

No Welcome Mat, No Problem?: Federal-Question Jurisdiction after *Grable*
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Abstract

For nearly 20 years, the Supreme Court’s federal-question jurisprudence was muddied after the Court’s decision in Merrell-Dow. Last term, the Court issued a much-needed clarification in Grable. But that clarification needs clarification. In this Article, Professor Ryan endeavors to provide a candid synthesis of what the law is after Grable. While this area is rich with debate about what the law should be, a candid post-Grable synthesis is needed both to guide courts and to provide a common ground for these debates. Even such a modest task, however, is formidable. Federal-question jurisdiction is not a concept that can be viewed without its historical and theoretical underpinnings. And a bald reading of Grable does not reveal the nuances that exist, as many years of precedent have been synthesized into a new test. Professor Ryan traces the evolution of the meaning of the words “arising under” in the federal-question statute up to and through Grable and analyzes the new test in light of history, evolution, and policy

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I. Introduction.

Federal-question jurisdiction has always been an elusive concept at its boundaries. The amorphous, jurisdiction-granting words of 28 U.S.C. § 1331 are: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”² The key words, “arising under,” have proven to be two of the more versatile words in the English language. They mean different things in different contexts. And over time, they have evolved to mean very different things even in the same contexts. Last term, in *Grable & Sons Metal Products, Inc. v. Darue Engineering*

² 28 U.S.C. § 1331.

& Manufacturing,³ the Supreme Court issued the latest edition of its “arising under” dictionary. This Article is a guide to that edition. I will attempt to provide a framework for answering the is-there-federal-question-jurisdiction question. While there is much to debate regarding what the law in this area should be, this Article avoids that question, and instead endeavors to synthesize what the law is after *Grable*.

Having clarified the Article’s purpose, I must offer some preliminary warnings. Federal-question jurisdiction cannot be understood without its theoretical and historical contexts. While many cases present easily identifiable federal questions, the boundaries of federal-question jurisdiction “require sensitive judgments about congressional intent, judicial power, and the federal system.”⁴ And while the new edition modifies the definition of “arising under,” the cases decided under earlier editions retain much significance, and understanding them is crucial to understanding *Grable*’s new four-prong edition. Accordingly, I will trace the evolution of the doctrine and policy, which ultimately must shape the interpretation of the *Grable* edition. I will explore, in depth, the four-prong test, synthesizing the earlier case law and highlighting ambiguities and potential problems within the new test. Ultimately, I will conclude that the *Grable* edition admirably answers more questions than it creates.

This Article proceeds in four additional parts. In Part II, I will outline the basic structure of the subject-matter-jurisdiction inquiry.⁵ There, I will explain the structure of Article III of the Constitution, the significance of its use of the words “arising under,” and the interrelationship between those words in the Constitution and the same words in § 1331. In Part III, I will trace the pre-*Grable* interpretation of the federal-question statute

³ 125 S. Ct. 2363 (2005).

⁴ *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 810 (1986).

⁵ Part II, *infra* at

to provide the necessary context for understanding *Grable* at more than a superficial level.⁶ In Part IV, I will detail the *Grable* decision and how it both arrived at and applied its new four-prong test.⁷ Finally, in Part V, I will analyze the four-prong test and provide a framework for applying it after *Grable*.⁸

II. The basic structure: how Article III and § 1331 interrelate.

Article III, § 2 provides that the judicial power “shall extend” to certain categories of cases or controversies, known as the heads of jurisdiction.⁹ Despite the “shall extend” language, Article III is not a self-executing grant of jurisdiction to the lower federal courts.¹⁰ That is, Article III confers no jurisdiction on the federal district courts.¹¹ To have subject-matter jurisdiction, the federal district courts need congressional authorization.¹² What purpose, then, do the heads of jurisdiction serve in Article III, § 2? The heads of jurisdiction define the limits on *Congress’s* power to confer jurisdiction on

⁶ Part III, *infra* at

⁷ Part IV, *infra* at

⁸ Part V, *infra* at

⁹ “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; --to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party’ --to Controversies between two or more States; --between a State and Citizens of another State [modified by the 11th Amendment]; --between Citizens of different States; --between Citizens of the same State claiming Lands under Grants of different States, and between a State, of the Citizens thereof, and foreign States, Citizens or Subjects.” U.S. Const. art. III, § 2.

¹⁰ *Merrell Dow Pharmaceuticals*, 478 U.S. at 807; *Cary v. Curtis*, 3 How. 236, 11 L.Ed. 576 (1845).

¹¹ *Id.*; John T. Parry, *No Appeal: The U.S.-U.K. Supplementary Extradition Treaty’s Effort to Create Federal Jurisdiction*, 25 *LOYOLA L.A. INT’L & COMP. L. REV.* 543, 561 (Summer 2003). In contrast to lower federal court jurisdiction, Article III’s grants of jurisdiction to the Supreme Court are self-executing. Lawrence Gene Sager, *Constitutional Limitations on Congress’s Authority to Regulate the Jurisdiction of the Federal Courts*, 95 *HARV. L. REV.* 17, 23-24 (1981).

¹² *Cary*, 3 How. at 245 (“[T]he judicial power of the United States, although it has its origins in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited or concurrent, or exclusive, and of withholding jurisdiction for them in the exact degree and character which to Congress may seem proper for the public good.”); see *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (“Federal Courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and those statutes enacted by Congress pursuant thereto.”).

the federal courts.¹³ In other words, Article III, § 2 defines the maximum reach of the federal judicial power—it sets the limits on what jurisdiction Congress can give its courts.¹⁴ When Congress confers jurisdiction on the federal courts, it must be able to point to one of the heads of jurisdiction as authorizing that particular grant. Thus, determining subject-matter jurisdiction is a two-step process. First, did Congress confer jurisdiction? And second, if so, did Article III, § 2 give Congress the power to confer that jurisdiction?

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

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

¹³ *Sheldon v. Sill*, 49 U.S. 441 (1850) (“The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised” by the lower federal courts.); *see* *Mesa v. California*, 489 U.S. 121, 136 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983).

¹⁴ *See* Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 54 *CATH. U. L. REV.* 671, 709-710 (1996).

¹⁵ “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. Const. art. III, § 2.

¹⁶ *Osborn v. Bank of the United States*, 22 U.S. 738, 823 (1824).

¹⁷ *Id.*

of the United States.¹⁸ The Court held that Congress had the authority, under the “arising under” head of jurisdiction, to confer federal jurisdiction even in a garden-variety breach-of-contract suit against the Bank, because federal law created the Bank and its right to contract, and because a question about that authority could potentially be raised in any suit against the Bank.¹⁹ While the Supreme Court has never defined the precise boundaries of this power,²⁰ *Osborn* and its progeny demonstrate an impressive breadth.

The federal-question statute uses the same “arising under” phrase, but the statute requires far more than federal law being merely a potential ingredient in the case.²¹

Although much of the legislative history suggests that Congress may have intended to confer all its power when it passed § 1331 and thus extend jurisdiction to every case in which federal law forms a potential ingredient,²² the Court has construed the language

¹⁸ Id. at 817.

¹⁹ Id. at 824.

²⁰ Scholars have long debated a theory of so-called “protective jurisdiction.” *E.g.* Eric J Segall, Article III as a Grant of Power: Protective Jurisdiction, Federalism, and the Federal Courts, 54 FLA. L. REV. 361 (July 2002); Linda S. Mullenix, Complex Litigation Reform and Article III Jurisdiction, 59 FORDHAM. L. REV. 169 (1990). The Supreme Court has been less interested than have the scholars. *See Mesa*, 489 U.S. at 137 (“We have, in the past, not found the need to adopt a theory of ‘protective jurisdiction’ to support Art. III ‘arising under’ jurisdiction, and we do not see any need for doing so here.”) (internal citations omitted).

²¹ *See Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8 n.8 (1983) (The statute’s “arising under” language tracks similar language in art. III, §2 of the Constitution, which has been construed as permitting Congress to extend federal jurisdiction to any case of which federal law potentially “forms an ingredient,” and its limited legislative history suggests that the 44th Congress may have meant to “confer the whole power which the Constitution conferred,” 2 Cong. Rec. 4986 (1874) (remarks of Sen. Carpenter). Nevertheless, we have only recently reaffirmed what has long been recognized—that “Article III ‘arising under’ jurisdiction is broader than federal-question jurisdiction under § 1331.”) (internal citations omitted).

²² Id.; *See* 2 Cong. Rec. 4896 (1874) (remarks of Sen. Carpenter) (“The Constitution says that certain judicial powers shall be conferred upon the United States. The Supreme Court of the United States in an opinion delivered by Judge Story—I do not recollect now in what celebrated case it was, whether *Cohens vs. Virginia* or some of those famous cases—said that it is the duty of the Congress of the United States to vest all the judicial power of the Union in some Federal Court, and if they may withhold a part of it they may withhold all of it and defeat the Constitution by refusing or simply omitting to carry its provisions into execution. . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less. . . [I]t seems to me that when Congress ought to do what the Supreme Court said more than forty years ago it was the duty to do, vest the power which the Constitution confers in some court of original jurisdiction.”).

much more narrowly.²³ The next Part explores the evolving meaning of the phrase “arising under” in § 1331.

III. Section 1331 and “arising under” before *Grable*.

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

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

A. Where to look: the well-pleaded-complaint rule.

The well-pleaded-complaint rule is a where-to-look rule. Under § 1331, a case does not “arise under” federal law unless the “plaintiff’s statement of his own cause of action shows that it is based upon” the Constitution or laws of the United States.²⁴ This

²³ *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986); *Franchise Tax Board v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1 (1983); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

²⁴ *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 152 (1908).

rule encapsulates two issues. First, to determine federal-question jurisdiction, a court can only look to the plaintiff's complaint, not to counterclaims or other claims by defendants.²⁵ And second, the court can only look at the well-pleaded part of the plaintiff's complaint. The well-pleaded part includes only that part that is necessary to maintain a viable cause of action.²⁶ It includes neither defenses the plaintiff anticipates nor the plaintiff's responses to those anticipated defenses.²⁷

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

²⁵ *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 830-31 (2002).

²⁶ *Gully v. First National Bank*, 299 U.S. 109, 112 (1936); *Bar J Sand & Gravel, Inc. v. W. Mobile N. Mexico*, 2005 WL 3663689, at *6 (D.N.M.) ("[A]ny statements in the complaint which go beyond a statement of the plaintiff's claim . . . are to be disregarded in deciding whether federal-question jurisdiction exists."); *see generally* John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law*, 76 TEX. L. REV. 1829, 1835 (June 1998).

²⁷ *Okl. Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); *see* Christopher A. Cotropia, *Counterclaims, the Well-Pleaded Complaint, and Federal Jurisdiction*, 33 HOFSTRA L. REV. 1, 7 (Fall 2004).

²⁸ 211 U.S. 149 (1908).

²⁹ *Id.* at 150-51.

³⁰ *Id.* at 150.

³¹ *Id.* at 151.

arises under the Constitution.”³² Although the suit would likely require the Court to construe a federal statute and determine its constitutionality, those questions arose outside the well-pleaded complaint.³³ The questions appeared in the plaintiff’s complaint, but not in the well-pleaded part.³⁴ Rather, those questions appeared only as anticipated defenses or responses to anticipated defenses.³⁵

The well-pleaded-complaint rule survives still, often eliminating federal jurisdiction in cases where the principal—or indeed only—contested question involves federal law.³⁶ For example, the well-pleaded-complaint rule prevents removal based upon the preclusive effect of a federal judgment³⁷ or a federal preemption defense.³⁸ Nor is federal jurisdiction properly based on the presence of a counterclaim created by federal law, even a compulsory one.³⁹ The Court has also extended the well-pleaded-complaint rule to the declaratory-judgment context.⁴⁰

³² Id. at 152.

³³ Id. at 153.

³⁴ Id. at 153-4.

³⁵ Id. at 154.

³⁶ *See generally*, Michael G. Collins, The Unhappy History of Federal Question Removal, 71 IOWA L. REV. 717 (1986); Richard E. Levy, Comment, Federal Preemption, Removal, and the Well-Pleaded Complaint Rule, 51 U. CHI. L. REV. 634, 638 (1984) (“the well-pleaded complaint rule withdraws from original federal jurisdiction a large number of cases that eventually do turn on the validity of a federal defense, and such cases are within the purposes of federal question jurisdiction.”).

³⁷ *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 477 (1998).

³⁸ *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1 (1983). One exception to the well-pleaded complaint rule is the complete-preemption doctrine. As recently reformulated, the complete-preemption doctrine allows a defendant to remove a case when the plaintiff asserts a state-law claim that falls within the scope of an exclusively federal cause of action. Such a claim, we have learned, is really federal. *See Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 9 (2003). Justice Scalia’s dissent aptly notes the oddity of this “federalize-and-remove” exception to the well-pleaded-complaint rule. Id. at 18 (Scalia, J., dissenting).

³⁹ *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 833-34 (2002). Although *Vornado* was a case interpreting the congressional grant of patent jurisdiction under 28 U.S.C. § 1338, the analysis applies equally to § 1331. As the Court noted, “[i]t would take an unprecedented feat of interpretive necromancy to say that §1338(a)’s ‘arising under’ language means one thing (the well-pleaded-complaint rule) in its own right, but something quite different (respondent’s complaint-or-counterclaim rule) when referred to by §1295(a)(1).” Id. at 834. *See also Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988).

⁴⁰ *Franchise Tax Board*, 463 U.S. at 10; *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

As noted above, *Grable* doesn't alter the well-pleaded-complaint rule. The rule still tells us where to look to find the federal issues. *Grable* impacts the next step, what kind of federal issues in that well-pleaded complaint give rise to federal-question jurisdiction.

B. What to look for: the two branches.

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

The so-called Holmes test covers the first branch, the easy federal-question cases. It states that when federal law creates the cause of action that the plaintiff asserts, the case “arises under” federal law.⁴¹ So if the plaintiff sues under 42 U.S.C. § 1983 or Section 4 of the Clayton Act,⁴² jurisdiction is proper under § 1331 because federal law created the cause of action. Similarly, a claim “arises under” federal law when federal common law creates the cause of action.⁴³

Justice Holmes intended his test as one of exclusion. In his view, a suit arises *only* “under the law that creates the cause of action.”⁴⁴ The test is as easily applied as it is stated. If state law creates a plaintiff's cause of action, the case arises only under state law, regardless of the presence of federal issues. And since § 1331 only grants jurisdiction in cases that arise under federal law, a state-law-created cause of action could never trigger § 1331 jurisdiction.⁴⁵ The Holmes Test has survived—but only as a test of

⁴¹ *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 261 (1916).

⁴² 15 U.S.C. § 15.

⁴³ *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (We see no reason not to give ‘laws’ its natural meaning, and therefore conclude that § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.) (internal citations omitted).

⁴⁴ *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 214-215 (1921) (Holmes, J., dissenting).

⁴⁵ *See id.*

inclusion. When federal law creates the plaintiff’s cause of action, the case still “arises under” federal law.⁴⁶ Those are branch-one cases.

Branch two was born when the Court rejected the Holmes test as one of exclusion. In *Smith v. Kansas City Title & Trust Co.*, Smith filed a shareholder derivative suit under Missouri law in federal district court against a corporation.⁴⁷ Missouri law created a derivative cause of action that allowed shareholders to enjoin corporations from purchasing unlawful bonds.⁴⁸ Smith sought to enjoin the corporation from purchasing bonds authorized by the Federal Farm Loan Act of 1916.⁴⁹ He alleged that those bonds were unlawful because the Federal Farm Loan Act was unconstitutional.⁵⁰ The Act’s unconstitutionality was the only theory he offered to support his claim, and indeed was the only issue disputed in the case.⁵¹ Thus, while Missouri state law created Smith’s cause of action, his well-pleaded complaint necessarily raised a question of federal law as an element of that state-law claim. The Court rejected the Holmes test as one of exclusion and held that the case arose under federal law. And thus, the second branch was born. The Holmes test still works as a test of inclusion—when federal law creates the plaintiff’s cause of action, the case arises under federal law. But state law created Smith’s cause of action, and yet the suit arose under federal law because there were federal issues embedded in the state-law cause of action.

⁴⁶ Some have mentioned a possible narrow exception where even a claim created by federal law will not satisfy § 1331. See *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 507 (1900). The case has no modern progeny, and Professor Oakley has recently concluded that *Shoshone* did not actually involve a federally created cause of action at all. Oakley, *supra* n.26 at ___, n.63.

⁴⁷ 25 U.S. 180 (1921).

⁴⁸ *Grable & Sons Metal Prods. v. Darue Engineering & Mfg.*, 125 S.Ct. 2363, 2367 (2005) (construing *Smith*).

⁴⁹ *Smith*, 25 U.S. at 195.

⁵⁰ *Id.*

⁵¹ *Id.* at 199.

So what types of federal issues embedded in state-law claims make a case arise under federal law? *Smith* confirmed that there is a second branch, but failed to define its boundaries. In the years that followed, no precise definition appeared.⁵² Essentially, the answer became a pragmatic one based on a certain amount of judicial intuition—the presence of a federal issue in a state-law claim made the case arise under federal law when the federal court should be empowered to hear it.⁵³ Justice Cardozo wrote that “What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial out of the web and lays the other ones aside.”⁵⁴ Cardozo’s statement teaches that the federal issue must be “substantial,” a requirement that remains today after *Grable*.

In 1983, in *Franchise Tax Board*, the Court summarized both branches:

“Under our interpretations, Congress has given the lower federal courts jurisdiction [under § 1331] to hear . . . only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff’s right to relief necessarily depends on the resolution of a substantial question of federal law.”⁵⁵

Franchise Tax Board seemed to unequivocally reaffirm the existence of the second branch. Although applying its test still required a kaleidoscope (and perhaps a secret decoder ring), *Franchise Tax Board* taught that an embedded federal issue in a state-law

⁵² See Paul Mishkin, The Federal “Question” in the District Courts, 53 COLUM. L. REV. 157 (1953); William Cohen, The Broken Compass: The Requirement That a Case Arise “Directly” Under Federal Law, 115 U. PA. L. REV. 890 (1967); Linda R. Hirshman, Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction over Cases of Mixed State and Federal Law, 60 IND. L.J. 17 (1985); David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. REV. 543 (1985).

⁵³ See Wright & Miller, Federal Practice and Procedure, § 3562 at 47 (“Rather than attempting a test it might be wiser simply to recognize that the existing doctrines as to when a case raises a federal question are neither analytical nor entirely logical, and that in the unusual case in which there is a debatable issue about federal question jurisdiction, pragmatic considerations must be taken into account.”).

⁵⁴ *Gully v. First National Bank*, 299 U.S. 109, 117-18 (1936).

⁵⁵ *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28 (1983).

claim sufficed for federal-question jurisdiction when the federal issue was “necessary” and “substantial.”

Three years later, the *Merrell Dow* case⁵⁶ cast serious doubt upon the existence of the second branch, and much ink was spilt by contemporary courts and commentators debating just what *Merrell Dow* did to the scope of federal subject-matter jurisdiction.⁵⁷ While *Grable* recently clarified what *Merrell Dow* “really” meant, a complete post-*Grable* synthesis of the law requires an understanding of that debate.

The *Merrell Dow* facts were not complex. The plaintiffs were mothers who had taken the drug Bendectin during pregnancy and whose children later developed birth defects.⁵⁸ In their state-court petition, plaintiffs alleged six causes of action: negligence, gross negligence, fraud, breach of warranty, strict liability, and negligence per se.⁵⁹ The first five causes of action relied entirely on state law, but the sixth contained a second-branch, embedded-federal-issue problem. Negligence per se is, of course, a state-law-created cause of action. But that claim involved a federal issue because, as their sole basis for proving negligence per se, the plaintiffs alleged that the defendants misbranded the drug in violation of the Federal Drug and Cosmetic Act (the Drug Act).⁶⁰ Citing § 1331 and relying on the *Franchise Tax Board* decision, the defendants removed the case, alleging that a federal issue (construction of the Drug Act), was both necessary and

⁵⁶ *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986).

⁵⁷ *E.g.*, Martin H. Redish, Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the “Martian Chronicles”, 78 VA. L. REV. 1769 (1992); William V. Luneberg, Nonoriginalist Interpretation—A Comment on Federal Question Jurisdiction and *Merrell Dow Pharmaceuticals*, 48 U. PITT. L. REV. 757 (1987); Note, Mr. Smith Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-*Merrell Dow*, 115 HARV. L. REV. 2272 (2002).

⁵⁸ *Merrell Dow*, 478 U.S. at 805.

⁵⁹ *Id.*

⁶⁰ *Id.*

substantial. Ultimately, the Supreme Court held that the issue was necessary but not substantial.

When the Sixth Circuit examined whether Merrell Dow could remove based upon the presence of an embedded federal issue, it held that there was no “necessary” federal question.⁶¹ In the above-quoted *Franchise Tax Board* language, the Court had stated that the plaintiff’s *right to relief* must necessarily depend upon the resolution of a question of federal law. Five of the plaintiffs’ six causes of action involved no issue of federal law. So, the Sixth Circuit held, the plaintiffs’ *right to relief* did not necessarily depend upon the Drug Act’s construction because they could recover under five different causes of action without even referencing federal law.

The Supreme Court held that this case didn’t fail at the “necessary” stage.⁶² Instead of looking at the plaintiffs’ right to recover in the aggregate, the Court held that necessity is determined on a claim-by-claim basis.⁶³ The “necessary” box was checked because the negligence per se claim necessarily depended upon a question of federal law, even though the plaintiffs asserted other claims. The Court held that, if the negligence per se claim presented a “sufficient federal question, its relationship to other state-law claims would be determined by the ordinary principles of [supplemental jurisdiction.]”⁶⁴ Part V-A will explore the necessity prong in more detail.⁶⁵

Although there was a necessary federal issue, the Court held there was no federal-question jurisdiction because the federal issue was not “substantial.” The Court noted that the Drug Act did not expressly create a private cause of action, and both parties

⁶¹ Id. at 806-7 (construing the Sixth Circuit’s decision).

⁶² *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. at 817, n.15 (1986).

⁶³ Id.

⁶⁴ Id.

⁶⁵ Part V-A, *infra* p.

conceded that the Drug Act did not contain an implied cause of action.⁶⁶ The Court held, over a vigorous dissent, that a “congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently ‘substantial’ to confer federal-question jurisdiction.”⁶⁷

The Court continued:

The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that it would flout congressional intent to provide a federal remedy for the violation of the federal statute. We think it would similarly flout, or at least undermine, congressional intent to conclude that federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because of the violation of the federal statute is said to be [actionable] under state law, rather than a federal action under federal law.⁶⁸

Many contemporary courts and commentators read this opinion as nearly eliminating the second branch.⁶⁹ In his treatise, after *Merrell Dow*, Professor Chemerinsky altered the *Franchise Tax Board* test to state: “A case arises under federal law if it is apparent from the face of the plaintiff’s complaint either that the plaintiff’s cause of action was created by federal law; or, if the plaintiff’s cause of action is based on state law, a federal law *that creates a cause of action* is an essential component of the plaintiff’s claim.”⁷⁰

⁶⁶ Id. at 810-11.

⁶⁷ Id. at 814. Justice Brennan, in dissent, countered (with the weight of the legal academy behind him): “Why should the fact that Congress chose not to create a private federal remedy mean that Congress would not want there to be federal jurisdiction to adjudicate a state claim that imposes liability for violating the federal law?” Id. at 825 (Brennan, J., dissenting); *see generally*, Martin H. Redish, Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the “Martian Chronicles”, 78 VA. L. REV. 1769, 1794 (1992); Patti Allewa, Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After *Merrell Dow*, 52 OHIO ST. L.J. 1477, 1524-25 (1991).

⁶⁸ *Merrell Dow* at 812.

⁶⁹ *See* Articles cited *supra*, n.57.

⁷⁰ Erwin Chemerinsky, *Federal Jurisdiction*, § 5.2 (3d ed. 1999).

Merrell Dow's meaning was the subject of much guessing.⁷¹ Should it be read to implicitly overrule *Smith*, where jurisdiction existed even though the Federal Farm Loan Act did not create a private cause of action? In *Merrell Dow*, the Court cited *Smith*, but didn't tell us it was overruled.⁷² And yet, the Court stated that exercising jurisdiction over a second-branch case would "flout, or at least undermine" congressional intent when the embedded federal statute did not create a private cause of action.⁷³ Indeed, the Court conspicuously noted that this was the "first case" in which it had reviewed a second-branch case since it had reformulated its implied-cause-of-action test.⁷⁴ This conspicuous note seemed to signal that the law was indeed changing. And the lower courts were left without significant guidance, resulting in divergent views over how much of branch two was left after the *Merrell Dow* massacre.⁷⁵

Several circuits subsequently held that the second branch only covered cases where federal law provided a parallel private cause of action.⁷⁶ For example, suppose a state consumer-protection statute provides for treble damages and provides that violations

⁷¹ See *supra*, n.57.

⁷² *Merrell Dow*, 478 U.S. at 814 n.12. In fact, the Court also noted the "widely perceived 'irreconcilable' conflict" between *Smith* and *Moore v. Chesapeake & Ohio Railroad Co.* 291 U.S. 205 (1934), where no jurisdiction was found in a similar embedded-issue case.

⁷³ *Id.* at 812.

⁷⁴ *Id.* at 811.

⁷⁵ See *infra*, notes 76-77. Indeed, a 2002 Harvard Law Review Note, revealed an amazing statistic. Between 1994 and 2002, the circuit courts heard 69 second-branch cases and reversed the lower court in 45 of those cases. Note, Mr. Smith Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-*Merrell Dow*, 115 HARV. L. REV. 2272 (2002).

⁷⁶ *Zubi v. AT&T Corp.*, 219 F.3d 220, 223 n.5 (3d Cir. 2000) (finding there can be no federal "jurisdiction where Congress has determined that there should be no private cause of action for violation of the federal law"); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 n.2 (6th Cir. 2000) (relying on *Merrell Dow* and Professor Chemerinsky's distillation of *Merrell Dow* to require a federal private cause of action); *Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994) (finding that "Under *Merrell Dow*, therefore, 'if federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question'"); *Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc.*, 159 F.3d 1209, 1212 (9th Cir. 1998) (finding that *Merrell Dow* does require a § 1331 suit to have as an element a federal law that provides a private cause of action); *Rogers v. Platt*, 814 F.2d 683, 688 (D.C. Cir. 1987) (finding that in *Merrell Dow*, "a closely divided Court held that if Congress affirmatively determines that there should be *no* private federal cause of action that is effectively the end of the matter").

of other specified “tie-in” statutes (both state and federal) are also deemed violations of the consumer-protection statute. Even if one of the tie-in statutes is federal, and even if that federal statute creates its own cause of action, a plaintiff seeking treble damages may choose to assert that violation under the state statute. To avoid flouting (or at least undermining) congressional intent, some circuits viewed the second branch as only encompassing similar circumstances.

Other circuits refused to read *Merrell Dow* so restrictively. In those circuits, a federal issue could still be “substantial” without Congress specifically providing for a federal remedy.⁷⁷ Those cases, however, are difficult to reconcile with *Merrell Dow*’s warning against flouting congressional intent. Some even suggested that branch two only covered embedded constitutional claims because in those situations, there was no analogous congressional intent to flout.⁷⁸

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

⁷⁷ *E.g.*, *W. 14th St. Commercial Corp. v. 5 W. 14th Owners Corp.*, 815 F.2d 188, 196 (2d Cir. 1987) (holding that “assuming that plaintiffs have no private right of action under [the Federal Condominium and Cooperative Abuse Act], we conclude that the federal element in plaintiffs’ state cause of action would still be sufficiently substantial to confer arising under jurisdiction”); *Ormet Corp. v. Ohio Pwer Co.* 98 F.3d 799, 807 (4th Cir. 1996); *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 759 (6th Cir. 2000) (finding that *Merrell Dow* “clearly left open the possibility of federal jurisdiction even in the absence of an express or implied federal cause of action”); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) (rejecting the notion that a federal cause of action as being required as “constru[ing] federal question jurisdiction and the [Indian Gaming Regulatory Act] too narrowly and underestimate[ing] the federal interest at stake”).

⁷⁸ *See Prerogative Lost: The Trouble with Statutory Federal-Question Jurisdiction after Merrell-Dow*, 52 OHIO ST. L. J. 1477, ____ n. 186 (1991) (outlining competing views on this theory).

IV. *Grable*'s modified definition.

Grable was a second-branch case involving an embedded federal tax issue within a state quiet-title claim.⁷⁹ To satisfy a tax delinquency, the IRS seized some of *Grable*'s real property.⁸⁰ The IRS sold the property to Darue and gave Darue a quitclaim deed.⁸¹ Five years later, *Grable* brought a quiet-title action against Darue in state court.⁸² While *Grable* conceded that it had received actual notice of the sale, *Grable* claimed that Darue's record title was invalid because the IRS had not strictly complied with the applicable notice provisions,⁸³ which *Grable* contended required personal service. Darue removed the case to federal court, arguing that *Grable*'s quiet-title claim, while created by state law, contained an embedded federal issue (the construction of the federal tax statute's notice provision).⁸⁴

The Supreme Court began by reaffirming the second branch's vitality. The Court noted that the federal-question statute is "invoked by and large by plaintiffs pleading a cause of action created by federal law."⁸⁵ But, the Court continued, there is "another longstanding, if less frequently encountered, variety of federal 'arising under' jurisdiction, this Court having recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues."⁸⁶ The Court categorized *Smith* as the "classic example" of a second-branch case and proceeded to reaffirm the second branch's existence.⁸⁷ But *Merrell*

⁷⁹ *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 125 S.Ct. 2363 (2005).

⁸⁰ *Id.* at 2366.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 26 U.S.C. § 6335.

⁸⁴ *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 125 S.Ct. 2363, 2366 (2005).

⁸⁵ *Id.*

⁸⁶ *Id.* at 2366-67.

⁸⁷ *Id.* at 2367.

Dow, which had sparked so much debate, loomed in the background. The *Grable* opinion synthesized the second-branch cases, settled the debate over *Merrell Dow*, and provided a new definition for second-branch cases: Jurisdiction is proper in a second-branch case when a “state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”⁸⁸

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

The Court easily concluded that *Grable*’s claim passed the necessity and actually disputed prongs. *Grable*’s claim necessarily raised the federal tax issue because the state law required *Grable* to specify the facts establishing the superiority of its title, and the only basis *Grable* had to claim a superior title was the IRS’s failure to give personal notice of the property’s sale.⁸⁹ And the federal issue was actually disputed; indeed, the Court noted, the meaning of the tax statute appeared to be the only legal or factual issue contested in the case.⁹⁰ While *Grable* did not implicate any difficult issues involving the first two prongs, Part V explores them in more depth.⁹¹

⁸⁸ *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 125 S.Ct. 2363, 2368 (2005).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Part V, *infra* p.

The Court also concluded that the federal tax issue was substantial. The tax issue was an “important issue of federal law that...belong[ed] in federal court.”⁹² The Court noted that the government has a strong interest in prompt and efficient tax collection and that the “ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers like Darue to satisfy themselves that the Service has touched the bases necessary for good title.”⁹³ Thus, the Court held, the government had “a direct interest in the availability of a federal forum to vindicate its own administrative action, and buyers may find it valuable to come before judges used to federal tax matters.”⁹⁴

Finally, the Court turned to the fourth prong, disruptiveness. As noted above, the disruptiveness prong is the new part of the test, and it represents the Court’s view of what *Merrell Dow* really meant. Recall *Merrell Dow*, where the Court found no federal-question jurisdiction over the plaintiffs’ negligence per se claim, which contained the embedded Drug Act issue. The *Merrell Dow* Court (we thought) resolved the case at the substantiality prong because the Drug Act did not create its own private right of action: “[A] congressional determination that there should be no federal remedy for the violation of [a] federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of a federal statute as an element of a state cause of action is insufficiently ‘substantial’ to confer federal-question jurisdiction.”⁹⁵ But *Grable* teaches that *Merrell Dow* is not really a substantiality case at all. In *Grable*, the Court noted that the absence of a private right of action under the Drug Act affected the *Merrell Dow*

⁹² Id.

⁹³ *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 125 S.Ct. 2363, 2368 (2005).

⁹⁴ Id.

⁹⁵ *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 814 (1986).

result in two ways. First, it was worth “some” consideration in the assessment of substantiality. But its “primary importance,” we now know, is found in the disruptiveness prong.⁹⁶

We now know, from *Grable*, that the *Merrell Dow* Court saw the missing Drug Act right of action “not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances when exercising federal jurisdiction” would disrupt the congressionally approved balance of federal and state judicial responsibilities.⁹⁷ Because finding jurisdiction over the negligence per se claim would have “attracted a horde of original filings and removal cases raising other state claims with embedded federal issues,” a welcome mat was required.⁹⁸

No welcome mat was required in *Grable* because allowing jurisdiction over the quiet-title claim would not be disruptive, as it would have been in *Merrell Dow*. Although Congress “indicated ambivalence by providing no private right of action to *Grable*, it is the rare state quiet title action that involves contested issues of federal law. Consequently, jurisdiction over actions like *Grable*’s would not materially affect, or threaten to affect, the normal currents of litigation.”⁹⁹

Thus, the Court concluded that jurisdiction was proper under the second branch because *Grable*’s state-law claim necessarily raised a federal tax issue, which was actually disputed and substantial. And in what is *Grable*’s addition to the “arising under” dictionary, allowing jurisdiction over quiet-title claims with embedded tax issues

⁹⁶ *Grable*, 125 S.Ct. at 2370.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 2371.

is not disruptive enough to require a welcome mat. The next Part analyzes the four prongs in greater depth.

V. Applying the new definition.

As noted above, second-branch cases now involve a four-prong jurisdictional inquiry. When a state-law claim contains an embedded federal issue, the federal issue must be: (1) necessary; (2) actually disputed; (3) substantial; and (4) accompanied by a welcome mat, if exercising jurisdiction would be disruptive.

A. Necessity.

A state-law *claim* “must necessarily raise a stated federal issue.”¹⁰⁰ The necessity prong requires a distinction between claims and theories. Again, recall *Merrell Dow*. There, the Supreme Court rejected the Sixth Circuit’s holding that the embedded Drug Act issue was not “necessary.”¹⁰¹ In *Franchise Tax Board*, the Court had stated that the plaintiff’s *right to relief* must necessarily depend upon federal law.¹⁰² The Sixth Circuit applied that language to the *Merrell Dow* plaintiffs and concluded that because the plaintiffs could have recovered on five separate claims that involved no issues of federal law, the plaintiffs’ right to relief did not necessarily depend upon federal law. The Supreme Court rejected this narrow view of necessity and concluded that federal law need only form a necessary element of *one* of the plaintiff’s claims. Whether jurisdiction is proper over the remaining claims is determined by principles of supplemental

¹⁰⁰ Id. at 2368.

¹⁰¹ *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 817 n.15 (1986).

¹⁰² *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 20 (1983).

jurisdiction.¹⁰³ Because the plaintiffs’ negligence per se claim necessarily depended on the Drug Act, the necessary prong was satisfied.

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

The claims-versus-theories distinction originated in *Christianson v. Colt Industries Operating Corp.*¹⁰⁴ Although *Christianson* was decided in a different context, many courts have applied its reasoning in § 1331 cases. The issue in *Christianson* was whether the Federal Circuit had jurisdiction over an appeal. The Federal Circuit has jurisdiction over appeals from final district-court decisions when the district court had jurisdiction under 28 U.S.C. § 1338.¹⁰⁵ Section 1338 provides that “the district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents.”¹⁰⁶ The Court noted that both § 1338 and § 1331 contained the terms “arising under” and held that linguistic consistency demanded that the terms be construed similarly.¹⁰⁷ Thus, the Court evaluated whether the plaintiffs’ claims necessarily raised an issue of patent law.

The plaintiffs had asserted two antitrust claims under the Sherman Act: a monopolization claim under § 2 and a group-boycott claim under § 1.¹⁰⁸ The plaintiffs

¹⁰³ *Merrell Dow* at 817, n. 15.

¹⁰⁴ 486 U.S. 800 (1988).

¹⁰⁵ 28 U.S.C. § 1295(a)(1) (2000).

¹⁰⁶ 28 U.S.C. § 1338 (2000).

¹⁰⁷ *Christianson*, 486 U.S. at 807; *Accord Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 833-34 (2002); *see* Note 39, *supra*.

¹⁰⁸ *Christianson*, 486 U.S. at 810.

had alleged alternative *theories* to support each *claim*. But not all of the theories involved the patent laws.¹⁰⁹ The Court noted that federal jurisdiction focuses on claims, not theories.¹¹⁰ A claim arises under the patent laws only if a question involving the patent laws is necessary to that claim. Accordingly, a “claim supported by alternative theories in the complaint may not form the basis for §1338(a) jurisdiction unless patent law is essential to each of those theories.”¹¹¹ Ultimately, the Court held that because the plaintiffs’ claims were each supported by alternative theories unrelated to the patent laws, the patent laws were not necessary to the claims, and the case did not arise under the patent laws.¹¹²

Because of the Court’s focus upon linguistic consistency with the term “arising under,” it is unsurprising lower courts have extended this test to the necessity prong of the second-branch federal-question test. For example, in *Willy v. Coastal Corp.*, the plaintiff asserted a state-law wrongful-discharge claim.¹¹³ The plaintiff alleged that he was fired because he refused to violate various state and federal environmental and securities laws.¹¹⁴ The Court characterized the plaintiff’s claim (wrongful discharge) as relying upon at least two alternative theories: first, that the plaintiff was fired for refusing to violate federal law; and second, that he was fired for refusing to violate state laws. Relying on *Christianson*, the Fifth Circuit concluded that jurisdiction was improper under

¹⁰⁹ Id.

¹¹⁰ Id. at 810.

¹¹¹ Id.

¹¹² Id. (“The patent-law issue, while arguably necessary to at least one theory under each claim, is not necessary to the overall success of either claim.”).

¹¹³ 855 F.2d. 1160, 1162 (5th Cir. 1988).

¹¹⁴ Id.

the second branch because federal law was not a necessary element of the state-law claim.¹¹⁵

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

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

¹¹⁵ Id. at 1171; *Accord*, *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 346 (9th Cir. 1996) (following *Willy*).

numbering would be inconsistent with a process that is supposed to involve selection of worthy federal issues through a “common-sense accommodation of judgment to kaleidoscopic situations.”¹¹⁶

The second principle that guides the necessity inquiry is: When a plaintiff asserts different ways in which a defendant violated a particular section of a statute, the allegations under *that section* form a single claim, and the ways in which the defendant is alleged to have violated that section are theories, all of which must depend upon federal law to satisfy the necessary prong. For example, in *Christianson*, though the plaintiff alleged different ways in which the defendant violated the group-boycott provision of § 1 of the Sherman Act, the court treated those allegations as involving a single group-boycott claim supported by alternative theories.¹¹⁷ Similarly, in *Dixon v. Coburg Dairy, Inc.*, the Fourth Circuit rejected jurisdiction.¹¹⁸ There, the plaintiff asserted a violation of a South Carolina statute that made it “unlawful for a person to discharge a citizen from employment or occupation because of political opinions or the exercise of political rights and privileges guaranteed by the Constitution and laws of the United States or by the Constitution and laws of South Carolina.”¹¹⁹ The plaintiff, who had been fired for bringing a toolbox to work with a Confederate battle-flag decal, asserted that his firing violated the law in three ways: it violated the First Amendment of the United States Constitution, South Carolina public policy, and the South Carolina Constitution.¹²⁰ Although the plaintiff asserted these theories in “separate counts” of his complaint, the Court correctly treated the statutory wrongful-discharge claim as a single claim and

¹¹⁶ *Gully v. First National Bank*, 299 U.S.109 (1936).

¹¹⁷ *Christianson v. Colt Industries Operating Co.*, 486 U.S. 800, 810 (1988).

¹¹⁸ 369 F.3d 811 (4th Cir. 2004).

¹¹⁹ *Id.* at 814-15.

¹²⁰ *Id.*

rejected jurisdiction because federal law was not essential to all of the theories supporting that claim.¹²¹

Third, a plaintiff who asserts violations of different statutory sections, even within the same statute, asserts multiple claims, only one of which must necessarily depend upon federal law. Again looking to *Christianson*, the plaintiff alleged violations of two sections of the Sherman Act.¹²² The Court construed the complaint as stating two claims—one based on each section—not merely one Sherman Act claim. To satisfy the necessity prong, resolving the question of federal law must be necessary to all the theories supporting one claim.¹²³

While distinguishing between common-law claims and theories can potentially be more difficult, most cases are not. For example, other courts have followed *Willy* and determined that wrongful discharge is a single claim, and reasons why the discharge was wrongful are theories, all of which must depend upon federal law to satisfy the necessity prong.¹²⁴ Similarly, if a plaintiff invokes multiple statutes as establishing a duty for negligence per se, those different statutes provide different theories, and if even one is a state statute, federal law cannot be a necessary element of the negligence per se claim. Additionally, *Merrell Dow* provides a basis for analogy when the plaintiff asserts closely related grounds of recovery. Recall that, there, the Court construed negligence and negligence per se as different claims, only one of which had to necessarily depend upon

¹²¹ Id. at 818.

¹²² *Christianson*, 486 U.S. at 810 (“Framed in these terms, our resolution of the jurisdictional issue in this case is straightforward. Petitioners’ antitrust count can readily be understood to encompass both a monopolization claim under § 2 of the Sherman Act and a group-boycott claim under § 1. The patent-law issue, while arguably necessary to at least one theory under each claim, is not necessary to the overall success of either claim.”).

¹²³ Id. at 810.

¹²⁴ E.g. *Rains v. Criterion Systems, Inc.* 80 F.3d 339, 346-7 (9th Cir. 1996).

federal law.¹²⁵ A more questionable distinction appears in a recent case where the plaintiff sued a cable company for breach of contract.¹²⁶ In that case, the contract obligated the cable company to disclose and charge rates “subject to applicable law.” The plaintiff asserted that the cable company breached the contract because it violated a federal statute and a state statute. The Court held that the plaintiff’s complaint contained two separate breach-of-contract claims, even though both relied upon the same contract and indeed the same provision.¹²⁷

In summary, the necessity prong is determined on a claim-by-claim basis. Federal law must be a necessary element of a state law *claim*. So long as that test is satisfied, jurisdiction over remaining claims will be determined by principles of supplemental jurisdiction.¹²⁸ But federal law will not be a necessary element of a state-law claim when that state-law claim is supported by alternative theories, unless each of those alternative theories requires resolution of a federal issue.

B. Actually disputed.

In a second-branch case, “the federal issue in a state-law claim must actually be in dispute to justify federal-question jurisdiction.”¹²⁹ In *Grable*, the parties actually disputed the tax issue, and indeed it “appear[ed] to be the only legal or factual issue contested in [the] case.”¹³⁰ Thus, the actually disputed prong was satisfied. The Court distinguished an older quiet-title case because, in the older case, the federal statutes on which title depended were not subject to any controversy respecting their validity,

¹²⁵ Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 817 n.15 (1986).

¹²⁶ Broder v. Cablevision Systems Corp., 418 F.3d 187 (2d Cir. 2005).

¹²⁷ Id. at 195-96.

¹²⁸ 28 U.S.C. § 1367 (2000).

¹²⁹ Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 125 S.Ct. 2363, 2369 n.3 (2005) (citing Shulthis v. McDougal, 225 U.S. 561 (1912)).

¹³⁰ Id. at 2368.

construction, or effect.¹³¹ While the following paragraphs explore this prong in some detail, I will ultimately conclude that the requirement that a federal issue be “actually disputed” is probably best left to the substantiality prong.

The Court’s treatment and articulation of this prong raises a timing anomaly. Federal-question jurisdiction is usually determined from the face of the plaintiff’s complaint. How can we determine what issues are actually disputed from the plaintiff’s complaint? In *Grable*, because the case was removed, the Court knew the issue was disputed because it could compare the plaintiff’s complaint with the notice of removal. But what if the plaintiff had filed the case originally in federal court? Would the Court look to the answer or a motion to dismiss? Suppose plaintiffs file a second-branch case in federal court, and suppose a federal issue appears on the face of the well-pleaded complaint. When does the court determine whether the federal issue is actually disputed? Does the inquiry end with the answer? What if the defendant’s answer disputes the federal issue, but after discovery progresses, the defendants clarify that they no longer dispute the federal issue, but still dispute other issues in the case? Subject-matter jurisdiction can, after all, be raised at any time. Does the fact that the federal issue is no longer disputed divest the court of jurisdiction?

Unless refined, this prong seems to be in tension with the well-pleaded-complaint rule.¹³² The well-pleaded-complaint rule has its critics,¹³³ but it has survived largely because it avoids the type of timing questions raised in the preceding paragraph. The

¹³¹ *Id.* at 2369 n.3.

¹³² See Wright & Miller, *Federal Practice and Procedure*, § 3562 at 27 (“This formulation . . . seems seriously deficient as a guide to judgment. . . . The test would be difficult, if not impossible, to apply, in view of the rule that jurisdiction must be determined from plaintiff’s well-pled complaint. The complaint by itself can hardly disclose on what aspects of the case there will be dispute or controversy.”).

¹³³ *E.g.*, Donald L Doernberg, *There’s Just no Reason for It; It’s Just our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 28 *HASTINGS L. J.* 597 (1987).

well-pleaded-complaint rule often operates to remove from federal jurisdiction even cases that turn entirely on federal law, when the federal issue arises only by way of defense or counterclaim.¹³⁴ It has survived (rightly or wrongly) because of the efficiency that results from being able to determine jurisdiction from the outset. If I were writing on a clean slate, I might suggest that federal-question jurisdiction should indeed depend on which federal issues are actually disputed. But a candid synthesis of what the law *is* must account for the ever-looming well-pleaded-complaint rule.

Given the survival of the well-pleaded-complaint rule, it is difficult to conclude that the Court meant, in this narrow context, to direct lower courts to look beyond the plaintiff's complaint. If a court must wait for an answer to determine whether the issue is actually disputed, it is hard to see why a court cannot also look to the answer to find substantial, disputed federal defenses. True, such a distinction would retain some notion of the plaintiff being "master of his complaint." But the master-of-the-complaint mantra, alone, is not so much of a justification as it is a tidy restatement of the result of being able to determine jurisdiction from only the plaintiff's pleadings. Once federal-question-jurisdiction inquiries proceed to the defendant's answer, it is difficult to justify—under what's left of the well-pleaded-complaint rule—declining jurisdiction when an answer reveals a substantial federal defense or counterclaim.¹³⁵

The Supreme Court's treatment of this prong suggests no calculated departure from the well-pleaded-complaint rule. Indeed, perhaps the Court means that the federal

¹³⁴ *Id.* at 599 ("[E]ven if a case turns upon an important question of federal law, and even if that is the only issue in the case, federal question jurisdiction does not exist unless the federal question appears in the "right" place, that is, in the plaintiff's well-pleaded complaint."); *see* note 36, *supra*.

¹³⁵ Unless, of course, the silent distinction is that resorting to the answer in the context of the actually disputed prong would *decrease* the availability of federal-question jurisdiction and in the context of a federal defense or counterclaim would *increase* the availability.

issue raised by the plaintiff must be actually (and reasonably) *disputable*. This rephrasing seems more consistent with the Court’s treatment of the older quiet-title case where the Court rejected jurisdiction because the “federal statutes on which title depended were not *subject to any controversy* respecting their validity, construction, or effect.”¹³⁶ If the federal issue is settled or the answer to the federal question clear, the presence of a settled issue in a state-law cause of action should not trigger federal adjudication.

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

C. Substantial.

The federal issue embedded in the state-law claim must be “substantial.” No precise definition of substantiality is available, and the precedents in this area are reconcilable only because the Court has made the “test sufficiently vague and general [such that] any set of results can be reconciled” with a *post hoc* analysis.¹³⁷

Substantiality depends upon the nature and importance of the embedded federal issue.¹³⁸ This broad statement about “nature and importance” can be further broken

¹³⁶ *Grable*, 125 S.Ct. at 2369 n.3 (emphasis added).

¹³⁷ *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 821 (1986) (Brennan, J., dissenting).

¹³⁸ *See id.*

down. Is there a special need for federal expertise in this matter?¹³⁹ Is there a special need for uniformity?¹⁴⁰ Will the issue's resolution reach beyond the instant dispute into areas of particular federal concern?¹⁴¹ Along with the nature and importance of the federal issue on a national scale, some have suggested that courts should consider how prominent the federal issue is in the particular lawsuit, or in other words how "central" the federal issue is to the dispute between the parties.¹⁴² This centrality concern seems better suited for the necessity prong, and indeed considering it within the substantiality prong seems to conflict with *Merrell-Dow*. The necessity prong covers how prominent the federal issue must be in a lawsuit. If the federal issue is necessary to one claim, the impact of other claims is determined under the supplemental-jurisdiction statute,¹⁴³ including its provisions for declining supplemental jurisdiction when state claims predominate.¹⁴⁴

Ultimately, the generalizations are just that, general.¹⁴⁵ And Justice Brennan seemed to be correct in arguing that the precedents in this area are reconcilable only

¹³⁹ U.S. Express Lines, Ltd v. Higgins, 281 F.3d 383, 391 (3d Cir. 2002) (embedded admiralty question).

¹⁴⁰ County of Santa Clara v. Astra USA, Inc., 2005 WL 3282245, at * 5 (N.D. Cal. 2005) (noting a special need for uniformity in areas of exclusive federal jurisdiction); see U.S. Express Lines, Ltd v. Higgins, 281 F.3d 383, 391 (3d Cir. 2002); see *Merrell Dow*, 478 U.S. at 826 (Brennan, J., dissenting).

¹⁴¹ E.g., Grable, 125 S.Ct. at 2368; Municipality of San Juan v. Corporacion Para El Fomento Economico De La Ciudad Capital, 415 F.3d 145, 148 n.6 (1st Cir. 2005) ("Because the propriety of COFECC's conduct turns entirely on its adherence to the intricate and detailed set of federal regulatory requirements, and the funds at issue are federal grant monies, we agree with the magistrate judge and district court that jurisdiction is proper."); County of Santa Clara v. Astra USA, Inc., 2005 WL 3282245, at *5 (a federal issue is substantial when it "directly affects the functioning of the federal government).

¹⁴² See Brianna J. Fuller, Developments in the Law: Federal Jurisdiction and Forum Selection, III. Federal Question Jurisdiction, 37 LOY L.A. L. REV. 1443, 1455-65 (Summer 2004).

¹⁴³ *Merrell Dow*, 478 U.S. at 817 n.15 (1986).

¹⁴⁴ 28 U.S.C. § 1367(c)(3).

¹⁴⁵ See Brianna J. Fuller, Developments in the Law: Federal Jurisdiction and Forum Selection, III. Federal Question Jurisdiction, 37 LOY L.A. L. REV. 1443, 1455-65 (Summer 2004).

because the standards are general enough to mold to any desired *post hoc* reconciliation.¹⁴⁶ This, of course, leaves much room for advocacy.

The *Grable* case raises the most compelling of the substantiality concerns. There, resolving the federal tax issue would reach well beyond the parties and impact an area of unique federal concern, IRS tax sales. As one court stated, resolving the federal issue would “directly affect the functioning of the federal government.”¹⁴⁷ In *Grable*, the Supreme Court noted, the “meaning of the federal tax provision is an important issue of federal law that sensibly belongs in federal court. The Government has a strong interest in the prompt and certain collection of delinquent taxes, and the ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers like Darue to satisfy themselves that the Service has touched the bases necessary for good title.”¹⁴⁸ While *stare decisis* will, of course, cause any ruling to reach beyond the parties, and while presumably all federal laws are important, the *Grable* case involved the government’s interest “in the availability of a federal forum to vindicate its *own* administrative action.”¹⁴⁹ *Grable* also implicated the other two concerns: the need for uniformity and federal expertise. State courts infrequently address federal tax statutes, and the need for uniformity was important for the reasons noted above.

It seems unlikely that the Court will find jurisdiction proper when a federal issue is embedded in a garden-variety state tort claim or when the parties incorporate a federal law into a private contract. Before *Grable*, most courts would have held that such a claim

¹⁴⁶ See *Almond v. Capital Properties, Inc.*, 212 F.3d 20 (1st Cir. 2000) (concluding, in a second-branch case that “what remains is the almost unanswerable question of whether the Supreme Court would regard the federal issue in this case as sufficiently important to confer “arising under” jurisdiction”).

¹⁴⁷ *Astra*, 2005 WL 3282245, at *5.

¹⁴⁸ *Grable*, 125 S.Ct. at 2368.

¹⁴⁹ *Id.*

would not contain a “substantial” federal issue. But after *Grable* clarified that *Merrell Dow* was not a substantiality case, how the federal issue is incorporated is probably best left to the “disruptiveness” prong. The substantiality prong focuses upon the nature and importance of the federal issue. How that issue is embedded or incorporated does not impact the need for uniformity or federal expertise—it impacts whether a welcome mat is needed.¹⁵⁰ Phrased differently (and perhaps too candidly), the substantiality prong appears to represent whether the court thinks this issue deserves federal resolution. The disruptiveness prong accounts for the structural reality that Congress, not the Court, has the final say in what issues deserve federal resolution.¹⁵¹

D. Disruptiveness.

A court cannot exercise second-branch jurisdiction if doing so would disrupt the congressionally approved balance of federal and state judicial responsibilities.¹⁵² The disruptiveness prong is a potential veto, grounded in the principle that Congress controls federal jurisdiction. Even when a federal issue is necessary, actually disputed, and substantial, jurisdiction is improper if exercising it would be disruptive.¹⁵³ Exercising jurisdiction is disruptive if Congress provided no “welcome mat” when one is needed. Not all cases require a welcome mat.

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

¹⁵⁰ Part V, *infra*; see *Buis v. Wells Fargo Bank, NA*, 2005 WL 3148280, at *3-5 (N.D. Tex. 2005).

¹⁵¹ Congress’s final say, of course, is regulated by the Constitution. See Part II, *supra*.

¹⁵² *Grable*, 125 S.Ct. at 2368.

¹⁵³ See *Buis*, 2005 WL at *5.

a case involves a federal statute that creates a cause of action, the plaintiff will have sued under that statute. That is, most cases involving cause-of-action-creating federal statutes are first-branch cases.¹⁵⁴ But if a welcome mat is present in a second-branch case, the disruptiveness inquiry ends, and jurisdiction is proper as long as the other three prongs are met.

But a welcome mat is not always needed. The presence of a federal right of action for the embedded federal law is not a “missing federal door key, always required,” but rather is only a welcome mat, needed when exercising jurisdiction over a class of cases would materially disrupt the flow of litigation between state and federal courts.¹⁵⁵ Contrasting *Grable* and *Merrell Dow* provides the starting place for determining when this welcome mat is needed.

In *Merrell Dow* (as construed by *Grable*), jurisdiction was absent because hearing the case without a welcome mat would have been disruptive. There, the plaintiffs incorporated the Drug Act standard into their negligence per se claim. The Drug Act did not create a private right of action—it contained no welcome mat.¹⁵⁶ A welcome mat was required because allowing garden-variety tort claims into federal court when they incorporated federal law would have “heralded a potentially enormous shift of traditionally state cases into federal court.”¹⁵⁷ As the Court noted, “One only needed to consider the treatment of federal violations generally in garden variety state tort law. The violation of federal statutes and regulations is commonly given negligence per se effect in

¹⁵⁴ See Part III-B, *supra*, suggesting how a second-branch case could involve an embedded federal statute that creates a cause of action.

¹⁵⁵ *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 125 S.Ct. 2363, 2370 (2005).

¹⁵⁶ *Id.* at 2371 (construing *Merrell Dow*).

¹⁵⁷ *Grable*, 125 S.Ct. at 2370-71 (construing *Merrell Dow*).

state proceedings.”¹⁵⁸ When allowing a type of embedded issue into federal court would attract a “horde of original filings and removal cases,” federal courts need the congressional welcome mat—even if they view the issue as substantial enough to warrant federal adjudication.

By contrast, in *Grable*, federal-question jurisdiction was proper despite the absence of a welcome mat because only the “rare state quiet title action . . . involves contested issues of federal law.”¹⁵⁹ Exercising “jurisdiction over actions like *Grable*’s would not materially affect, or threaten to affect the normal currents of litigation.”¹⁶⁰

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

Given the sensitive concerns outlined above, *Grable*’s proceed-without-a-welcome-mat holding should not be read too broadly. Congress can foresee cases involving garden-variety tort claims with embedded federal issues and provide the

¹⁵⁸ Id. at 2370 (construing *Merrell Dow*).

¹⁵⁹ Id. at 2371.

¹⁶⁰ Id.

welcome mats where appropriate.¹⁶¹ Thus, exercising jurisdiction in cases like negligence per se, breach of fiduciary duty, malpractice, and wrongful discharge would be disruptive, and cannot genuinely be distinguished from *Merrell Dow*.¹⁶² It would be similarly disruptive to allow private parties to incorporate federal standards into their contracts and create jurisdiction where Congress has not.¹⁶³ And importantly, the Court clarified that disruptiveness is a veto, separate from concerns about substantiality. The separation-of-powers concerns underlying the disruptiveness prong cannot be alleviated by a court's view about the importance of the federal issue. *Grable* teaches that's a separate inquiry.

VI. Conclusion.

Grable's new edition confirms that the second branch lives. Its four-prong test, while surely not providing a bright line, creates a workable structure when the steps are kept conceptually distinct. The first prong—necessity—and the well-pleaded-complaint rule govern the placement of the federal issue in the case and how prominent the federal issue must be in relation to the lawsuit. The second prong—actually disputed—is more conceptually troubling and is properly treated under the substantiality prong. The third prong—substantiality—still allows for judicial consideration of the need for federal adjudication, considering the nature and importance of the federal issue. And the fourth

¹⁶¹ See *RA Investment I, LLC v. Smith & Frank Group Services*, 2005 WL 3299710, at *3-4 (E.D. Tex. 2005) (gathering post-*Grable* cases involving tax issues embedded in tort claims); *Cantwell v. Deutsche Bank Sec., Inc.* No. 3:05-CV-1378-D (N.D. Tex. Sept. 21, 2005).

¹⁶² *Sarantino v. American Airlines, Inc.*, 2005 WL 2406024, at *8 (E.D. Mo. 2005); *Accord Leggette v. Wash. Mut. Bank FA*, 2005 WL 2679699, at *4 (N.D. Tex. 2005) (exercising federal jurisdiction over home foreclosure disputes typically governed by private contract and state law portends a significant transfer of judicial responsibilities from state to federal courts.); *State of Wisc. v. Abbot Laboratories*, 390 F. Supp. 2d 815, 823 (W.D. Wis. 2005) (“By contrast, the present case is one of many that have been filed by states across the country concerning pharmaceutical companies’ alleged fraud in price-setting.”).

¹⁶³ *Buis*, 2005 WL at *5.

prong—disruptiveness—is a possible veto, grounded in the notion that Congress, not the courts, controls federal jurisdiction. This latter prong requires restraint. It is separate from the substantiality determination and requires judicial deference to Congress’s judgment about the proper allocation of the federal judicial power.

Unless the second branch is entirely eliminated,¹⁶⁴ complete clarity in this area is unobtainable. If adhered to faithfully, *Grable* will result in few second-branch cases properly within § 1331. Whether that result is desirable can (and surely will) be debated. But the *Grable* edition admirably answers more questions than it creates and provides a reasonable structure for the inquiry. This clarity is a welcome change to the post-*Merrell Dow* world.

¹⁶⁴ See *Grable*, 125 S.Ct. at 2371-72 (Thomas, J., concurring) (noting an openness to consider a return to the Holmes test as one of exclusion). I view such an elimination extremely unlikely. Such a marked departure from a construction of § 1331 would require an inquiry into the meaning of § 1331, which would likely reveal an implausible answer—that Congress probably intended to extend jurisdiction to the constitutional maximum.