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THE CLAIM-CENTERED APPROACH TO ARISING-UNDER JURISDICTION: A BRIEF REJOINDER TO PROFESSOR MULLIGAN

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My claim-centered approach to arising-under jurisdiction fully embraces the three subcategories of jurisdiction that Professor Mulligan identifies.[1] My essential point is that the bifurcation (or trifurcation as Professor Mulligan suggests) into separate doctrines has led to a mechanical jurisprudence that is sometimes inconsistent with the fundamental principles that ought to animate § 1331 jurisdictional analysis. In my view, *Gully v. First National Bank*[2] illuminates those fundamental principles by focusing on the role of the federal issue in the case before the court.[3] That does not mean that *Gully* provides an easy answer for all applications of arising-under jurisdiction; it does mean, however, that *Gully* points to the fundamental question presented in the jurisdictional analysis.

Professor Mulligan suggests that the *Gully* standard I endorse requires an abstract consideration of the issue's importance presented in the case.[4] But this is not my view. As I explained in my article, *Gully*'s "importance" inquiry pertains solely to the role that the federal issue plays in the plaintiff's claim: Does it lurk in the background or does it operate in the foreground as an essential element of that claim? In fact, one of my chief criticisms of the "rights separation" model advocated by Professor Mulligan is that, as presently configured, it invites a subjective determination of the importance of the federal issue to the federal system, a determination that I believe is inappropriate to the jurisdictional question.[5] My objection to the current bifurcated doctrinal

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1. *See* Lumen N. Mulligan, Gully *and the Failure to Stake a 28 U.S.C. § 1331 "Claim,"* 89 WASH. L. REV. 441 (2014).

2. 299 U.S. 109 (1936).

3. *Id.* at 114–15.

4. *See, e.g.*, Mulligan, *supra* note 1, at 459–60, 480.

5. *See* Simona Grossi, *A Modified Theory of the Law of Federal Courts: The Case of Arising-*

approach is that, differently from my proposed unified model, it relies on a subjective determination of whether the issue is somehow important as perceived by the individual judge.

Professor Mulligan also argues that the *Gully* approach "leads to unclear—meaning unpredictable ex ante—§ 1331 doctrine."[6] But he provides no proof of that claim other than the assertion that other commentators have assumed that to be the case.[7] In fact, *Gully* pinpoints the essential jurisdictional question, i.e., the role of the federal issue within the context of the claim asserted, and numerous cases preceding *Gully* fully illuminate how that principle had been applied.[8] Thus, there was no reason for the cases following *Gully* to stray from that course. Parts III through VI of my article examine and critique the consequences of straying from *Gully*'s principled approach.[9] My primary concern with Professor Mulligan's approach is that it conforms too easily to the current jurisprudence of arising-under jurisdiction without addressing its defects.

Of course, my claim-centered approach does fully embrace causes of action, rights, and federal common law. The difference between my approach and Professor Mulligan's approach is that I do not see those descriptive categories as calling for distinct doctrinal developments. Instead, the analysis should gravitate around the essential, fundamental question: Is the plaintiff's claim truly about federal law? This question is consistent with the text of § 1331, the contemporaneous interpretations of that text, and the intent of Congress. It is also consistent with a federal court's obligation to exercise the jurisdiction Congress has conferred upon it.[10] This approach also has the benefit of avoiding the necessity of drawing clean distinctions among causes of action, rights, and common law principles. *Gully*'s fundamental question is neither vague nor difficult to apply. For the claim is truly about federal law when the plaintiff needs to plead and prove an issue of federal law to prevail.

Finally, I do agree that a claim-centered jurisdictional inquiry resembles the question of whether the plaintiff has stated a claim upon

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Under Jurisdiction, 88 WASH. L. REV. 961, 992, 997–99, 1003, 1114–17 (2013).

6. *See* Mulligan, *supra* note 1, at 482.

7. *Id.* n.218.

8. *Gully*, 299 U.S. at 112 (citing Starin v. New York, 115 U.S. 248, 257 (1885); First Nat'l Bank v. Williams, 252 U.S. 504, 512 (1920)).

9. *See* Grossi, *supra* note 5, at 987–1013.

10. *See, e.g.*, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8 n.8 (1983) (discussing federal courts' obligation to decide cases).

which relief can be granted.[11] However, the latter consideration involves whether a claim has been stated, the former involves whether that claim belongs in federal courts.

11. *See* Mulligan, *supra* note 1, at 442–43 (discussing Grossi, *supra* note 5).