id.* at 6.

(ERISA).[153] CLVT removed the case to federal court on the theory that the plaintiff's action for declaratory relief arose under federal law.[154] The plaintiff filed a motion to remand, which the trial court denied, ruling that ERISA did not preempt the State's claims.[155] The Court of Appeals affirmed on the jurisdictional question, but reversed on the merits.[156] On certiorari, the Supreme Court addressed only the jurisdictional issue.[157]

The Court's jurisdictional inquiry focused largely on the claim for declaratory relief. As the Court explained, the decision in *Skelly Oil Co. v. Phillips Petroleum Co.*[158] had held that the Federal Declaratory Judgment Act did not expand the scope of federal arising-under jurisdiction.[159] Although the immediate action was filed under the California Declaratory Judgment Act, the Court ruled that the standard applicable under *Skelly Oil* would also apply to actions filed under state declaratory judgment statutes.[160] Under *Skelly Oil*, federal question jurisdiction is satisfied only if one of the parties to the declaratory relief action could have filed a coercive suit against the opposing party that itself would arise under federal law consistent with the well-pleaded complaint rule.[161] Hence, if the party filing for declaratory relief does no more than seek a declaration that its claimed right is not preempted by federal law, the case does not arise under federal law for purposes of § 1331, since, in a suit by that party to enforce that right, the federal preemption question would be raised by the defendant as a defense to the action.[162] But if the declaratory judgment defendant would have a coercive federal preemption claim against the declaratory judgment plaintiff,[163] then the case will in fact arise under federal law.[164]

Although the Tax Board's claim for declaratory relief did seek a

153. *Id.* at 5–7.

154. *Id.* at 7–8.

155. *Id.*

156. *Id.*

157. *Id.*

158. 339 U.S. 667 (1950).

159. *Franchise Tax Bd.*, 463 U.S. at 15–17.

160. *Id.* at 18–19.

161. *Id.* at 19.

162. *Id.* at 16.

163. *See, e.g.*, Osborn v. Bank of the U.S., 22 U.S. 738 (1824).

164. *Franchise Tax Bd.*, 463 U.S. at 19 ("Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.").

declaration that federal law did not preempt its claim,[165] there was something more to the case. As the Court explained, "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question."[166] The Court then noted that § 502(a)(3) of ERISA specifically granted "trustees of ERISA-covered plans like CLVT a cause of action for injunctive relief when their rights and duties under ERISA are at issue."[167] Having so noted, the Court asked whether the Tax Board's claim for declaratory relief arose under federal law.[168] Given that CLVT had a claim for coercive relief under ERISA—a claim that was the mirror image of the Tax Board's "defensive" claim for declaratory relief—the obvious answer would seem to be "yes."

The Court, however, concluded that jurisdiction was lacking:

> We have always interpreted what *Skelly Oil* called "the current of jurisdictional legislation since the Act of March 3, 1875," with an eye to practicality and necessity . . . . There are good reasons why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law. States are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation. They have a variety of means by which they can enforce their own laws in their own courts, and they do not suffer if the preemption questions such enforcement may raise are tested there. The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes. It did not go so far as to provide that any suit *against* such parties must also be brought in federal court when they themselves did not choose to sue.[169]

---

165. *Id.* at 6–7.

166. *Id.* at 19.

167. *Id.* at 19–20.

168. *Id.* at 20.

169. *Id.* at 20–21 (emphasis in original) (internal citations omitted); *see also id.* at 27 ("Nevertheless, CLVT's argument that appellant's second cause of action arises under ERISA fails for the second reason given above. ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party does not 'arise under' that provision.").

The Court also held that the Tax Board's suit to enforce tax levies was not subject to the complete preemption doctrine, since such tax proceedings were "not of central concern" to ERISA.[170]

While the Court's introductory discussion of the law of federal question jurisdiction suggested a relatively traditional approach to the topic, the Court's application of the traditional standards was novel to say the least. Clearly, CLVT qualified as a declaratory judgment defendant with a coercive claim that presented a substantial federal question, namely, whether the State's action was preempted by ERISA. Thus, under *Skelly Oil*, and as the Court itself had just explained,[171] the case presented a substantial federal issue consistent with the well-pleaded complaint rule as applied in actions for declaratory relief.

However, the Court's analysis ignored this factor and instead took a surprising turn driven by the open-ended policy considerations of "practicality and necessity."[172] The immediately preceding block quotation[173] provides the Court's entire discussion of the relevant policy. Essentially, the Court reasoned that federal jurisdiction was lacking since the State could vindicate its rights in state court and since Congress had not expressly given the State access to the federal forum.[174] The fact that Congress clearly wanted ERISA-preemption claims litigated in federal courts seemed irrelevant. Nor did the Court credit the fact that Congress had vested parties such as CLVT with a right to a federal forum.

Judged against the classic and modified legal process method, the *Franchise Tax Board* opinion is deficient in several respects. As already noted, it abandoned a well-established and durable principle in service of a vague policy judgment seemingly designed to resolve the specific case before it. In addition, the Court's opinion betrayed the principle of reasoned elaboration given the empty space that fell between the Court's description of arising-under standards and the Court's ultimate and inexplicable conclusion that those standards had not been satisfied. Finally, the Court denied jurisdiction in the face of clear congressional intent to the contrary, and in violation of the principles of institutional settlement and separation of powers.

---

170. *Id.* at 25–26.

171. *Id.* at 20–21.

172. *See id.* at 20.

173. *See supra* text accompanying note 169.

174. *Franchise Tax Bd.*, 463 U.S. at 21.

B. Merrell Dow Pharmaceuticals Inc. v. Thompson

In 1986, the Court in *Merrell Dow Pharmaceuticals Inc. v. Thompson*[175] took *Franchise Tax Board*'s "practicality and necessity"[176] approach a step further. There, two sets of parents, residents of Canada and Scotland, respectively, sued Merrell Dow, a drug manufacturer, claiming that their children had suffered birth defects caused by a drug manufactured by the defendant and ingested by the mothers while pregnant.[177] The suit was filed in an Ohio state court and removed to federal court by the defendant.[178] The defendant argued that the case arose under federal law because one of the six claims asserted by the plaintiffs relied on an alleged violation of the labeling standard imposed by the Federal Food, Drug, and Cosmetic Act (FDCA), the violation of which was said to create a presumption of negligence under state law.[179] The plaintiffs filed a motion to remand arguing that no federal question was presented in their suit.[180] The defendants responded by filing a motion to dismiss on forum non conveniens grounds.[181] The district court denied plaintiffs' motion to remand but granted the defendant's motion to dismiss.[182] The court of appeals, addressing only the jurisdictional issue, reversed in a one-page opinion, concluding that federal law was not necessarily implicated in the plaintiffs' suit and that, as a consequence, the case did not arise under federal law.[183] The question before the Supreme Court was whether the plaintiffs' claim arose under federal law for purposes of § 1331.[184]

Adopting the policy-driven approach endorsed by the Court three years earlier in *Franchise Tax Board*,[185] the focus of the majority opinion was less on the nature of the action, as had been the focus of the court of appeals, and more on the "dictates of sound judicial policy" that, in the majority's view, should justify the exercise of federal

175. 478 U.S. 804 (1986).

176. *See* 463 U.S. at 20.

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

178. *Id.*

179. *Id.* Although alienage jurisdiction was satisfied under § 1332(a)(2), the case could not be removed under § 1441 since Merrell Dow was a resident of the forum state. *Id.* at 806 n.1; *see also* 28 U.S.C. § 1441(b) (1982).

180. *Merrell Dow*, 478 U.S. at 806.

181. *Id.*

182. *Id.*

183. Thompson v. Merrell Dow Pharms. Inc., 766 F.2d 1005, 1006 (6th Cir. 1985).

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

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

jurisdiction.[186] Thus, according to the Court, the "'increased complexity of federal legislation and the increased volume of federal litigation,' as well as 'the desirability of a more careful scrutiny of legislative intent,'" were key considerations that should be taken into account in determining whether a case satisfied the arising-under standard.[187]

In concluding that there was no federal question jurisdiction in this case, the most significant factor to the Court, however, was the untested assumption that Congress had not intended to create a private right of action to enforce the FDCA.[188] From this assumption, the Court further assumed that Congress also intended to preclude the exercise of federal jurisdiction over state law claims premised on a violation of an FDCA standard.[189] In response to the petitioner's argument that the claim included a substantial federal question,[190] the Court replied that the absence of a congressionally created private right of action 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."[191]

Thus, in *Merrell Dow*, a judicially imposed policy judgment, driven by case-management concerns and mechanically applied, operated as a determinative measure of substantiality. In fact, the Court attributed a variety of meanings to the word "substantial," further enhancing the scope of its discretion to reject federal jurisdiction in these cases. "Substantial," said the Court, could connote meaningfulness within the context of the pending case,[192] importance to the federal system in a way

---

186. *Merrell Dow*, 478 U.S. at 810 (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 (1959)).

187. *Id.* at 811–12 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377 (1982)).

188. *Id.* at 812.

189. *Id.*

190. The petitioner contended that "the case represents a straightforward application of the statement in *Franchise Tax Board* that federal-question jurisdiction is appropriate when 'it appears that 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.*, 463 U.S. at 13).

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

192. *Id.* at 814 n.12 (quoting Shulthis v. McDougal, 225 U.S. 561, 569–70 (1912)) ("A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws[.]").

that transcended the pending case,[193] or non-frivolousness as a matter of substantive law.[194] The federal issue presented in *Merrell Dow* was insubstantial under any of these standards, and proof of that insubstantiality required no resort to the Court's newly crafted policy judgment. Instead, the Court could have asked and answered a simple question: Was the case one that was truly about federal law?

In order to answer this question, a little background might be helpful. The lawyer who represented the two sets of parents in *Merrell Dow* had previously filed a virtually identical suit against the company in the same federal district court, invoking that court's diversity jurisdiction, but representing different (also foreign) plaintiffs.[195] The district court dismissed that case on forum non conveniens grounds.[196] The lawyer, with new foreign clients in hand, then sued Merrell Dow in an Ohio state court asserting essentially the same claims.[197] Merrell Dow, quite plainly, wanted this new iteration of the case in the same federal court that had earlier dismissed on forum non conveniens grounds. Since 28 U.S.C. § 1441(b) precluded removal on diversity grounds[198]—Merrell Dow being a citizen of Ohio for purposes of diversity—the only possibility was removal as a federal question case. So the fight over jurisdiction was really a fight over forum non conveniens.

The focus on forum non conveniens helps explain why the plaintiffs—who invoked federal law in their complaint—argued against jurisdiction, while the defendant—who denied the legitimacy of their "federal claim"—argued that federal question jurisdiction was satisfied. It is true that the plaintiffs' complaints raised a potential violation of the FDCA, but what is not apparent from the *Merrell Dow* decision is that the federal issue was frivolous from the outset, and more a product of the imagination of the lawyers representing Merrell Dow than anything else. The text of the FDCA addresses itself to interstate and intrastate transactions. It does not (at least on its face) purport to apply to drugs manufactured and sold outside the United States. The drugs at issue in

193. *Merrell Dow*, 478 U.S. at 814 ("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.").

194. *Id.* at 817 ("Although it is true that federal jurisdiction cannot be based on a frivolous or insubstantial federal question . . . .").

195. *See In re* Richardson-Merrell Inc., 545 F. Supp. 1130, 1130–32 (S.D. Ohio 1982).

196. *Id.* at 1136–37.

197. *See* Chambers v. Merrell Dow Pharms. Inc., No. C-850888, 1986 WL 14901, at *1 (Ohio App. Dec. 24, 1986).

198. *Merrell Dow*, 478 U.S. at 805 n.1.

Merrell Dow were, in fact, manufactured and sold outside the United States (though that was not revealed on the face of the complaint).[199] *Merrell Dow* nonetheless argued that the case presented a significant question of whether the FDCA applied beyond the U.S. borders.[200] But the plaintiffs had made no such claim; rather, their complaints seemed to be based on the prayer that no one would notice that the statutory standard they invoked was inapplicable under the circumstances presented.

Returning to the question of whether this was a case that could be heard by a federal court, the dissent, authored by Justice Brennan,[201] questioned the logic of the majority's reasoning. "Why," the dissent asked, "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?"[202] As the dissent saw it, 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.[203] In the dissent's view, the majority had not even considered that question.[204]

As to the last point, the dissent observed that Congress had vested district courts with exclusive jurisdiction over administrative actions arising under the FDCA, strongly suggesting that the exercise of jurisdiction in cases such as this would be consistent with congressional intent as to the proper scope of federal question jurisdiction.[205] The dissent's explanation is worth a close reading:

> Congress passes laws in order to shape behavior; a federal law expresses Congress' determination that there is a federal interest in having individuals or other entities conform their actions to a particular norm established by that law . . . . It is the duty of courts to interpret these laws and apply them in such a way that the congressional purpose is realized. As noted above, Congress granted the district courts power to hear cases "arising under" federal law in order to enhance the likelihood that federal laws would be interpreted more correctly and applied more

199. Brief for Petitioner at 6–7, Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804 (1986) (No. 85-619).

200. *Merrell Dow*, 478 U.S. at 816–17.

201. *Id.* at 818.

202. *Id.* at 825 (Brennan, J., dissenting) (emphasis in original).

203. *Id.*

204. *Id.* at 830.

205. *Id.* at 831.

uniformly. In other words, Congress determined that the availability of a federal forum to adjudicate cases involving federal questions would make it more likely that federal laws would shape behavior in the way that Congress intended.

By making federal law an essential element of a state-law claim, the State places the federal law into a context where it will operate to shape behavior: the threat of liability will force individuals to conform their conduct to interpretations of the federal law made by courts adjudicating the state-law claim . . . . Consequently, the possibility that the federal law will be incorrectly interpreted in the context of adjudicating the state-law claim implicates the concerns that led Congress to grant the district courts power to adjudicate cases involving federal questions in precisely the same way as if it was federal law that "created" the cause of action. It therefore follows that there is federal jurisdiction under § 1331.[206]

The views of the dissent are well taken. The majority opinion replaced the fundamental inquiry into the nature of the federal issue and the role of that issue within that lawsuit with an abstract policy judgment based on a presumed congressional intent. The dissent, on the other hand, returned the analysis to durable principles of general applicability, more consistent with *Gully* and with the Court's obligation to exercise the jurisdiction intentionally vested in it by Congress—and thus more in line with legal process.

C. Christianson v. Colt Industries Operating Corp.

In 1988, the Court added another consideration to the arising-under analysis. In *Christianson v. Colt Industries Operating Corp.*,[207] the plaintiff sued his former employer in a federal court, claiming violations of sections 1 and 2 of the Sherman Act and state law tortious interference with his business relationships.[208] The defendant responded by arguing that its conduct was justified by a need to protect its trade secrets and by filing a variety of counterclaims based on the plaintiff's alleged misappropriation of one of defendant's patent specifications.[209] The precise question before the Supreme Court was whether either the Seventh Circuit or the Federal Circuit had appellate jurisdiction over this

206. *Id.* at 827–28.

207. 486 U.S. 800 (1988).

208. *Id.* at 805.

209. *Id.* at 805–06.

case.[210] The answer to that question depended on whether the case arose under patent law within the meaning of 28 U.S.C. § 1338, for if it did, then appellate jurisdiction would lie exclusively in the Federal Circuit.[211] The Court held that the case was not one arising under patent law since the plaintiff's antitrust claim rested on two theories, only one of which relied on patent law.[212] In adopting this "alternative theories" approach to arising-under jurisdiction, the Court relied on language from its decision in *Franchise Tax Board*:

> If "on the face of a well-pleaded complaint there are . . . reasons completely unrelated to the provisions and purposes of [the patent laws] why the [plaintiff] may or may not be entitled to the relief it seeks," . . . then the claim does not "arise under" those laws.[213]

The *Christianson* Court further limited the scope of federal question jurisdiction by adding yet another mechanical test—specifically, the alternative theories test.[214] In adopting this approach, the Court did not define or even consider the difference between separate claims, separate theories on the same claim, and the possibility of having original jurisdiction over some claims (and/or theories) and supplemental jurisdiction over others. Moreover, the Court's reliance on *Franchise Tax Board* as establishing an alternative-theories test was completely misplaced, since the Court in *Franchise Tax Board* neither adopted nor alluded to any such test. Rather, the language from *Franchise Tax Board* that the *Christianson* Court relied on was simply used as an explanation as to why the complete preemption doctrine did not apply to that case.[215] This obvious misreading of a precedent certainly flies in the face of the

---

210. *Id.* at 803–04, 806–07.

211. *Id.* at 807.

212. *Id.* at 810–12.

213. *Id.* at 810 (alterations in original) (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 26 (1983)).

214. The Court, indeed, explained that "arising under" means precisely the same thing under § 1331 and § 1338. 486 U.S. at 808–09.

215. *See Franchise Tax Bd.*, 463 U.S. 1, 25–26 (1983) ("Against this background, it is clear that a suit by state tax authorities under a statute like § 18818 does not "arise under" ERISA. Unlike the contract rights at issue in *Avco*, the State's right to enforce its tax levies is not of central concern to the federal statute. For that reason, as in *Gully*, on the face of a well-pleaded complaint there are many reasons completely unrelated to the provisions and purposes of ERISA why the State may or may not be entitled to the relief it seeks. Furthermore, ERISA does not provide an alternative cause of action in favor of the State to enforce its rights, while § 301 expressly supplied the plaintiff in *Avco* with a federal cause of action to replace its preempted state contract claim. Therefore, even though the Court of Appeals may well be correct that ERISA precludes enforcement of the State's levy in the circumstances of this case, an action to enforce the levy is not itself preempted by ERISA.") (citation omitted).

principle of reasoned elaboration.

The combination of *Franchise Tax Board*, *Merrell Dow*, and *Christianson* fragmented the jurisdictional inquiry and abandoned the principled approach endorsed in *Gully* and its predecessors. In so doing, the Court made it increasingly difficult to honor the institutional authority of Congress to vest federal courts with general arising-under jurisdiction.

In deciding these cases, the Court had clearly strayed from the path set by *Gully*. Practicality and necessity, speculation about an ersatz congressional intent, and mechanical tests had come to replace the fundamental inquiry into the federal nature of the plaintiff's claim. In this sense, the Court's emerging jurisprudence sacrificed the interest of the individual in service of the interest of the federal judicial system. At the same time, the Court was slowly developing a doctrine that would give federal judges a potential veto over cases that would otherwise have fallen within their arising-under jurisdiction.

Merrell Dow, in addition to abandoning *Gully*, generated a major conflict among the lower federal courts. Circuit courts split on the critical question of whether federal courts could exercise federal jurisdiction on state-law claims that include an essential federal ingredient in the absence of an express or implied right of action to enforce the federal standard.[216] The Court finally granted certiorari in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*[217] in an effort to resolve this conflict.[218]

D. Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing

In *Grable*, the Internal Revenue Service (IRS) seized real property owned by Grable to satisfy Grable's federal tax delinquency.[219] The IRS gave Grable notice of the seizure by certified mail and Grable received

---

216. *Compare* Flood v. Braaten, 727 F.2d 303, 304–05 (3d Cir. 1984) (finding arising-under jurisdiction under the Parental Kidnaping Prevention Act despite absence of private right of action), Hickey v. Baxter, 800 F.2d 430, 431 (4th Cir. 1986) (accord), McDougald v. Jenson, 786 F.2d 1465, 1477 (11th Cir. 1986), (accord), *and* Heartfield v. Heartfield, 749 F.2d 1138, 1140–41 (5th Cir. 1985) (accord), *with* Rogers v. Platt, 814 F.2d 683, 694–96 (D.C. Cir. 1987) (arriving at the opposite conclusion post-*Merrell Dow*). *See also* Ormet Corp. v. Ohio Power Co., 98 F.3d 799, 806–07 (4th Cir. 1996) (no private right of action required to establish federal ingredient jurisdiction post-*Merrell Dow*). *But see* Seinfeld v. Austen, 39 F.3d 761, 764 (7th Cir. 1994) (private right of action required to establish federal ingredient jurisdiction post-*Merrell Dow*).

217. 545 U.S. 308 (2005).

218. *Id.* at 311–12 & n.2.

219. *Id.* at 310.

actual notice.[220] After the property was sold to Darue, Grable did not exercise its statutory right to redeem it.[221] Five years later, Grable sued Darue in a quiet title action in a state court claiming that Darue's title "was invalid because the IRS had failed to notify Grable of its seizure of the property in the exact manner required by [26 U.S.C.] § 6335(a)."[222] That section provided that written notice had to be "given by the Secretary to the owner of the property . . . [or] left at his usual place of abode or business."[223] The defendant removed the case to federal court asserting jurisdiction under § 1331 since the quiet-title claim depended on the interpretation and application of the federal notice statute.[224] The district court denied Grable's motion to remand and a judgment was entered for Darue, the court having concluded that the notice given to Grable was in "substantial compliance" with § 6335(a).[225] The court of appeals affirmed.[226]

The question presented to the Supreme Court was whether the state-created quiet title claim contained a federal ingredient sufficient to justify the exercise of federal question jurisdiction.[227] The Court explained that the mere presence of a federal ingredient in a state law claim is not itself sufficient to satisfy the statutory "arising-under" standard.[228] Rather, "the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."[229]

In adopting this four-part test, the Court also made it clear that *Merrell Dow* was not to be read as requiring a private right of action in order to establish "arising under" jurisdiction.[230] While it thus aligned itself with the lower courts that had similarly held, the *Grable* Court did not return to *Gully*'s durable principle. Instead, it remained focused on

220. *Id.*

221. *Id.* at 310–311.

222. *Id.* at 311.

223. 26 U.S.C. § 6335(a) (2000).

224. *Grable*, 545 U.S. at 311.

225. *Id.*

226. *Id.*

227. *Id.* at 310–11.

228. *Id.* at 313.

229. *Id.* at 314.

230. In the Court's words, "[a]ccordingly, *Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires." *Id.* at 318 (quoting Merrell Dow Pharms. Inc., v. Thompson, 478 U.S. 804, 810 (1986)).

the details of a doctrine that seems designed to serve the federal judiciary's interest at the expense of the legitimate interests of individual claimants in choosing a federal forum.

Applying its four-part test to the case before it, the Court found that Grable's claim was one arising under federal law. First, the adequacy of notice under the terms of a federal statute was an essential element of the plaintiff's claim.[231] Second, the meaning of the federal statute was actually disputed between the parties.[232] Third, the issue was substantial due to the federal government's interests in the collection of taxes, the marketability of the title to property sold in tax delinquency sales, and the availability of a federal forum "to vindicate its administrative action."[233] Finally, the Court saw no threat to the congressionally approved balance between federal and state court jurisdiction since it would "be the rare state title case that raises a contested matter of federal law."[234]

While *Grable* eliminated the conflicts caused by *Merrell Dow* with respect to the role of the private right of action in the determination of arising-under jurisdiction, it did nothing to clarify *Merrell Dow*'s multiple usages of the word "substantial," for it did precisely the same thing—varying the meaning of substantial between important to the pending litigation,[235] and important in a way that transcended that litigation.[236] In addition, the *Grable* Court endorsed and amplified the policy-driven approach introduced by the Court in *Franchise Tax Board*, and thus made the potential veto into an integral component of the arising-under analysis.[237] This component, which ostensibly focuses on the presumed intent of a silent Congress, cannot be measured other than through a collective assessment of the ad hoc judgment of the courts that apply it.

The inconsistency between the *Grable* approach, on the one hand, and the classic and modified legal process method on the other, is palpable. The veto principle is neither durable nor of general application, as it calls for ad hoc determinations while providing no guidance as to how those determinations should be made. It is also inconsistent with the separation of powers principle since it allows courts to ignore the actual

231. *Id*. at 315.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 310, 312.

236. *Id.* at 315.

237. *See id.* at 313–14.

intent of Congress.

E. Empire Healthchoice Assurance, Inc. v. McVeigh

The arising-under saga continued in *Empire Healthchoice Assurance, Inc. v. McVeigh*,[238] where a private healthcare provider for federal employees brought an action against a former enrollee's estate, seeking reimbursement of insurance benefits on the ground that the enrollee had recovered damages for his injuries in a state-court tort action.[239] The question presented was whether the action for reimbursement arose under federal law for purposes of § 1331.[240] The plan itself was subject to the Federal Employees Health Benefits Act of 1959 (FEHBA) and was a product of negotiations with a federal agency.[241] However, neither FEHBA nor any federal regulation addressed the question of reimbursement, nor was there any dispute as to the interpretation of any federal statute or rule on which the healthcare provider's contractually based reimbursement claim depended.[242] Nonetheless, the suit was filed in federal court invoking § 1331 jurisdiction.[243] The district court granted the defendant's motion to dismiss for lack of subject matter jurisdiction and the Second Circuit affirmed.[244]

The Supreme Court likewise affirmed.[245] It first held that neither federal common law[246] nor FEHBA created a cause of action for reimbursement.[247] Indeed, the Court's discussion of these questions strongly suggested that the plaintiff's reimbursement claim presented no federal issue whatsoever.[248] Nonetheless, the Court proceeded (or purported) to apply *Grable*'s four-part test,[249] premised on the caveat that it designed this test to reach only a "special and small category" of cases.[250]

---

238. 547 U.S. 677 (2006).

239. *Id.* at 682–83.

240. *Id.* at 683.

241. *Id.* at 683–84.

242. *Id.* at 683.

243. *Id.*

244. *Id.* at 688.

245. *Id.* at 701.

246. *Id.* at 691–93.

247. *Id.* at 693–99.

248. *See id.* at 690–99 (strongly suggesting that neither federal common law nor FEHBA were in any manner implicated by plaintiff's claim).

249. *See supra* text accompanying note 229.

250. *McVeigh*, 547 U.S. at 699.

The Court did not address the first or second prongs of the *Grable* test, which is to say that the Court neither identified a federal ingredient embedded in plaintiff's reimbursement claim nor described any dispute over the meaning, application or validity of any such ingredient. Instead, the Court began by observing that the case before it was "poles apart from *Grable*."[251] There were, in the Court's view, two key distinctions. First, because the dispute in Grable "centered on the action of a federal agency (IRS) and its compatibility with a federal statute, the question qualified as 'substantial' . . . ."[252] By way of contrast, plaintiff's "reimbursement claim was triggered, not by the action of any federal department, agency, or service, but by the settlement of a personal-injury action launched in state court . . . ."[253] Second, "*Grable* presented a nearly 'pure issue of law,' one 'that could be settled once and for all and thereafter would govern numerous tax sale cases.'"[254] By way of contrast, "Empire's reimbursement claim . . . [was] fact-bound and situation-specific."[255] Given these distinctions, the Court concluded that the case did not arise under federal law.[256]

The approach adopted by the *Empire* Court raises three distinct problems. First, as a general matter, the *Empire* Court's treatment of the specific facts of *Grable* as suggesting additional doctrinal limitations on the scope of federal-ingredient jurisdiction misperceives the role of the facts in the development of the law and confuses the particular application of a rule with the rule itself. Certainly, the absence of a federal agency in the background of the case has no necessary bearing on the substantiality of the federal issue presented. Second, given that the category of federal question cases is inherently "special and small,"[257] the inclusion of that phrase suggests another unprincipled contraction of the federal-ingredient category further disserving the intent of Congress. On what principled ground, and by whose authority, must that category be small? Finally, the distinction drawn by the Court between pure questions of law and questions of fact fails to recognize the important role of federal courts as finders of fact in vindicating federal rights and obligations. As the Court had previously observed in

---

251. *Id.* at 700.

252. *Id.*

253. *Id.*

254. *Id.* (quoting RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65 (Supp. 2005)).

255. *Id.* at 700–01.

256. *Id.* at 701.

257. *Id.* at 699.

England v. Louisiana State Board of Medical Examiners,[258] fact-finding is a critical component of a federal district court's exercise of federal question jurisdiction:

> Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. There is always in litigation a margin of error, representing error in fact-finding."[259]

It is also fair to say that *Empire* failed to satisfy the reasoned elaboration principle in that the Court's discussion has virtually nothing to do with resolving the federal question before it. The discussion wanders into arising-under law when no such journey was required by the claims presented to it. Instead, all that the Court had to do was rule that no federal question was presented in the case, or on that basis dismiss the petition on the ground that certiorari was improvidently granted.

F. Grable *and* Empire *in the Lower Federal Courts*

In the wake of *Grable* and *Empire*, lower federal courts have struggled to develop a coherent approach to what they perceive as the mandate of the *Grable*/*Empire* test.[260] At least one circuit has created its own multi-factor test as a method of navigating the *Grable/Empire* standard.[261] Others have attempted to avoid the full implications of that

---

258. 375 U.S. 411 (1964).

259. *Id.* at 416–17 (citations and internal quotation marks omitted); *see also* Osborn v. Bank of the U.S., 22 U.S. 738, 821–23 (1824) ("A cause may depend on several questions of fact and law. . . . [I]f the circumstance that other points are involved in it, shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will."); William Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV., 890, 892–93 (1967); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 170–72 (1953).

260. For a rare case in which all of the *Grable* and *Empire* factors seem to have been satisfied, see *Gilmore v. Weatherford*, 694 F.3d 1160 (10th Cir. 2012).

261. Thus, in *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555 (6th Cir. 2007) (en banc), *cert. denied*, 553 U.S. 1031 (2008), the court adopted a four-part test to measure the *Grable* substantiality prong: (1) whether the case includes a federal agency, and particularly, whether that agency's compliance with the federal statute is in dispute; (2) whether the federal question is important (i.e., not trivial); (3) whether a decision on the federal question will resolve the case (i.e., the federal

standard by compressing the *Grable* four-part test into something that resembles the *Gully* standard.[262] In essence, lower courts are creating tests to measure the *Grable/Empire* test.

The variable approach to *Grable*'s substantiality prong is particularly telling. Although the *Grable* Court focused much of its substantiality analysis on whether the federal issue was dear to the federal system, lower federal courts have not approached this issue uniformly. Some have followed *Grable* strictly, completely ignoring the importance of the role of the federal issue in the pending litigation.[263] Others continue to consider the significance of the federal issue to the pending litigation,[264] and some also attend to the independent importance (or unimportance) of the federal issue presented.[265] In addition, some courts consider the absence of a federal agency in the case as being a significant limiting factor on the question of substantiality.[266] Others require that the federal issue present an almost pure question of law, implicitly discarding the important fact-finding role of federal courts.[267] Similarly, some lower courts have demanded that resolution of the federal issue be applicable to a broad range of future cases.[268] In addition, several lower courts have enforced the alternative-theory principle elaborated in *Christianson*,[269] while others have advised that "jurisdiction is disfavored for cases

---

question is not merely incidental to the outcome); and (4) whether a decision as to the federal question will control numerous other cases (i.e., the issue is not anomalous or isolated). *Id.* at 570.

262. *See* Immunocept, LLC v. Fulbright & Jaworski, LLP, 504 F.3d 1281, 1284–86 (Fed. Cir. 2007); Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262, 1271–73 (Fed. Cir. 2007).

263. *E.g.*, McCormick v. Excel Corp., 413 F. Supp. 2d 967, 969–70 (E.D. Wis. 2006).

264. *E.g.*, N.Y.C. Health & Hosps. Corp. v. WellCare of N.Y., Inc., 769 F. Supp. 2d 250, 257 (S.D.N.Y. 2001).

265. *Immunocept*, 504 F.3d at 1284–86; *Air Measurement*, 504 F.3d at 1271–73; Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 818 (4th Cir. 2004); Bowdrie v. Sun Pharm. Indus. Ltd., 909 F. Supp. 2d 179, 184 (E.D.N.Y. 2012); West Virginia *ex rel*. McGraw v. Eli Lilly & Co., 476 F. Supp. 2d 230, 233–34 (E.D.N.Y. 2007); Beechwood Dev. Grp., Inc. v. Konersman, 517 F. Supp. 2d 770, 775 (D.S.C. 2007).

266. Gilmore v. Weatherford, 694 F.3d 1160, 1174 (10th Cir. 2012).

267. *Id.*; Bender v. Jordan, 623 F.3d 1128, 1130 (D.C. Cir. 2010); Alade v. Barnes-Jewish Hosp., Inc., No. 4:12-CV-497 CAS, 2012 WL 2598091, at *4 (E.D. Mo. 2012); Yellen v. Teledne Cont'l Motors, Inc., 832 F. Supp. 2d 490, 497–98 (E.D. Pa. 2011); McAdams v. Medtronic, Inc., No. H-10-831, 2010 WL 3909958, at *2–4 (S.D. Tex. 2010).

268. *Alade*, 2012 WL 2598091, at *4; *Yellen*, 832 F. Supp. 2d at 497–98; *McAdams*, 2010 WL 3909958, at *3–4; Alcarmen v. Citibank N.A., No. C–09–0853 EMC, 2009 WL 1330803, at *3 (N.D. Cal. 2009).

269. Whittington v. Morgan Stanley Smith Barney, No. 1:12CV112, 2012 WL 4846484, at *4 (W.D.N.C. 2012); *In re* Oxycontin Antitrust Litig., 821 F. Supp. 2d 591, 599 (S.D.N.Y. 2011); Blakenship v. Bridgestone Americas Holding, Inc., 467 F. Supp. 2d 886, 898 (C.D. Ill. 2006).

that . . . involve substantial questions of state as well as federal law."[270] Finally, some lower courts have treated *Empire*'s admonition that cases satisfying the *Grable* standard should represent a "special and small category" as creating an additional presumption against the exercise of federal question jurisdiction.[271] Taking all of these approaches together, and considering their inherent malleability, the law of federal question jurisdiction has become anything but principled and seemingly rests within the hands of each individual federal court judge.

In short, *Gully*'s elegant compass, with its point pinned on the "true north" of congressional intent and the role played by the federal issue in the claim presented, has been replaced by a maze of multi-pronged tests that mask the essential inquiry with the rhetoric of policy, pragmatics, ersatz intent, speculation, and ever-expanding multi-prong tests.

IV. *GUNN V. MINTON*: A CASE STUDY

We now come to *Gunn v. Minton*,[272] the Supreme Court's latest foray into the thicket of arising-under jurisdiction. At the very least, *Gunn* provided the Court an opportunity to clarify the confusion generated by its most recent federal-ingredient decisions; at its very best, *Gunn* offered the Court an opportunity to return jurisdictional analysis to its principled roots. The Court chose a different path.

Vernon Minton filed a federal patent infringement action (the "Patent Litigation") against the National Association of Securities Dealers, Inc. (the "NASD"), assisted by attorney Jerry W. Gunn and other lawyers.[273] Minton alleged that the NASD had infringed his U.S. patent for TEXCEN, a telecommunications network and software program.[274] Minton's company had leased TEXCEN to R.M. Stark & Co. ("Stark") more than one year before he applied for the patent for that invention.[275] At the time of the lease, Minton assured Stark that TEXCEN was a finished product and never suggested that the purpose of the lease was

---

270. *E.g.*, *Bender* 623 F.3d at 1130.

271. *Gilmore*, 694 F.3d at 1171; *Alade*, 2012 WL 2598091, at *4; *Yellen*, 832 F. Supp. 2d at 497; Baum v. Keystone Mercy Health Plan, 826 F. Supp. 2d 718, 720 (E.D. Pa. 2011); *McAdams*, 2010 WL 3909958, at *2; J. Kaz, Inc. v. Brown, No. 10-0382, 2010 WL 2024483, at *3 (W.D. Pa. 2010); *In re* Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig., 2008 WL 5450351, at *4 (S.D. Cal. 2008).

272. __U.S.__, 133 S. Ct. 1059 (2013).

273. Petitioners' Brief on the Merits at 3, Gunn v. Minton, __U.S.__, 133 S. Ct. 1059 (2013) (No. 11-1118).

274. *Id.* at 3–4.

275. *Id.* at 4.

experimentation.[276] NASD moved for summary judgment arguing that the technology that formed the basis of Minton's patent had been the subject of a commercial lease—the lease to Stark—more than a year before Minton applied for the patent.[277] According to NASD, the "on sale bar" would thus apply and preclude Minton from acquiring a patent on the technology.[278] The district court granted NASD's summary judgment motion.[279] Minton's attorneys then filed a motion for reconsideration, raising the new argument that the "experimental use" negated the "on sale bar."[280] The district court, however, denied reconsideration.[281] Minton appealed and the Federal Circuit affirmed the district court's judgment.[282]

Minton then filed a legal malpractice suit before a Texas state court against Gunn and the attorneys who represented Minton in the Patent Litigation.[283] He alleged that, by failing to raise the experimental use doctrine in a timely fashion, his lawyers had been negligent and caused him to lose the case.[284] The lawyer defendants filed motions for summary judgment, challenging the causation element of Minton's malpractice claim.[285] They argued that the experimental use exception did not apply to the commercial lease at issue and that their alleged failure to timely plead and brief the exception therefore could not have caused Minton any harm.[286] The trial court granted the defendants' summary judgment motions and entered a take-nothing judgment on all Minton's claims.[287] Minton appealed to the Court of Appeals for the Second District of Texas.[288] While that appeal was pending, the Federal Circuit decided *Air Measurement Technologies, Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P.*[289] and *Immunocept, LLC v. Fulbright &*

276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 5.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* at 5–6.
287. *Id.* at 6.
288. *Id.*
289. 504 F.3d 1262 (Fed. Cir. 2007).

Jaworski, LLP,[290] each of which addressed the precise question presented in *Gunn v. Minton*.

In *Air Measurement*, the question was whether a state-created legal malpractice case for negligent representation in a previous patent prosecution and litigation could be removed to federal court as a suit arising under the patent laws within the meaning of § 1338.[291] The Federal Circuit relied on the *Grable* test and held that removal was proper.[292] First, the court found that the patent law issue was embedded in the malpractice claim since proof of patent infringement was a necessary element of the plaintiff's malpractice claim.[293] Next, since the parties disagreed on the question of patent infringement, the court easily concluded that the infringement question was actually disputed.[294] Third, the court concluded that the patent infringement question was substantial, citing three reasons—because it was "a necessary element of the malpractice case,"[295] "because patents are issued by a federal agency,"[296] and because litigants will benefit "from federal judges who have experience in claim construction and infringement matters."[297] Finally, as to the last *Grable* prong, the court found that the exercise of jurisdiction would be consistent with the congressionally mandated balance of jurisdiction between state and federal courts, explaining, "Congress considered the federal-state division of labor and struck a balance in favor of this court's entertaining patent infringement. For us to conclude otherwise would undermine Congress's expectation."[298]

The *Immunocept* case,[299] decided by the Federal Circuit on the same day as *Air Measurement*, involved another patent-based legal malpractice claim. The court again found arising-under jurisdiction satisfied.[300] As was true in *Air Measurement*, the plaintiff's malpractice claim included an essential patent-law ingredient that was the subject of an actual dispute between the parties.[301] With this as its starting point,

290. 504 F.3d 1281 (Fed. Cir. 2007).

291. *Air Measurement*, 504 F.3d at 1267.

292. *Id.* at 1273.

293. *Id.* at 1269.

294. *Id.* at 1272.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. Immunocept, LLC v. Fulbright & Jaworski, LLP, 504 F.3d 1281 (Fed. Cir. 2007).

300. *Id.* at 1283.

301. *Id.* at 1285.

the *Immunocept* court addressed the last two prongs of the *Grable* test jointly. In that discussion, the court relied on three factors in concluding that the plaintiff's patent-law-premised malpractice claim arose under federal law: (1) the federal issue presented in the case was important as a matter of patent law; (2) the issue was one that called for the expertise of federal judges from which litigants would benefit; and (3) the exercise of jurisdiction under the circumstances was consistent with congressional intent.[302]

Air Measurement and *Immunocept* are almost perfect exemplars of the classic and modified legal process method. Each is premised on durable jurisdictional principles of general applicability, which each court applied consistently with the full range of constitutional structure in mind, including the right of individual claimants to seek a federal forum under standards consistent with congressional intent. The courts' analyses also provide a straightforward, reasoned elaboration in that the conclusions reached logically proceed from the principled premise on which they are based. It almost goes without saying (but I have to say it!) that both cases are consistent with the claim-centered approach to jurisdiction developed in Part I.B of this article and, hence, are consistent with *Gully*.

In his then-pending case before the Texas Court of Appeals, Minton now argued, based on *Air Measurement* and *Immunocept*, that his legal malpractice action belonged to the exclusive jurisdiction of federal courts.[303] The state appellate court disagreed and held that Minton's state law malpractice claims did not "arise under" federal law.[304] Specifically, the Court of Appeals' majority held that the third and fourth prongs of the *Grable* test had not been satisfied.[305]

In so ruling, the state court declined to follow the Federal Circuit's decisions in *Air Measurement* and *Immunocept*, explaining that those rulings were not binding on it.[306] The appellate court further observed that, in its view, the Federal Circuit misapplied United States Supreme Court precedent by disregarding the "federalism" component of the *Grable* test and by misapplying the substantiality requirement.[307]

Minton appealed to the Texas Supreme Court.[308] The Texas high

302. *Id.* at 1285–86.

303. Minton v. Gunn, 301 S.W. 3d 702, 708 (Tex. Ct. App. 2009).

304. *Id.* at 709.

305. *Id.*

306. *Id.*

307. *Id.*

308. Minton v. Gunn, 355 S.W.3d 634, 639 (Tex. 2011).

court applied the *Grable* test and, finding each prong of that test to have been satisfied, held that Minton's legal malpractice claim fell within the exclusive jurisdiction of the federal courts.[309] The majority's reasoning largely tracked the decisions in *Air Measurement* and *Immunocept*.[310] Under this approach, the first two *Grable* prongs were easily satisfied since Minton's malpractice claim was dependent on a question of patent law and since the parties disputed the application of that federal standard under the facts presented.[311] The question of substantiality was resolved by reference to the significant role the patent law issue played within the context of the plaintiff's claim.[312] Finally, with respect to the balance between federal and state court jurisdiction, the Texas court emphasized the strong federal interest in the uniform application of patent law.[313]

On October 5, 2012,[314] the Supreme Court granted certiorari in *Gunn v. Minton* on the following question:

> Did the Federal Circuit depart from the standard this Court articulated in *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), for "arising under" jurisdiction of the federal courts under 28 U.S.C. § 1338, when it held that state law legal malpractice claims against trial lawyers for their handling of underlying patent matters come within the exclusive jurisdiction of the federal courts? Because the Federal Circuit has exclusive jurisdiction over appeals involving patents, are state courts and federal courts strictly following the Federal Circuit's mistaken standard, thereby magnifying its jurisdictional error and sweeping broad swaths of state law claims - which involve no actual patents and have no impact on actual patent rights - into the federal courts?[315]

Thus, the issue presented in *Gunn* was whether a state-based malpractice claim that requires the resolution of a federal patent law question arises under federal law for purposes of § 1338.

Before we analyze the Supreme Court's decision in that case, we will address the issue under the standards established by *Gully* and through the lens of the proposed modified legal process model.

---

309. *Id.* at 642–47.

310. *See id.*

311. *Id.* at 642–43.

312. *Id.* at 643.

313. *Id.* at 644–46.

314. Gunn v. Minton, __U.S.__, 133 S. Ct. 420 (2012) (granting certiorari).

315. Petition for a Writ of Certiorari at i, Gunn v. Minton, __U.S.__, 133 S. Ct. 1059 (No. 11-1118) (filed Mar. 9, 2012).

V. *GUNN* THROUGH THE UNIFIED CLAIM-CENTERED APPROACH

When deciding whether a case arises under federal law, the essential question should be whether the plaintiff's claim depends on the construction, validity, or effect of federal law.[316] Resolving this question does not require the application of any multi-pronged or mechanical test. Nor does this question require a distinction between causes of action created by federal law and state causes of action that include an essential federal ingredient. In both circumstances, the relevant litigation unit is the claim. Hence, the jurisdictional analysis requires nothing more than a careful assessment of the claim and a sound judgment as to the role that the federal question plays in the resolution of that claim. It would be difficult to improve on Justice Cardozo's earlier quoted admonition in *Gully*:

> What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.[317]

The only policy reflected in Justice Cardozo's analysis is one of careful judgment in determining whether the role played by the federal question in the claim is sufficiently important to justify the exercise of jurisdiction. Thus, the entire analysis focuses on a durable principle, and no mechanical test or formula can improve on that. Rather, as indicated by Justice Cardozo, a mechanical approach carries the risk of creating doctrinal labyrinths from which there is no exit.

---

316. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908); Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894).

317. Gully v. First Nat'l Bank, 299 U.S. 109, 117–18 (1936) (citations omitted).

One could argue that the approach offered by Justice Cardozo in *Gully* is too broad and too vague, and that the tests and the doctrinal formulas later endorsed by the Supreme Court in cases such as *Franchise Tax Board*, *Merell Dow*, *Christianson*, *Grable*, and *Empire* were necessary to give content and contour to the general principles and foundations identified in *Gully*. Yet, history belies this. Decades before *Gully*, the Court had established that the focus of the arising-under jurisdictional analysis was on the plaintiff's claim and on the federal question substantially involved in that claim. There had been no indication that this formula was not working or that it had caused a flood of litigation in the federal courts. As explained in *Shulthis*,[318] if the plaintiff's claim depended on the "validity, construction, or effect" of federal law,[319] that claim gave rise to a true controversy on federal law which, as such, deserved a federal forum.[320] The standard may have been simple, but it was not vague.

Any additional inquiry is a distraction from these fundamental questions and could lead to results inconsistent with the underlying durable principle and with congressional intent. For example, to ask simply whether federal law has created a claim is to misstate the inquiry. The issue is not one of creation or of the source of the right being sued upon, but rather pertains solely to the nature of the claim. This approach is fully consistent with the classic and modified legal process model. It reflects the entire range of structural considerations that ought to be included in a legal process methodology. It renders to federal courts that which is truly federal in nature (federalism and supremacy), it respects the judgment of Congress (separation of powers), and it measures the scope of jurisdiction from the perspective of the individual's claim of right (individual rights).

Likewise, to speak in terms of an essential federal ingredient adds an additional layer of complexity to the analysis by suggesting that a different line of inquiry is needed to assess the availability of federal question jurisdiction in that particular context.

Highly specific tests and rules are sometimes used by legal systems to achieve impartiality and certainty in the administration of justice. Moreover, the application of mechanical tests is easier than going beneath the form to substance of the matter.[321] Today, however, legal

---

318. Shulthis v. McDougal, 225 U.S. 561 (1912).

319. *Id.* at 570.

320. *Id.*

321. Roscoe Pound, *The Administrative Application of Legal Standards*, 42 ANN. REP. A.B.A. 445, 452–53 (1919).

systems have become too complex to be managed by narrow rules and tests and "[i]t is . . . in the maturity of law that men acquire confidence in reasoning as an infallible, impersonal instrument, quite as reliable as mechanical forms and much superior in its results."[322] This more flexible method of legal analysis is more successful than one that proceeds through narrow rules and tests, "[f]or human interests will assert themselves continually in new ways and significant institutions of every-day life often arise extra-legally and produce their most important results independent of or even against the law."[323]

Thus, the proper question to guide the arising-under analysis is simply whether the plaintiff's claim truly involves the construction, validity, or effect of federal law. Certainly this is the approach that was applied in *Smith*,[324] and the one that was endorsed in Justice Frankfurter's oft-quoted description of federal question jurisdiction:

> Almost without exception, decisions under the general statutory grants have tested jurisdiction in terms of the presence, as an integral part of plaintiff's cause of action, of an issue calling for interpretation or application of federal law. E.g., *Gully v. First National Bank*, 299 U.S. 109. Although it has sometimes been suggested that the "cause of action" must derive from federal law, see *American Well Works Co. v. Layne and Bowler Co.*, 241 U.S. 257, it has been found sufficient that some aspect of federal law is essential to plaintiff's success. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180. The litigation-provoking problem has been the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote.[325]

Once it is established that the plaintiff's claim requires the determination of a federal question, the natural consequence should be that that a federal court may address that question. True, federal courts are courts of limited jurisdiction. However, they were created in part to ensure uniformity in the interpretation and application of federal law. Any artificial limitation on the access to federal courts undermines that purpose. Also, if a non-frivolous federal question appears in the case, exercising arising-under jurisdiction over that question cannot, by definition, upset the congressionally mandated balance between federal and state courts in the absence of an express congressional direction to

---

322. *Id.* at 453.

323. *Id.*

324. Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

325. Textile Workers v. Lincoln Mills, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting) (parallel citations omitted).

the contrary. Whether the exercise of federal question jurisdiction upsets the congressionally mandated balance is a question for Congress ultimately to decide, and Congress is fully capable of doing that. Indeed, one wonders how a court can ever know whether some exercise of federal question jurisdiction would upset that balance other than through sheer speculation. Moreover, it is unclear on what legitimate basis a federal court judge should have the authority to force cases involving basic and necessary federal questions into state courts.

Thus, the way out of the maze created by the modern approach to federal question jurisdiction is to be found in the claim-centered approach as exemplified in *Gully* and not in some further elaborations of *Grable* or any of the other recent jurisdictional cases. Indeed, the second, third and fourth prongs of *Grable* are all suspect. As to the second, given that the jurisdictional analysis must be carried out solely by reference to the plaintiff's complaint, the *Grable* Court's requirement that the federal issue be actually disputed is impossible to apply, for no actual dispute can be assessed by reference to only one side of the controversy. Hence, a lower federal court's effort to determine whether a federal issue is actually disputed in a case is misplaced and completely inconsistent with the well-pleaded complaint rule.

The third *Grable* inquiry—the substantiality of the federal issue—is redundant. Establishing the existence of a true and colorable controversy on the construction, validity, or effect of federal law should create the strongest possible presumption in favor of federal jurisdiction. No independent inquiry into substantiality need be required. In fact, learning from the struggles, and the diverging approaches, of the lower courts, and from *Gully* and *Smith*, a federal issue should be considered "substantial" if it is meaningful within the context of the litigation, i.e., colorable and essential within that proceeding. And, certainly, if a federal question plays an important role in the case, the strongest presumption should be that there is a federal forum available to hear that claim. Thus, the last *Grable* inquiry—the possible veto—is illegitimate. In fact, in light of the strong presumption in favor of jurisdiction when a federal question is truly presented, only a clear signal from Congress to the contrary should provide a sufficient rebuttal.

The answer to the issue presented by *Gunn* should now be easy. In *Gunn*, the malpractice litigation was truly about patent law. If it were concluded that Minton's lawyers improperly failed to raise the experimental use exception in the Patent Litigation, Minton would prevail on his legal malpractice claim. To make that determination, it would be necessary to interpret and apply the standards of patent law to the facts relevant to Minton's malpractice claim. Thus, the controversy

over the federal issue is neither collateral nor merely possible. Rather, the controversy over the proper interpretation and application of the experimental use exception is basic and necessary to the resolution of Minton's claim. This is a quintessential question for federal courts. Having established this proposition, any additional analysis required by *Grable* would be either redundant or illegitimate. Moreover, any contrary conclusion on the jurisdictional issue would simply be wrong because Congress has in no way suggested that jurisdiction should be unavailable for the adjudication of such federal issues. Quite the opposite: by giving exclusive federal question jurisdiction over patent law claims and patent law counterclaims,[326] Congress has expressed a clear mandate that patent law issues should be welcomed by, and adjudicated in, federal courts and only in federal courts.[327]

The *Gunn* Court arrived at a different conclusion, not under a different interpretation of *Gully*, but under an approach that draws a bright-line distinction between causes of action created by federal law and state law claims containing an essential federal ingredient. This approach essentially ignores *Gully* and turns a blind eye to congressional intent in an apparent effort to reduce the federal courts' caseload.

VI. THE SUPREME COURT'S MECHANICAL SOLUTION IN *GUNN*

The *Gunn* Court began its analysis by admitting that its arising-under jurisprudence had come to resemble a "Jackson Pollock" canvas.[328] However, as the Court explained, *Grable* was designed to "bring some order to this unruly doctrine,"[329] and, in the Court's view, resolution of the issue in *Gunn* required nothing more than a straightforward application of the four-prong *Grable* test—a myopic paint-by-numbers approach to jurisdiction under which a judge may never look at, much less consider, the picture as a whole.

In applying that test, the Court acknowledged that the "resolution of

---

326. *See* the "Holmes Group fix," contained in Pub. L. No. 112-29, § 19, 125 Stat. 284, 331 (2011) (codified at 28 U.S.C. § 1338(a) (2006 & Supp. V 2007–2012)).

327. *Id.* Apropos to that mandate, leaving disputes over federal law such as that presented in *Gunn* to state courts would pose the risk of inconsistent interpretations and applications of a body of law that Congress wanted exclusively decided by federal courts. Patent lawyers would have to be aware of the federal interpretation of patent law and of individual state courts' interpretation of that law under which they could be subject to malpractice. This complexity would certainly have an impact on the litigation of patent issues in federal courts.

328. Gunn v. Minton, __U.S.__, 133 S. Ct. 1059, 1065 (2013).

329. *Id.*

[a] federal patent question [was] 'necessary' to Minton's case"[330] and that the patent-law issue was "the central point of dispute."[331] The third and fourth prongs of the *Grable* test, however, proved fatal to Minton's quest for exclusive federal jurisdiction.[332]

On the question of substantiality, the Court admonished the Supreme Court of Texas for focusing "on the importance of the issue to the plaintiff's case and to the parties before it."[333] The Court explained, "The substantiality inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole."[334] The Court followed up on this observation by explaining that in *Grable* the "Federal Government" had a "strong interest" in the resolution of the federal issue there presented.[335] Hence, the exercise of jurisdiction there was in order.

The *Gunn* Court's treatment of substantiality was particularly troubling. First, the artificial distinction between cases satisfying the creation test and cases satisfying the essential federal ingredient test is a relatively recent phenomenon, traceable largely to *Merrell Dow*. Certainly, the Court in *Smith* did not create a novel jurisdictional doctrine.[336] Prior to *Merrell Dow*, the decision in *Gully* had fully captured a unified arising-under theory. That theory focused on the importance of the federal issue to the plaintiff's claim, an approach that seemed completely consistent with the congressional intent to create a federal forum for the resolution of claims premised on questions of federal law. Also, there is no evidence that Congress wanted the courts to adopt a narrower construction of arising-under jurisdiction in federal-ingredient cases. Hence, this distinction, however useful it may be in reducing the federal courts' caseload, is nothing more than a creature of judicial imagination.[337]

Federal courts were created by Congress and vested with federal question jurisdiction for the benefit of litigants, not for the benefit of the federal system or federal judges. The notion that federal question jurisdiction should turn on the interest of the federal government or on

---

330. *Id.*

331. *Id.*

332. *See id.* at 1066–68.

333. *Id.* at 1066.

334. *Id.*

335. *Id.*

336. *See* Woolhandler & Collins, *supra* note 82, at 2153 (essential federal ingredient cases "were perhaps the paradigm 'arising under' cases" in the nineteenth century).

337. *See* F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 923–25 (2009).

the interest of the federal system (whatever that may mean), or in federal judges' perception as to the burden of their caseload, is wholly inconsistent with this principle. This notion, first introduced in 1986 in *Merrell Dow* and further developed in *Grable* and *Empire*, seems to be more in service of the judiciary's interest in docket management than it is faithful to congressional intent. Indeed, given that the purpose of federal question jurisdiction is to serve litigants who assert claims premised on federal law, this newly created principle flies in the face of congressional intent and the structural principles of separation of powers and the protection of individual claims of right.[338]

The Supreme Court is of course free to change doctrine. As I previously noted, courts retain an important role in statesmanship. But nothing in the Court's recent federal-question jurisprudence suggests that its abandonment of both *Gully*'s durable principle and a claim-centered approach to jurisdiction is a product of statesmanship. Rather, given the workability of the established principles, the exercise of jurisdiction would seem to call for an exercise of judicial craftsmanship, a skill that is sorely lacking in the Court's recent federal-question jurisprudence.

The *Gunn* Court also thought that the federal issue presented there was not substantial because it was "posed in a merely hypothetical sense: *If* Minton's lawyers had raised a timely experimental-use argument, would the result in the patent infringement proceeding have been different?"[339] It is true that the resolution of this question would not have altered the judgment already rendered in the patent litigation. However, this "hypothetical" issue was, as the Court noted, essential to Minton's claim and, if he prevailed on it, he would be entitled to significant monetary damages from his former attorneys.[340] In addition, this hypothetical patent law decision, if resolved by the state courts, would necessarily have an effect on patent law attorneys practicing in that state, for they would have to adjust their patent litigation practices to the patent law interpretations rendered by the courts of the state in which they practice. One might think that this collateral consequence would be of interest to the "federal system," but the Court offers no elaboration,

338. Congress has consistently indicated its intent to open the doors of federal courts to a wide range of federal question cases. *See* 28 U.S.C. § 1338(a) (2006) (extending patent arising under jurisdiction to patent law counterclaims); *id.* § 1367(a) (broad supplemental jurisdiction over claims and parties in federal question cases); *id.* § 1441(c) (removal of federal question cases that have been joined with otherwise non-removable claims); *id.* § 1454 (authorizing removal of actions in which any party asserts a claim for relief arising under patent or copyright law).

339. *Gunn*, 133 S. Ct. at 1067.

340. *Id*. at 1067–68.

reasoned or otherwise, of why it did not matter.

The Court, borrowing from *Empire* and measuring the case before it against a mechanical test rather than a durable principle, also noted that "[t]he present case is 'poles apart from *Grable*,' in which . . . resolution of the federal question 'would be controlling in numerous other cases.'"[341] This is a curious observation, since the federal issue in *Grable* was not important enough for the Supreme Court to review on certiorari. Instead, the Supreme Court left that question to the lower courts. One also wonders how a federal district court, measuring arising-under jurisdiction from the perspective of the plaintiff's complaint, could possibly determine whether the federal issue presented is going to be controlling in numerous other cases. Certainly, the Court has offered no workable method through which a federal court can assess this impact other than by looking at the court's own caseload which often will not fully reflect the importance of an issue on a national basis.

The Court also observed that the "fact-bound and situation-specific" nature of the federal issue weighted against the exercise of federal question jurisdiction.[342] However, as the Court noted in *Osborn v. Bank of the United States*,[343] "[a] cause may depend on several questions of fact and law."[344] Thus, the *Gunn* Court's narrow view of the role of federal court jurisdiction as one pertaining only to the interpretation of law, overlooks the important fact-finding role of federal trial courts[345] and again fails to account for a federal court's role in providing a *federal* forum for the vindication of individual claims of right.

Finally, the Court's treatment of the fourth *Grable* prong was peculiar. The Court suggested that because the third prong was not satisfied, the fourth was not either, essentially rendering the fourth prong meaningless.[346] The Court did observe, however, that the states have a special interest in policing members of "licensed professions."[347] As to the legal profession, the Court noted that the states' "interest . . . in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have

341. *Id.* at 1067 (quoting Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 700 (2006)).

342. *Id.* at 1068.

343. 22 U.S. 738 (1824).

344. *Id.* at 821.

345. *See supra* text accompanying note 259.

346. *Gunn*, 133 S. Ct. at 1068.

347. *Id.*

historically been officers of the courts."[348]

Yet the Court did not explain why a state would have a paramount interest in ensuring the competence of lawyers litigating patent law issues in federal courts. Nor did the Court consider the countervailing federal interest in the competence of those lawyers, who are, after all, members of the federal bar. The Court's reasoning here is illogical in that a state's general interest in regulating the practice of law does not establish a specific interest in regulating the practice of law in federal courts exercising exclusive federal jurisdiction. Also, the Court fell into the trap of treating federalism as a narrow concept reflecting only the "states' rights" side of the equation. Hence, the opinion on this point runs afoul of the principles of structural interpretation and reasoned elaboration.

*****

As it stands right now, after the decision in *Gunn*, the essential federal ingredient test requires (at a minimum) four elements: (1) an essential federal ingredient embedded in a state law claim, that is (2) actually disputed, (3) substantial—i.e., (i) an issue of law, (ii) important to the federal system, and (iii) controlling numerous other cases—and (4) such that assigning it to federal courts would not distort the appropriate balance of federal and state judicial responsibilities as envisioned by the courts. In addition to the above, however, one must also take into account the other factors that the lower courts continue to apply.

Under the standards established in *Gunn*, it will be a very rare federal-ingredient case indeed that qualifies for statutory arising-under jurisdiction. To put it differently, it would be very easy for a busy federal judge to apply *Gunn* to find jurisdiction lacking. Yet, if a case truly presents a federal issue that is at the forefront of a state-created claim, it should be the exceptional circumstance under which jurisdiction is denied.

As Justice Brennan observed in his *Merrell Dow* dissent:

> Congress passes laws in order to shape behavior; a federal law expresses Congress' determination that there is a federal interest in having individuals or other entities conform their actions to a particular norm established by that law . . . . It is the duty of courts to interpret these laws and apply them in such a way that the congressional purpose is realized . . . . Congress granted the district courts power to hear cases "arising under" federal law in order to enhance the likelihood that federal laws would be

348. *Id.* (quoting Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975)).

> interpreted more correctly and applied more uniformly. In other words, Congress determined that the availability of a federal forum to adjudicate cases involving federal questions would make it more likely that federal laws would shape behavior in the way that Congress intended.
>
> By making federal law an essential element of a state-law claim, the State places the federal law into a context where it will operate to shape behavior: the threat of liability will force individuals to conform their conduct to interpretations of the federal law made by courts adjudicating the state-law claim . . . . Consequently, the possibility that the federal law will be incorrectly interpreted in the context of adjudicating the state-law claim implicates the concerns that led Congress to grant the district courts power to adjudicate cases involving federal questions in precisely the same way as if it was federal law that "created" the cause of action.[349]

To be sure, if Congress expressly precludes the exercise of jurisdiction, a court must conform to that express intent. There might also be other circumstances indicating a congressional intent to limit jurisdiction over particular federal questions, or to give courts discretion as to whether a particular form of jurisdiction should be exercised.[350] But whether there are such circumstances should not be dependent on an artificial, judicially created four-part test. That artificial test allows judges to ignore congressional intent and to reject federal jurisdiction at the expense of allowing plaintiffs to have their federal claim heard in a federal court.

VII. CONCLUDING REMARKS

The current law of federal question jurisdiction is just another example of the problems generated by the proliferation of doctrines and tests apparently intended to provide guidance to lower courts and perhaps cabin their discretion. However, this proliferation of doctrines and tests ends up, as the Court itself has admitted, creating a Jackson Pollock canvas,[351] cluttering the analysis with irrelevancies and illegitimate considerations that stray far from the durable principles that

---

349. Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 827–28 (1986) (Brennan, J. dissenting).

350. *See, e.g.*, 28 U.S.C. § 1367(c) (2006) (giving federal courts discretion with respect to hearing certain supplemental jurisdiction claims).

351. *Gunn*, 133 S. Ct. at 1065.

should instead guide the courts. The results are often confusing, rarely helpful and frequently inconsistent with the fundamental principles that they purport to apply.

The Supreme Court's decision in *Gunn* represents the Supreme Court's most recent statement on the law of arising-under jurisdiction in the context of a federal question embedded in a state-law claim. The decision appears inconsistent with virtually all classic and modified legal process principles. As to the principle of structural interpretation, the Court overplays federalism by failing to take into account other countervailing interests such as federal supremacy, actual congressional intent, and individuals' congressionally vested right to access a federal forum on claims that truly raise federal issues—issues as to which a federal court may be more expert and fairer than its state counterpart.

The Court's decision also challenges the institutional settlement principle by adopting what is in essence a procedural test that will lead to ad hoc and unpredictable results. In addition, the *Gunn* opinion's free-style interpretation of federal statutes represents a type of anti-formalism that borders on legal realism, and that allows the judicially perceived interests of the "federal system" to trump a wider spectrum of legitimate and constitutionally demanded interests, including the actual intent of Congress. As Cardozo observed,

Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law.[352]

Gunn is also inconsistent with the rule of law principle, for it designs a completely unpredictable and unworkable procedure that allows federal courts to divest themselves of cases that would otherwise sensibly fall within the scope of arising-under jurisdiction. Next, as I have already explained, several passages of the opinion fail to satisfy any sensible standard of reasonable elaboration. But most importantly, the major flaw with the *Gunn* opinion, as with several of the Court's other recent procedural decisions,[353] is its mechanical, test-driven

352. CARDOZO, *supra* note 36, at 129.

353. For an analysis of this phenomenon in related contexts, see Grossi, *Forum Non Conveniens Reconsidered*, *supra* note 5; Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth With No Exit*, *supra* note 5; Allan Ides & Simona Grossi, *The Purposeful Availment Trap*, 7 FED. CT. L. REV. (forthcoming 2013); Allan Ides, *A Critical Appraisal of the Supreme Court's Decision in* J. Mcintyre Machinery, Ltd. v. Nicastro, 45 LOY. L.A. L. REV. 341 (2012); Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The Shady Grove Debate between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041 (2011).

approach to doctrine that operates contrary to the valid, durable principles and fails to provide any real guidance to lower courts and litigants in the application of the law. This myopic test-driven approach is not only inappropriate but it is inefficient, for it requires continuous interventions by the Court to revisit its earlier pronouncements that have proven themselves inadequate and theoretically ungrounded.[354]

While there is clearly a need for the Court to again visit the statutory arising-under topic, one would be naïve to believe that the next visit will suddenly rescue certainty from this sea of confusion. In the meantime, the level of unpredictability and unfairness will likely remain high. While it may often be healthy that reasonable minds differ, this is not true with respect to the standards that govern the access to the federal courts. These standards, particularly for federal question cases, should be clear, fair, and true to the underlying intent of Congress, rather than subject to the unfettered discretion of courts that may be interested in reducing their caseload.

354. An apt example of this phenomenon can be seen in the law of personal jurisdiction where the Court seems unable to find a transcendent, theoretical principle to meaningfully guide the analysis. Thus, on March 4, 2013, the Supreme Court granted certiorari in *Walden v. Fiore*, __U.S.__, 133 S. Ct. 1493 (2013), yet another case involving personal jurisdiction. *See* Petition for a Writ of Certiorari at i, Walden v. Fiore, No. 12-574 (filed Nov. 6, 2012). This happened less than two years after the Court decided two other personal jurisdiction cases, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, __U.S.__, 131 S. Ct. 2846 (2010), and *J. McIntyre Mach., Ltd. v. Nicastro*, __U.S.__, 131 S. Ct. 2780 (2011).