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## Removal Reform: A Solution for Federal Question Jurisdiction, Forum Shopping, and Duplicative State-Federal Litigation

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# Removal Reform: A Solution for Federal Question Jurisdiction, Forum Shopping, and Duplicative State-Federal Litigation

MARTHA A. FIELD\*

*Federal court procedural, especially jurisdictional ones, need to be governed by clear, effective, and fair rules. Yet twentieth century doctrines and reforms, even when made in the name of pragmatism, have produced decidedly unpragmatic results: a vague and disputed doctrine of federal question jurisdiction that excludes from federal court many cases where federal law controls the outcome, rules that facilitate forum shopping by plaintiffs and make it impossible to predict in advance what law will apply to decide one's case, and the stunning waste of a system in which the exact same issues are simultaneously litigated in state and federal courts as part of a "race to judgment." The status quo is, quite simply, broken.*

*This Article contends that we can ameliorate these concerns by permitting removal to federal court whenever the parties are diverse and whenever the defendant's answer or plaintiff's reply shows that a case arises under federal law—rather than artificially limiting our vision to the plaintiff's well-pleaded complaint. Though modest, these reforms could serve as a tonic to many of the status quo's most striking irrationalities: the criteria for federal question jurisdiction would be expanded to cover many currently excluded cases that turn on federal law, plaintiffs would lose opportunities to forum shop by pinning unwilling defendants in state courts, and the systemic waste of duplicative and concurrent state-federal litigation could be largely eliminated. By broadly addressing these deeply-rooted problems, this Article aims at improving the clarity, rationality, and essential fairness of the rules that govern our federal courts.*

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## INTRODUCTION

This Article discusses changing certain aspects of U.S. federal rules permitting the removal to federal court of cases commenced in a state court: one aspect that concerns federal question jurisdiction and one that concerns primarily diversity litigation. Current rules allow plaintiffs to select both where to sue and whether to proceed in state or federal court in a range of cases that qualify either for the general federal question jurisdiction, under 28 U.S.C. § 1331, or the federal diversity jurisdiction, under 28 U.S.C. § 1332.<sup>1</sup> Today's removal procedures (embodied in 28 U.S.C. § 1441) sometimes, but not always (see 28 U.S.C. § 1441(b)), allow defendants to remove a case brought in state court when a plaintiff could have chosen a federal forum but selected state court instead.<sup>2</sup>

In federal question cases, both the determination whether the plaintiff can choose federal jurisdiction and the determination whether the defendant(s) can remove if the plaintiff has selected state court, are made from reading solely the complaint the plaintiff has filed to initiate the litigation. In order for federal question jurisdiction to be available, that complaint must disclose (and traditional

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\* Langdell Professor of Law, Harvard Law School. Over a period of years, I have presented portions of this Article at workshops and conferences at Berkeley Law School, University of Pennsylvania Law School, and Harvard Law School. I also presented it at an AALS Civil Procedure Conference in New York City. I thank all participants for their helpful suggestions. I am particularly grateful to Professors Donald Dorenberg, David Shapiro, Daniel Meltzer, and Frank Goodman for helpful comments and discussions. I also want to thank Harvard Law School for the several months of summer support it provided for research and writing of this Article.

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1. Section 1332 gives the district courts jurisdiction “of all civil actions where the matter in controversy exceeds the sum or value of \$75,000 . . . and is between . . . citizens of different states.” 28 U.S.C. § 1322(a) (2006). Section 1331 gives district courts jurisdiction “of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2006).

2. Section 1441(a) states the general rule for removal:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (2006). Section 1441(b) provides for one express exception:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b) (2006). That is, if any defendant is sued in his or her home state, then a federal court located therein may not obtain diversity jurisdiction in such action.

rules of pleading must require it to disclose) that the case “arises under” federal law, as that phrase has been defined by the Supreme Court. This rule is now known as the “well-pleaded complaint rule”—and it is central to federal question jurisdiction.

The change I will suggest makes the defendant’s answer and the plaintiff’s reply also relevant to whether a case “arises under federal law” at the stage of removal. One effect is to lessen the plaintiff’s opportunity to control the federal-state choice and sometimes even the choice of what law will apply, with his initial choice of court and his control of the initial pleadings.<sup>3</sup> Another effect is to broaden federal question jurisdiction by admitting more cases in which federal law controls the outcome. In diversity litigation, the proposed change dispenses with the long-existing exception from removal of the defendant who is sued in her home state. If the parties to a litigation are from different states, the plaintiff could no longer sue in a way that pins the defendant(s) into state court, as he can now, by choosing to sue in her home state. The aim of the changes is to allow defendants to remove to federal court, within either the diversity or the federal question jurisdictions, *whenever* the plaintiff could have chosen federal court but has selected state court instead. Cases that qualify for federal jurisdiction thus would take place in state court only with the concurrence of both parties.

The proposals are not entirely new. Over the past half century, others, most notably the American Law Institute (ALI), have suggested some similar changes, or changes that would have similar effects.<sup>4</sup> Although the ALI report captured a certain amount of attention in Congress, it did not result in statutes or reform.<sup>5</sup> I will review, albeit quickly, some conventional reasons for favoring identical and equal opportunities for federal jurisdiction by both parties, in both federal question and diversity contexts, as well as the reasons against doing so.

But the main point of this Article goes beyond evaluation of current removal rules in their own right. Whatever one thinks of the proposed rules in terms of their direct consequences, my principal point is the enormous effect the change in

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3. Plaintiffs’ choices are limited anyway by rules of pleading, directing what may and may not appear in the complaint. In some cases, however, plaintiffs can choose whether to sue on a state or federal cause of action, without thereby affecting the substance of the case. See *infra* text accompanying notes 207–09. In those situations, current law allows them to control the choice of forum.

4. See AM. LAW INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* (1969).

5. See *The Division of Jurisdiction Between State and Federal Courts: Hearings Before the Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary*, 92d Cong. (1971); Margaret Tarkington, *Rejecting the Touchstone: Complete Preemption and Congressional Intent After Beneficial National Bank v. Anderson*, 59 S.C. L. Rev. 225 (2008). Although “multiple bills have been introduced in Congress to repeal the well-pleaded complaint rule, at least to the extent that the rule forbids removal on the basis of a federal defense . . . Congress has yet to pass such an act.” Tarkington, *supra*, at 237. The ALI proposed one such act which Congress rejected: “[A] major effort was made in 1971, based on a study by the American Law Institute . . . to change the judicial code to allow removal on the basis of a federal defense.” *Id.* at 237 n.58 (citing *The Division of Jurisdiction Between State and Federal Courts: Hearings Before the Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary*, *supra*).

removal rules could and would have on other, seemingly unrelated federal court doctrines. I will discuss three important problem areas in federal court jurisprudence that would be sharply affected, indeed radically improved, if both parties had the same opportunity to invoke federal jurisdiction in each case. The three subject areas to be improved, or even fixed, by removal reform are:

1. The ill-defined and fundamentally irrational criteria for invoking federal question jurisdiction;
2. Forum shopping by litigants and would-be litigants aiming to alter the result in the particular litigation; and
3. Duplicative, concurrent state and federal litigation between the same parties.

After setting out the proposed changes in the removal statutes, I will discuss each of these problem areas in turn, showing how the proposed revisions would be helpful.

#### I. THE PROPOSED REMOVAL STATUTES

The statutes granting diversity and federal question jurisdiction (current §§ 1331 and 1332) could remain the same. The first section of the removal statute, 28 U.S.C. § 1441(a), would be amended to read:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, *as judged either from the complaint in the controversy or from the answer or reply submitted at the outset of the litigation*, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. *The plaintiff or the plaintiffs also may remove the litigation to that district court on the basis of the defendant's answer or the plaintiff's reply, submitted at the outset of the litigation.* For purposes of removal under this chapter, the citizenship of *parties* sued under fictitious names shall be disregarded.

The parts to be added to the current statute are italicized. The use of the term “parties,” in the last sentence, substitutes for the existing statute’s reference to “defendants.”

The current subsection (b) of § 1441—denying removal to a defendant in a diversity action who is sued in her home state—would be deleted. The rest of the provisions in § 1441 would remain, with current (c) becoming (b), (d) becoming (c), and so forth.

#### II. FEDERAL QUESTION JURISDICTION

An extraordinary feature of federal question jurisdiction is the long-standing difficulty of stating what “arises under” federal law and what does not. Federal

question jurisdiction is probably the most important category of federal court jurisdiction, yet during most of its existence its contours have been indiscernible. It may be possible to state its rules today; indeed, I make an effort at a concise statement later in the discussion.<sup>6</sup> Even if correct, those rules are very complex, as well as being both arbitrary and irrational. (And if my statement is inaccurate, that should demonstrate continuing confusion as to what the rules are.)

Uncertainty in law is not always a vice. In some contexts it can be tolerable and even productive. Those contexts do not include jurisdictional rules. Rules that involve choosing the correct forum for a lawsuit—or a correct forum—cause needless litigation when they do not offer clear guidance. Even clear rules that leave discretion to be exercised on some vague basis are disruptive and wasteful, especially if that discretion can be invoked at a late stage in the litigation, like Supreme Court review.

The problem is extreme because of our doctrine that jurisdictional flaws can be raised at any time in the litigation, during trial or for the first time on appeal. Even if the parties overlook the problem, a deciding court can and should address it whenever the court notices it. If the court finds no federal jurisdiction and lower federal courts have already ruled, even on the merits in prolonged litigation, the earlier litigation is void, and the parties must start anew in state court—assuming that they are not precluded by a statute of limitations that expired while they were still in federal court. The parties and the courts both needlessly expend what may be substantial time and resources; the justification, of course, is enforcement of the federal jurisdictional limitation.

Uncertainty about the contours of federal question jurisdiction remains, despite a unanimous 2005 Supreme Court decision purporting to resolve confusing jurisdictional issues. Indeed, the 2005 decision, *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*,<sup>7</sup> builds heavily on and reaffirms an earlier unanimous decision, *Franchise Tax Board v. Construction Laborers' Vacation Trust*,<sup>8</sup> decided in 1983. One problem with these cases as clarifiers of the law is that each was closely followed by an arguably contradictory subsequent case; *Merrell Dow Pharmaceuticals v. Thompson*<sup>9</sup> in the case of *Franchise Tax*, and *Empire Healthchoice Assurance v. McVeigh*<sup>10</sup> in the case of *Grable*. Those follow-up decisions were produced by divided courts, with the principal opinions seemingly reflecting a view of federal question jurisdiction contrary to that of their unanimous predecessor.

Even if the murky holdings of the follow-up cases are removed from consideration, however, *Franchise Tax* and *Grable* themselves do little to settle some central problems concerning the current scope of federal jurisdiction. They may have given us a stronger sense of what the rules are, but if so, those rules suggest neither a rational nor an easily workable structure for federal question jurisdiction. I will discuss these more modern cases in detail, after setting out the background and the problem(s) to be confronted.

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6. See *infra* text accompanying Part II.D.

7. 545 U.S. 308 (2005).

8. 463 U.S. 1 (1983).

9. 478 U.S. 804 (1986).

10. 547 U.S. 677 (2006).

*A. The 100-Year-Old Problem*

For the past 100 years, the salient ambiguity in federal question jurisdiction has been whether a matter qualifies for jurisdiction because it “turns on” issues of federal law. Another way to state the issue is to ask whether a federal cause of action is the sole basis for federal question jurisdiction.<sup>11</sup>

It was not until 1875 that general federal question jurisdiction was established.<sup>12</sup> It is much newer than the diversity jurisdiction, which has been with us from the outset.<sup>13</sup> Early federal question cases, such as *Hans v. Louisiana*<sup>14</sup> and *Ex parte Young*,<sup>15</sup> often describe the statute as placing within the jurisdiction cases that “turn on federal law.” That seems a functional and sensible interpretation of “arising under” jurisdiction, because enabling greater uniformity and expertise in the decision of federal issues are important reasons for federal question jurisdiction.<sup>16</sup> The “turns on” approach was also a workable one during the early years of federal question jurisdiction.<sup>17</sup> Indeed, under the 1875 statute, removal was available to both parties;<sup>18</sup> courts considered all pleadings relevant, not simply the complaint.

11. Arguably a third category of federal question jurisdiction exists, allowing removal when the plaintiff’s cause of action is “clearly preempted” by federal law. That category has developed since 1968, when the Supreme Court decided *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists & Aerospace Workers*, 390 U.S. 557 (1968). The contours of the preemption category are not yet delineated; they are still developing. By suggesting the possibility of federal cause of action as the sole test for federal question jurisdiction under § 1331, I am not discounting this preemption category. Rather, I consider it a subset of the federal cause of action test, because the theory behind it is that the plaintiff is required to bring a particular, exclusive federal action if he is to pursue the litigation.

12. It also existed briefly from 1801 until 1802. *See* Act of Feb. 13, 1801, § 11, 2 Stat. 89, 92, *repealed by* Act of Mar. 8, 1802, § 1, 2 Stat. 132, 132. The circumstances are more fully treated in FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 23–32 (1928).

13. Act of September 24, 1789, ch. 20, 1 Stat. 73.

14. 134 U.S. 1 (1890).

15. 209 U.S. 123 (1908).

16. *See* Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 158–59 (1953); *see also* *Martin v. Hunter’s Lessee*, 14 U.S. 304, 347–48 (1816) (“That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.”).

17. *See* *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449 (1884) (allowing federal question jurisdiction on the basis of federal issues central to the case but not necessarily in the plaintiff’s complaint, let alone his well-pleaded complaint); *R.R. Co. v. Mississippi*, 102 U.S. 135, 140–41 (1880) (same); *Tennessee v. Davis*, 100 U.S. 257, 264 (1879) (same).

18. Act of March 3, 1875, ch. 137, § 2, 18 Stat. 470, 470–71 (“That any suit of a civil nature, at law or equity . . . brought in any State court . . . and arising under the Constitution

In the late 1880s, the Court began to impose a well-pleaded complaint rule as a way to limit the plaintiff's initial pleading.<sup>19</sup> Until then, a plaintiff could obtain jurisdiction by claiming a case would be federal because of answers and issues he anticipated the defendant would raise.<sup>20</sup> The plaintiff could obtain federal jurisdiction on this basis even when the defendant did not plead in her answer the federal argument the plaintiff attributed to her, or any other federal argument.<sup>21</sup>

In 1887, Congress amended the removal statute to permit removal by defendants but not by plaintiffs.<sup>22</sup> Unable to remove, plaintiffs seeking federal jurisdiction had added reason to anticipate federal arguments by defendants. But courts came to limit such anticipatory pleading; eventually they denied jurisdiction not only when plaintiffs had erroneously anticipated defenses but also when defendants did in fact raise the anticipated defense.<sup>23</sup>

The big step in extension of the well-pleaded complaint rule came when some judges started applying the rule to defendants on removal as well as to plaintiffs' initial pleadings.<sup>24</sup> Instead of interpreting the 1887 amendment simply to limit removal to defendants, this interpretation also limited defendants' ability to remove. Although it seems illogical, courts began to prevent removal even by defendants if the basis for federal jurisdiction did not appear in the plaintiff's well-pleaded complaint. At least by 1908, this broad application of the well-pleaded complaint rule to defendants as well as plaintiffs became the accepted standard for federal question jurisdiction, and it has been deemed settled precedent ever since.

The case that definitively established this broad application of the well-pleaded complaint rule is *Louisville & Nashville Railroad Co. v. Mottley*.<sup>25</sup> The *Mottley* plaintiffs sued in federal court to complain of the railroad not honoring their lifetime passes, which they had obtained in a settlement against the railroad.<sup>26</sup> Their complaint correctly revealed that the railroad would rely on a federal statute that forbid it from honoring the passes. The controlling issues were whether the statute applied retroactively, and if so, whether that federal statute was constitutional.<sup>27</sup> By the time the case got to the Supreme Court, lower federal courts had passed on the merits, holding for the Mottleys, but the Supreme Court held that federal courts

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or law of the United States . . . either party may remove said suit into the circuit court of the United States for the proper district.”).

19. *Third St. & Suburban Ry. v. Lewis*, 173 U.S. 457, 460 (1899); *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894).

20. *See Robinson v. Anderson*, 121 U.S. 522, 524 (1887) (decided under the March 3, 1875 statute (§ 5, 18 Stat. 470)).

21. *See Metcalf v. City of Watertown*, 128 U.S. 586 (1888).

22. Act of March 3, 1887, ch. 373, § 2, 24 Stat. 552, 553 (“That any suit of a civil nature at law or in equity . . . of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States . . .”).

23. *See City of Shreveport v. Cole*, 129 U.S. 36 (1889).

24. *See Chappell v. Waterworth*, 155 U.S. 102, 107–08 (1894) (removal); *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894).

25. 211 U.S. 149 (1908).

26. *See id.* at 150–51.

27. *See id.* at 151–52.

never had original jurisdiction of the controversy.<sup>28</sup> The reason: the Mottleys' allegation that federal law would govern, although correct, was not required to appear in their well-pleaded complaint. They had been required to allege only that they had been denied their contractual (state-created) right to ride. It was the defendant's appropriate pleading that would rely on the federal statute and the Mottleys' reply that would allege unconstitutionality. Therefore, although the case undoubtedly turned on federal issues, those issues would not arise on a properly pleaded complaint. Accordingly, all prior litigation was void, and the Mottleys were sent to state court to pursue their grievance. If the case turned on federal law after the state proceedings were completed (as it clearly would), then the Supreme Court could review the federal issues.<sup>29</sup>

*Mottley* dramatically illustrates how application of the well-pleaded complaint rule keeps out of federal courts cases that turn on federal law. It also shows the wastefulness, both for courts and for parties, of prolonging issues about the proper court in which to litigate.

After *Mottley* had made clear that courts could look only to the well-pleaded complaint to establish either original or removal jurisdiction, the question remained, "What were courts to look for?" In 1916, Justice Holmes answered this question, refining *Mottley's* rule by proclaiming that only the cause of action (which would appear on the face of any well-pleaded complaint) determines jurisdiction; a federal cause of action was essential for federal question jurisdiction.<sup>30</sup> Others disagreed, believing that other federal elements apparent from an appropriate complaint could also support jurisdiction. Not any nor every federal element was sufficient. A remote federal right or issue unlikely to have any effect in the case could not sustain jurisdiction, even if it was required to appear on the complaint. Congress could explicitly give jurisdiction of such a controversy under a specific grant of federal jurisdiction, but such jurisdiction did not "arise" under the general federal question statute.<sup>31</sup> But if the complaint showed (and was required to show) that the case would turn on federal law, the traditional and trusted test for federal jurisdiction would admit the controversy to the federal courts.

The disagreement came to a head in *Smith v. Kansas City Trust*,<sup>32</sup> in which the Court upheld "turns on" jurisdiction over Justice Holmes's insistence in dissent that a federal cause of action was required.<sup>33</sup> But *Smith* did not forsake the well-pleaded

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28. *See id.* at 152.

29. The Mottleys' case again came to the Supreme Court, in *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467 (1911).

30. *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action."). Moreover, unlike today, the volume of litigation was such that the Supreme Court could be expected to review a large percentage of the meritorious cases turning on federal issues that were wrongly decided. Therefore, there was more opportunity for federal input in a case that did not receive federal jurisdiction than there is today, when only a small number of cases litigated in state courts make it beyond their state's supreme court.

31. *See Osborn v. Bank of the United States*, 22 U.S. 738 (1824) (discussing the meaning of "arising under" as used in the Constitution).

32. 255 U.S. 180 (1921).

33. *See id.* at 214-15 (1921) (Holmes, J., dissenting) ("But it seems to me that a suit

complaint rule. *Smith* was the rare case in which the pleading rules allowed—indeed required—that the plaintiff disclose the nature of the controversy. In that pleading, the plaintiff had shown a potentially dispositive federal issue. *Smith*, therefore, satisfied both the well-pleaded complaint rule and the “turns on federal law” test.<sup>34</sup> That rarity occurred partly because state pleading rules were still applicable and the plaintiff’s pleading seemed consistent with Minnesota requirements for shareholder derivative actions. Since 1934, the Rules Enabling Act has directed federal courts to use federal procedures in actions brought in federal court.<sup>35</sup>

Given the well-pleaded complaint rule, Holmes’s choice of federal cause of action as the element that would define federal question jurisdiction seems most sensible. The cause of action will always appropriately appear on the face of the complaint. Therefore, if Holmes’s cause of action test were the only basis for federal question jurisdiction, the well-pleaded complaint rule would be superfluous because it would always be satisfied. The *Smith* position that a pivotal federal question could also confer jurisdiction if it appeared on the face of the well-pleaded complaint was plausible also. Indeed it seems consistently to have been “the law,” and there are important reasons for allowing cases that will actually turn on federal law to have access to federal courts. But the problem is that the category is almost an empty one.

The reason that the well-pleaded complaint rule so undercuts “turns on” jurisdiction is that at the point in a case when the complaint is filed, it is usually not possible to know *what* the lawsuit will turn on. For example, a plaintiff may allege copyright infringement (a federal cause of action) but the defendant’s answer may simply deny the primary facts; or the answer may show she is relying on a contract with the plaintiff permitting her to use the copyrighted work—and the plaintiff’s reply may then show that the controversy between her and the plaintiff concerns whether the contract is valid, a question of state law, so the litigation would not turn on anything to do with copyright or infringement. The basic dilemma is that the complaint alone does not reveal what are the pivotal issues between the parties, and usually cannot if it is “well-pleaded.” Nonetheless, post-*Mottley* courts and

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cannot be said to arise under any other law than that which creates the cause of action. It may be enough that the law relied upon creates a part of the cause of action although not the whole . . . . But the law must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States. The mere adoption by a state law of a United States law as a criterion or test, when the law of the United States has no force *proprio vigore*, does not cause a case under the state law to be also a case under the law of the United States, and so it has been decided by this Court again and again.” (internal citations omitted); *see also Am. Well Works*, 241 U.S. 257.

34. Of course the defendant might still have simply denied facts, or claimed that the statute of limitations precluded the suit, but the “turns on” test has not been applied so strictly as to exclude jurisdiction because of such possibilities. Another issue that will require definition if a “turns on” test is adopted and given reasonable breadth, is where on the scale between “possibly could turn on” and “probably will turn on” the line for jurisdiction will be drawn, and what court will make that decision. *See infra* text accompanying note 146.

35. Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2072–2074 (2006)).

jurists continued to refer to “turns on federal law” as an important part of federal question jurisdiction.<sup>36</sup>

If one believes that federal courts should be able to hear controversies about federal law, the “turns on” test cannot achieve that end. Instead, the vast majority of cases that test would admit to the federal jurisdiction will be kept out for failure to satisfy the well-pleaded complaint rule. In fact, precluding such cases from jurisdiction is the principal role played by applying the well-pleaded complaint rule at the stage of removal. Accordingly, the “turns on federal law” test survived *Mottley*, but was left with almost no room in which to operate.

Jurists seemed not to appreciate this interaction between the traditional “arising under” test and the well-pleaded complaint requirement. Judge Friendly, writing in 1964, opined that Holmes’s formulation is “more useful for inclusion than for the exclusion for which it was intended,” and proceeded to set out two other bases for jurisdiction, including a “turns on” test.<sup>37</sup> Friendly’s support for the existence of this pivotal federal question approach includes only *Smith*, discussed above, and *DeSylva v. Ballentine*,<sup>38</sup> a case in which the jurisdictional issue was not mentioned in any of the Supreme Court opinions.<sup>39</sup>

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The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.

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

37. *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964). Friendly also tentatively suggested a special rule for federal common law, an approach that has not been adopted. *See id.* at 828. Instead, federal common law has been treated like other federal law and has given rise to federal jurisdiction when it creates a federal cause of action. Common law issues like others are subject to a well-pleaded complaint rule.

38. 351 U.S. 570 (1956).

39. Indeed Friendly may have gotten the jurisdictional issue of *DeSylva* wrong. Writing in *T.B. Harms*, Friendly opined:

[A] case may ‘arise under’ a law of the United States if the complaint discloses a need for determining the meaning or application of such a law. . . . A recent application of this principle . . . is *De Sylva v. Ballentine* . . . where the Supreme Court decided on the merits a claim to partial ownership of copyright renewal terms.

*T.B. Harms*, 339 F.2d at 827 (internal citations omitted). Friendly at least forgot to go through the steps required to bring a declaratory judgment to federal court, *see infra* text accompanying notes 55–56, and *DeSylva* was a declaratory judgment action. In fact, it is not clear that either party had a possible infringement action against the other in *DeSylva*, and infringement is the only federal cause of action under the federal Copyright Act, as Friendly holds in *T.B. Harms*. Therefore *DeSylva* could not satisfy the well-pleaded complaint rule under *Skelly Oil*. It would not even have satisfied it if the *Skelly Oil* rule had been liberalized with *Edelmann*, as it is today. *See infra* text accompanying note 86–87. Moreover, even if *DeSylva* had qualified for jurisdiction under the *Skelly-Edelmann* rules, that would not make it a “turns on” case but rather a federal cause-of-action case. *Skelly Oil* requires that federal jurisdiction be based on causes of action that would or could have been brought if the declaratory judgment act were not available and thus appears a subset of the federal cause of action test for declaratory judgments. *Skelly Oil v. Phillips Petroleum*, 339 U.S. 667 (1950).

A stronger argument might have been that “turns on federal law” was an undisputed basis for “arising under” jurisdiction from the outset of general federal question jurisdiction, and that it makes sense for such cases to be decided by federal courts. Moreover the Supreme Court—unlike Holmes—has never squarely repudiated that test for jurisdiction (that is, other than by adopting the well-pleaded complaint rule).

Friendly’s position—that a federal cause of action was but one avenue to federal question jurisdiction, and that another concerned cases that turned on federal law—became the classical position of commentators and courts. Indeed, Friendly’s “more useful for inclusion than for the exclusion for which it was intended” remark<sup>40</sup> was in turn picked up by the ALI’s 1969 study of federal courts<sup>41</sup> and then inserted verbatim into federal court treatises and federal question opinions.<sup>42</sup> But although the commentators were in agreement, they too paid insufficient attention to the effect of the well-pleaded complaint rule upon the substantive question of what “arises under” federal law in the general federal question statute.

I am suggesting that Holmes’s position on the exclusivity of the federal cause of action test may correctly describe the law, then and now. At least it is almost correct, because of the near absence of cases within the pivotal federal question category.<sup>43</sup> The “turns on federal law” proponents do purport to retain the well-pleaded complaint rule,<sup>44</sup> although occasionally they forget about it or ignore it.<sup>45</sup>

Of course the well-pleaded complaint rule would be compatible with “turns on” jurisdiction if the nub of the controversy were required, by the rules of pleading, to be put forward in the initial complaint. That seems to have been the situation in

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40. *T.B. Harms*, 339 F.2d at 827.

41. See AM. LAW INST., *supra* note 4, at 483 (“If . . . the justification for original federal question jurisdiction is the need for uniformity in the construction of federal law, and the danger that state courts will misunderstand that law or lack sympathy with it, the Holmes test is both too narrow and too broad.”).

42. See *generally* *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377 (2004); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 809 n.5 (1986).

43. Later, I will show that other tests that lead to federal question jurisdiction can all be conceptualized as part of the federal cause of action category—for example, a category of jurisdiction involving federal preemption that has developed since Friendly spoke, starting only in 1968. See *Avco Corp. v. Aero Lodge No. 735, Int’l Ass’n of Machinists & Aerospace Workers*, 390 U.S. 557 (1968).

44. This is demonstrable from Friendly in *T.B. Harms*, to Brennan in *Franchise Tax*, and cases in between and since, even though it is this requirement that takes away everything, or almost everything, that the “turns on” test puts into the jurisdiction. On the other hand, if the well-pleaded complaint rule did not have this effect, it would have no effect at all; it rarely matters in the federal cause of action context because one would expect the cause of action always to appear on the face of the well-pleaded complaint. *But see* *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59 (1978); *Avco Corp.*, 390 U.S. 557.

45. See *Duke Power Co.*, 438 U.S. at 69–70 n.13 (concluding that petitioners’ claim that the Price-Anderson Act, which limits the rights to recovery for potential victims of nuclear disasters, would violate their due process rights could be interpreted to constitute “an essential ingredient of a well-pleaded complaint asserting a right under the Constitution”); *DeSylva v. Ballentine*, 351 U.S. 570, 570–84 (1956).

*Smith*, and one could devise similar rules for federal pleading. A better informed judgment could then be made about the likelihood of a case turning on federal law as a way of determining jurisdiction. Sometimes, of course, a plaintiff does not know his defendant's position, and such an approach could not work. But in certain actions, most noticeably declaratory judgment actions, the appropriate pleading does describe the controversy between the parties.

*B. Treatment of Declaratory Judgment Actions: A Missed Opportunity to Simplify, Clarify, and Rationalize*

The easy solution of accepting jurisdiction over cases with pivotal federal questions appearing on the face of a declaratory judgment complaint (or any other form of action that required the pleading of the issues apparently at controversy) was discarded by Justice Frankfurter in *Skelly Oil v. Phillips Petroleum*,<sup>46</sup> somewhat to the dismay of classical federal court scholars.<sup>47</sup> Frankfurter pointed out that the Declaratory Judgment Act was “procedural only” and was not intended, according to congressional debates, to increase federal courts’ jurisdiction. He concluded that a well-pleaded declaratory judgment complaint disclosing a case that would turn on federal law was not sufficient to support federal question jurisdiction.<sup>48</sup>

The legislative history that Frankfurter referred to, and the very real concern it embodies, is that the Declaratory Judgment Act does not sanction federal courts deciding matters which are not “cases or controversies”—that is, that are not sufficiently adverse or developed that a court should intervene. Doctrinally, they are not “ripe,” or the parties may not have standing. The question is a particularly delicate one in the declaratory judgment area, because one point of the action is to intervene earlier than coercive law might—sometimes in order to save a party from being caught between a rock and a hard place. When, for example, federal employees were not allowed to be politically active even on their own free time as a condition of their employment,<sup>49</sup> they might not have wanted to risk their jobs to test the constitutionality of the law even though the law had an active effect by inhibiting them from engaging in politics. A declaratory judgment procedure could give them a way to test the validity of the law, so that if the Constitution so

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46. 339 U.S. 667 (1950).

47. See Mishkin, *supra* note 16, at 184 (arguing that the holding was mere dictum because the issue fell outside the scope of the federal question statute regardless of the cause of action: “Thus, despite powerful dictum to the contrary in *Skelly Oil*, the case is distinguishable, and there remains the possibility of the declaratory judgment being given full credence as a new and independent form of action for purposes of applying the ‘well-pleaded on the face of the complaint’ test of original federal question jurisdiction.”); see also RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003).

48. *Skelly Oil*, 339 U.S. at 671–74.

49. Hatch Act § 9(a), 5 U.S.C. § 7324(a)(2) (2006) (“An employee may not engage in political activity . . . in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof.”).

ordained, they could keep their job and also exercise political rights; and even if they lost on the merits, they would still have their jobs.<sup>50</sup>

Although Frankfurter was correct in one sense in considering the Declaratory Judgment Act “procedural only,” that fact does not support his decision that a well-pleaded declaratory judgment complaint was insufficient to support federal question jurisdiction, even if it showed the case turned on federal law. The pleading rules of other forms of action also are “procedural only,” in the sense that they were not adopted with the intent of affecting federal jurisdiction any more than was the Declaratory Judgment Act. The forms of action simply distribute the pleading burdens in the case, saying what the plaintiff must plead and what the defendant is responsible for raising, whether in a contract action, a tort action, or an infringement case. When the elements to be pleaded were originally established for a breach of contract cause of action, or for adverse possession or quiet title actions, to give a few examples, the considerations had nothing to do with state or federal jurisdiction. The requirements for these various forms of action were established by tradition and common law and are discussed in Chitty’s *Pleading and Parties to Actions*<sup>51</sup> and other nineteenth century treatises.

What is considered the plaintiff’s and what is considered the defendant’s part of the case often is arbitrary. And the lines drawn may depend less on the facts of the controversy than on the different writs of action themselves.<sup>52</sup> For example, if a federal government official is occupying your land and you sue in ejectment, the federal issue will not appear on the well-pleaded complaint, but it will if you sue for injunctive relief.<sup>53</sup> Similarly, if there is a dispute about ownership of real property, the properly drafted equitable writ to remove a cloud on title, often characterized as a quiet title action, will set forth the full controversy in the plaintiff’s initial pleading.<sup>54</sup>

Accordingly, none of the forms of action or their pleading requirements were developed with the intent to determine federal jurisdiction. It is only the Supreme Court that made the pleading requirements of particular traditional causes of action important and determinative by having them define which cases should qualify for federal question jurisdiction.<sup>55</sup>

50. U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548 (1973).

51. See JOSEPH CHITTY, PLEADING AND PARTIES TO ACTIONS, WITH PRECEDENTS (1809).

52. “So great is the ascendancy of the Law of Actions in the Infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.” HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1883).

53. *White v. Sparkhill Realty Corp.*, 280 U.S. 500 (1930); see JAMES LANDON HIGH, A TREATISE ON THE LAW OF INJUNCTIONS (1880); JOHN J. MCKELVEY, PRINCIPLES OF COMMON-LAW PLEADING (1917); 11 ALBERT H. PUTNEY, COMMON LAW PLEADING COD LEADING FEDERAL PROCEDURE EVIDENCE 24 (1908).

54. See generally 6 CYCLOPEDIA OF LAW AND PROCEDURE 287 (William Mack & Howard P. Nash eds., 1903); 32 CYCLOPEDIA OF LAW AND PROCEDURE 1296 *et seq.* (William Mack ed., 1909); 34 CYCLOPEDIA OF LAW AND PROCEDURE 614 (William Mack ed., 1910); 37 CYCLOPEDIA OF LAW AND PROCEDURE 1488 (William Mac ed., 1911). See also *Hopkins v. Walker*, 244 U.S. 486 (1917).

55. The language of the general federal question statute is almost identical to that concerning federal question jurisdiction in the Constitution, but the constitutional language is

The Supreme Court in *Skelly Oil* did not rule that declaratory judgment actions were per se precluded from the federal question jurisdiction. Instead, it went behind the declaratory judgment complaint to ascertain what suit would have been brought in the absence of the declaratory judgment action. If that imagined suit would qualify for federal question jurisdiction (presumably because it was a federal cause of action), then the declaratory judgment action could be heard in federal court.<sup>56</sup> Otherwise, it must go to state court.

There are many problems with turning jurisdiction on what suit the declaratory judgment is essentially replacing. One difficulty with requiring identification of another cause of action is that the declaratory judgment procedure is often used when there is no coercive proceeding yet available.<sup>57</sup> The declaratory judgment procedure sometimes allows the parties to proceed without having to violate the law in order to test it. *Skelly Oil* does not reveal whether the “coercive action that would have been brought” can include actions that could not yet be brought. Another vexatious question has been whether an action that could be brought by either party is sufficient to provide jurisdiction, or whether the imagined action must have the same party plaintiff as the declaratory suit.<sup>58</sup> Whatever the resolution to these persistent issues, basing the existence or nonexistence of federal jurisdiction upon an imagined suit rather than the suit at hand makes creative lawyering important in procuring federal jurisdiction and reinforces uncertainty concerning the jurisdictional law.

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interpreted much more broadly than that in the statute. The courts have crafted tests for the statutory jurisdiction like the federal cause of action test in order to limit the number of cases that would otherwise be in the federal courts.

56.

The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified.

*Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950).

57. See *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59 (1978); *GNB Battery Techs., Inc. v. Gould, Inc.*, 65 F.3d 615 (7th Cir. 1995) (allowing a declaratory judgment action for indemnification from potential CERCLA liability between two companies when CERCLA enforcement actions had not been instigated); *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 252 (7th Cir. 1981) (allowing a declaratory judgment to determine RCRA liability when actions had been threatened but not yet taken) (“At the time NEC’s complaint was filed, the alleged controversy between it and defendant Scott was based entirely upon his April 22, 1980 announcement that he intended at some future date to bring an action against NEC alleging violations of Illinois’ environmental protection laws. Of course, a plaintiff need not always await the actual commencement of enforcement proceedings to challenge the authority under which those proceedings would be brought. *E.g.*, *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979); *Lake Carriers’ Association v. MacMullan*, 406 U.S. 498, 507–08 (1972). However, for such an action to present a justiciable controversy the threat of enforcement must have immediate coercive consequences of some sort upon the plaintiff. *Id.* at 508 n.12; *Poe v. Ullman*, 367 U.S. 497, 508 (1961).” (parallel citations omitted)).

58. The Supreme Court has now resolved this choice in favor of the “either party” alternative. See *infra* text accompanying note 86–87.

Many, including myself, think that Frankfurter got it wrong; he should have accepted declaratory judgments disclosing a controversy about federal law into the federal courts in their own right.<sup>59</sup> In ruling them out, he contributed greatly to the irrationality and uncertainty of federal question jurisdiction. Nonetheless the Court has stuck with the rule. Indeed, in *Franchise Tax*, the Court even extended it to state declaratory judgment actions because of “fidelity to the spirit” of *Skelly Oil*.<sup>60</sup> (Brennan did not just forget that no one likes the *Skelly Oil* rule; a footnote explains his view that “any adjustment in the system that has evolved under the *Skelly Oil* rule must come from Congress.”)<sup>61</sup>

The end result is that the tests for federal question jurisdiction remain in a state of confusion, and a category of jurisdiction of central importance for federal courts has almost nothing in it. When one does discover a case admitted to federal court because it “turns on federal law,” one finds that the admission was almost always by mistake, usually in disregard of *Skelly Oil*.<sup>62</sup> One reason is that these cases appear “so federal” that they proceed as federal question cases without anyone thinking to question jurisdiction. But the problem is that anyone can notice the flaw at any time, thereby potentially voiding years of litigation.

At least in declaratory judgment proceedings (and any other complaint that, well-pleaded, discloses the nub of the controversy),<sup>63</sup> the pivotal question should control jurisdiction, *not* the form of action that allows it to be pleaded.<sup>64</sup>

### C. The Jurisprudence of the Last Twenty-Five Years

During much of the twentieth century the law was in disarray, Congress failed to regulate, and the Supreme Court did not clarify the criteria for federal question jurisdiction. Some scholars actually proclaimed that an analytically sound test was not possible and should not be sought.<sup>65</sup>

Meanwhile the Supreme Court seemed ready to create bold new law, good for one case and that case only, rather than squarely address the need for a real “turns on federal law” jurisdiction. In *Duke Power v. Carolina Environmental Study Group, Inc.*, the constitutionality of the federal Price Anderson Act, governing the

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59. Whether *Skelly Oil* itself should have been included in federal question jurisdiction is another matter. The federal issue was relevant only because it had been incorporated into a private contract; federal law had no application to the case apart from the parties’ agreement. See *infra* text accompanying note 149 (suggesting that such cases not qualify for federal question jurisdiction).

60. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 18 (1983).

61. *Id.* at 18 n.17.

62. See, e.g., *Duke Power Co.*, 438 U.S. 59; *De Sylva v. Ballentine*, 351 U.S. 570 (1956). In *TB Harms*, 339 F.2d 823 (2d Cir. 1964), Judge Friendly undertook a full review of federal question issues seemingly without noticing that *Skelly Oil* was applicable to that declaratory judgment action.

63. See *infra* text accompanying notes 127–28.

64. In that sense, Holmes’s description of the federal cause of action test as the only one was in fact overinclusive. Holmes spoke before the Declaratory Judgment Act became law.

65. E.g., William Cohen, *The Broken Compass: The Requirement that a Case Arise “Directly” under Federal Law*, 115 U. PA. L. REV. 890 (1967).

building and liability of nuclear power plants, was the matter in dispute.<sup>66</sup> The suit was brought by “two organizations—Carolina Environmental Study Group and the Catawba Central Labor Union—and 40 individuals who live[d] within close proximity” to nuclear facilities planned by Duke Power.<sup>67</sup> As in *Mottley*, the federal jurisdictional problem went unnoticed until the case was in the U.S. Supreme Court, but, as Justice Rehnquist clearly demonstrated in dissent, the case shared *Mottley*’s flaw: The cause of action arose strictly under state law—with federal law not arising before pleading of the defense.<sup>68</sup> Rather than face the inadequacy of its federal jurisdiction rules, and their ousting from jurisdiction even cases where important federal issues are the sole subject of dispute, the majority, led by Chief Justice Burger, decreed that jurisdiction existed in this case, and did so without purporting to establish any new tests for federal jurisdiction.

The Chief Justice essentially rewrote the plaintiffs declaratory judgment complaint to claim a cause of action against the Nuclear Regulatory Commission (NRC) arising under the Fifth Amendment due process and takings clauses—“directly under the Constitution.”<sup>69</sup> Then having postulated this possible federal cause of action, the Chief Justice found it unnecessary to decide whether it in fact existed; it was enough that it was sufficiently “substantial” to establish federal question jurisdiction. The Chief Justice thus went on to decide the case without regard to whether there was an actual federal cause of action to support jurisdiction of state claims.<sup>70</sup> Such a bootstrap approach to federal jurisdiction, which provided a path around the established *Mottley* holding, if it were repeatedly used in other cases, could provide federal question jurisdiction very broadly.<sup>71</sup>

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66. *Duke Power Co.*, 438 U.S. 59.

67. *Id.* at 67.

68. *Id.* at 96–97 (Rehnquist, J., dissenting) (“It is apparent that appellees’ first asserted basis for relief does not state a claim ‘arising under’ the Price-Anderson Act. Their complaint alleges that the operation of the two power plants will cause immediate injury to property within their vicinity. The District Court explicitly found that these injuries ‘give rise to an immediate right of action for redress. Under the law of North Carolina a right of action arises as soon as a wrongful act has created ‘any injury, however slight,’ to the plaintiff.’ This right of action provided by state, not federal, law is the property of which the appellees contend the Act deprives them without due process. Thus, the constitutionality of the Act becomes relevant only if the appellant Duke Power Co. were to invoke the Act as a defense to appellees’ suit for recovery under their North Carolina right of action.” (internal citations omitted)).

69. *Id.*

70. Justice Rehnquist argued convincingly that no such cause of action existed and that the only cause of action was the state cause of action for damage to property. He understood that the Chief Justice’s reliance on the NRC was an effort to satisfy the state action component of the claimed constitutional complaint and was also necessary in order to meet the then-existing jurisdictional amount, but he pointed out that the plaintiffs had no grievance against the NRC and that it would have been equally as plausible for the Mottleys to have joined a federal agency charged with administering the railroads, supporting their claim against the railroads themselves under only supplemental jurisdiction. *Id.* at 64 n.2.

71. It would greatly increase the expanse of “federal cause of action,” but it still does not rely upon a “turns on federal law” rationale.

Burger had what he considered reasons of statesmanship for insisting on deciding the *Duke Power* controversy on the merits, despite an apparent lack of federal jurisdiction under existing tests (and an equal lack of justiciability in federal court under existing approaches to case and controversy, standing, and ripeness doctrines). Burger's problem was that a ruling that the Court could not pass on the merits would have left the constitutionality of the Price Anderson Act in doubt, a situation that might have discouraged any development of nuclear power plants. The likelihood of affecting would-be nuclear developers was increased because the district court had reached the merits of the case and had held the Price Anderson Act unconstitutional on the plaintiffs' theories. Although that opinion would formally lack force if the Supreme Court pronounced an absence of jurisdiction, it would remain the only opinion that had addressed the constitutional question on the merits and thus might carry weight in discouraging nuclear development.

*Franchise Tax*<sup>72</sup>, a 1983 opinion, in some ways seems a refreshing change from this kind of avoidance. In its first serious effort since *Smith v. Kansas City Title & Trust Co.*<sup>73</sup> to give guidance about the contours of federal question jurisdiction, the Court unanimously lays out answers to several specific longstanding questions pertaining to "turns on" jurisdiction. But the various answers do not fit easily together, and when in the end the opinion refuses to follow the result that its clear rules have led it to, the opinion does not add so much guidance after all. When considered for its effects on "turns on" jurisdiction, the rules set forth are an odd amalgam of positions, some supporting "turns on" jurisdiction and some that are destructive of it.

Another strange facet is the twists and turns in the opinion itself. Justice Brennan opened by saying that the question in dispute—whether the Employee Retirement Income Security Act of 1974 (ERISA)<sup>74</sup> "permits state tax authorities to collect unpaid state income taxes by levying on funds held in trust for the taxpayers under an ERISA-covered vacation benefit plan"<sup>75</sup>—"is an important one, which affects thousands of federally regulated trusts and all nonfederal tax collection systems, and it must eventually receive a definitive, uniform resolution."<sup>76</sup> California, through its Franchise Tax Board, sued the trust, Construction Laborers Vacation Trust (CLTV), for refusing to hand over all amounts held for the delinquent taxpayers; CLTV defended on the ground that ERISA prohibits it from complying. The Tax Board sued in state court, seeking damages and a declaration that CLTV must obey all its future tax levies.

CLTV removed the case to federal court, which denied a motion to remand and held on the merits for the Tax Board. The court of appeals reversed, claiming ERISA provides for federal preemption.<sup>77</sup> On this appeal, the Supreme Court held

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72. *Franchise Tax Bd. v. Constr. Laborers*, 463 U.S. 1 (1983).

73. 225 U.S. 180 (1921).

74. Pub. L. 93-406, 88 Stat. 829 (1974) (codified in scattered sections of 29 U.S.C.).

75. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 3-4 (1983).

76. *Id.* at 4.

77. The Ninth Circuit reversed the district court based on a preemption argument: The same chapter of ERISA that describes the scope of protection of employee pension benefits provides for federal preemption in connection with welfare

that the federal courts lacked removal jurisdiction in the case. In the course of so holding, it wrote a major opinion evidently trying to clarify the important open questions in this area of law. After this clarification, however, Brennan adopts a “pragmatic” discretionary approach, departing from the clear rules he had previously announced and also thereby avoiding decision of the question he had at the outset deemed so important to answer.

Brennan’s opinion for the Court takes the position that the federal cause of action test is not the exclusive test for federal question jurisdiction and that those state causes of action in which the complaint shows that the case will turn on federal law are also eligible for federal question jurisdiction.<sup>78</sup> Brennan clearly endorses this category of jurisdiction, and is its long-time supporter,<sup>79</sup> but here he also notes, for the first time in a Supreme Court opinion, that the well-pleaded complaint cuts back severely on the number of cases without federal causes of action that can be heard in federal court. Curiously, in this case he acts as though that is a benefit, because it “avoid[s] more-or-less automatically a number of potentially serious federal-state conflicts”;<sup>80</sup> nonetheless he accepts the well-pleaded complaint rule as established and settled, while admitting it produces “awkward results” when it precludes jurisdiction for cases (like *Duke Power* and *Mottley*) in which the only question for decision is federal.<sup>81</sup>

But, says Brennan, “Even though state law creates appellant’s causes of action, its case might still ‘arise under’ the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.”<sup>82</sup> The damages cause of action was not in original federal question jurisdiction (except as supplemental to a proper federal claim), because a proper complaint requires only state law, and the federal ERISA issue arose only in defense. But the other state

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benefit plans. 29 U.S.C. § 1144(a). See *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). The vacation trust fund now before the court is obviously a benefit plan described in § 1002(1). Accordingly, under the teaching of the *Alessi* case, which had not been decided when this matter was before the district court, we have no choice but to reverse with directions to enter judgment for the appellants.

*Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 679 F.2d 1307, 1309 (9th Cir. 1982) (parallel citations omitted).

78. Brennan uses language to describe the test that combines with the well-pleaded complaint rule, describing it variously as cases in which “in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law,” *Franchise Tax*, 463 U.S. at 9 (quoting another source), cases in which “the complaint discloses a need for determining the meaning or application of [federal] law,” *id.* (quoting *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964)), or “cases in which a well-pleaded complaint establishes . . . that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law,” *id.* at 27–28. Brennan also uses the more conventional “turns on” federal law. *Id.* at 28.

79. See, e.g., *Wheeldin v. Wheeler*, 373 U.S. 647, 659–60 (1963) (Brennan, J., dissenting) (“In short, there is federal-question jurisdiction if a proposition of federal law is inherent in the plaintiff’s claim.”).

80. *Franchise Tax*, 463 U.S. at 10.

81. *Id.* at 12.

82. *Id.* at 13.

cause of action, the declaratory judgment action, was potentially more promising. The full controversy, with its important federal issues, appeared upon the complaint and was required to do so by California's declaratory judgment pleading rules.<sup>83</sup>

The situation thus was much like *Skelly Oil*, except that the *state* declaratory judgment statute was at issue instead of the federal one. *Franchise Tax* provided an opportunity for the Court to limit *Skelly Oil*'s effect by not applying its reasoning when a plaintiff sued in state court under the state declaratory judgment statute and the defendant removed to federal court. Surely the pragmatic case for federal question jurisdiction exists when the parties and the district court know that a suit will revolve around federal law. Indeed that is why it is in declaratory judgment cases that the courts most often do not notice the absence of federal question jurisdiction; *Skelly Oil* is often forgotten and the cases proceed to decide the obviously federal issues.<sup>84</sup>

The issue of how to treat state declaratory judgments had not yet been resolved. Applying a different rationale to state declaratory judgments than to the Federal Declaratory Judgment Act might have relaxed the tension between the federal cause of action test and the disputed federal question test, and made federal jurisdiction more rational and more manageable.

Brennan recognized that *Skelly Oil* does not directly govern state declaratory judgment statutes, but nonetheless concluded that "fidelity to [*Skelly Oil*'s] spirit" required the same analysis and result for state declaratory actions.<sup>85</sup> Hence Brennan stuck to *Skelly Oil* and extended its approach to state declaratory judgment actions seeking entry to federal courts. In then applying the *Skelly Oil* rule, he answered another question about *Skelly Oil* that many had considered open: whether in determining the coercive action that would otherwise have been brought and that must support jurisdiction, a judge should look only to traditional causes of action that the plaintiff could have brought against the defendant, or instead include actions that the defendant could bring against the plaintiff. Brennan claimed that "[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."<sup>86</sup>

Hart and Wechsler in their casebook had also suggested Brennan's statement as the prevailing rule, out of a distaste for *Skelly Oil* and a desire to limit its effects. Although they had claimed that the rule was followed generally, their casebook cited only one case—a patent case—ignoring the many other cases that did not accept that rule. The case they relied upon was *E. Edlmann & Co. v. Triple-A Specialty Co.*,<sup>87</sup> and for that reason I refer to this position, adopted as the Court's

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83. California requires a party to plead "facts showing the existence of an actual controversy relating to the legal rights and duties of the parties" in order to obtain a declaratory judgment. *Id.* at 14 n.13 (quoting *Wellenkamp v. Bank of Am.*, 582 P.2d 970, 972 (Cal. 1978)).

84. *See, e.g.*, *Duke Power Co. v. Carolina Env'tl. Study Grp., Inc.*, 438 U.S. 59 (1978); *De Sylva v. Ballentine*, 351 U.S. 570 (1956); *see also* *T.B. Harms Co. v. Elisou*, 339 F.2d 823 (2d Cir. 1964).

85. *Franchise Tax*, 463 U.S. at 18.

86. *Id.* at 19.

87. 88 F.2d 852 (7th Cir. 1937), *cert. denied*, 300 U.S. 680 (1937).

view in *Franchise Tax*, as “the *Edelmann* rule.” To recap, the *Edelmann* rule, a modification or interpretation of *Skelly Oil*, is: The possibility of a coercive action brought by the defendant that would qualify for federal question jurisdiction is sufficient to allow federal jurisdiction of a declaratory judgment action. Adopting this rule resolved an open issue on which there had been disagreement, despite the Court’s and the Hart and Wechsler casebook’s early implication of a consensus.

Adopting and consistently following the *Edelmann* test results in admission to federal courts of more cases in which federal law is pivotal than rejection of the test would. The proposed removal reform is broader, however, because it would allow the choice of federal court in cases with dispositive federal issues but without any coercive federal cause of action available to either party. (The proposal is also broader because it would allow federal jurisdiction for the small number of cases in which the pivotal federal issue emerges only in the plaintiff’s reply.)

Seemingly, Brennan’s approval of the *Edelmann* rule would allow *Franchise Tax* to remove to federal court, for ERISA explicitly grants trustees like CLVT “a cause of action for injunctive relief when their rights and duties under ERISA are at issue, and that action is exclusively governed by federal law.”<sup>88</sup> But having found that CLVT could bring a coercive suit and that the possibility of coercive suits by defendants does satisfy *Skelly Oil*’s requirement of a federal cause of action, Brennan decided that the rule allowing jurisdiction should not apply in this case.

Why did Brennan exercise discretion to avoid what he had called “an important” issue that needs federal resolution?<sup>89</sup> The holding also makes unnecessary all the other reasoning in the case. Brennan asserted that federal court jurisdiction had always been decided “with an eye to practicality and necessity.”<sup>90</sup> Then instead of focusing on the necessity of deciding this important ERISA issue, he said that states were “not significantly prejudiced by an inability to come to federal court” before the injunctive suit that the defendant could admittedly bring in federal court against the state.<sup>91</sup>

That may of course be true, but in this case the rule was not designed to favor or comfort the state. It was not the state that had sought federal jurisdiction—it was the defendant on removal. It had satisfied all of the tests that Brennan had just announced were the law of federal question jurisdiction.

A footnote may disclose that attention to state concerns was in fact the main reason for the Court’s holding. In footnote 22, Brennan pointed out that these cases will come to federal court most often by removal and that “considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it.”<sup>92</sup> Such a rationale, of course, could affect whether other *Edelmann* cases are accepted in federal forums. If the rationale was limited to cases brought by states,<sup>93</sup> it is too bad that was not well explained and did not even appear in the body of the opinion.

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88. *Franchise Tax*, 463 U.S. at 19–20.

89. *Id.* at 4.

90. *Id.* at 20.

91. *Id.* at 21.

92. *Id.* at 21 n.22.

93. The attention to possibilities of prejudice to states in disallowing removal, without any attention to harms to defendants, supports Brennan’s focus upon federal-state comity in

Thus the *Franchise Tax* opinion endorses both the “turns on” test and the well-pleaded complaint rule. It supports and extends *Skelly Oil* but then adopts an interpretation put forward by *Skelly Oil*’s critics in order to limit the effect of the rule. And having done all that, Brennan then claimed a broad-ranging discretion to discard the result his rules require and to decline to decide an issue he earlier claimed was important and needed to be settled. In many ways, in the name of pragmatism he produces a most unpragmatic result.

*Merrell Dow Pharmaceuticals v. Thompson*<sup>94</sup> followed three years later. It added confusion, for the Court’s opinion appeared to contradict *Franchise Tax*’s endorsement of a “turns on” test and to support federal cause of action as the sole basis for federal jurisdiction. This time the Court was divided, 5–4, with Stevens writing for the Court and Brennan authoring the dissent. The result was twenty more years of utter confusion as to what were the rules for federal jurisdiction, at which time the Court granted certiorari in *Grable v. Darue*<sup>95</sup> in order to resolve a conflict among the circuits concerning the same old question: whether a federal cause of action was always required for statutory “arising under” jurisdiction.

*Merrell Dow* concerned a product liability tort for per se negligence. Two foreign claimants whose children were born with severe birth defects alleged that Merrell Dow’s drug Bendectin was responsible. They sued in Ohio state court for substantial damages. Multiple counts were alleged, one of which charged per se negligence for “misbranding” in violation of the Federal Food, Drug, and Cosmetic Act (FDCA);<sup>96</sup> the claim was that the company’s failure to provide adequate warning, as mandated by that statute, “constitute[d] a rebuttable presumption of negligence.”<sup>97</sup>

Defendant petitioned for removal to federal court, arguing that this statutory negligence claim made the case, in part, arise under federal law. Removal was granted by the district court, but subsequently the court of appeals reversed.<sup>98</sup> The FDCA, which inter alia establishes federal standards for labeling, provides no private right to action.<sup>99</sup> Allowing federal jurisdiction for state law negligence claims on this ground could open to federal courts a broad category of potential tort claims, historically the domain of state judiciaries.<sup>100</sup>

*Merrell Dow* seemingly undercut the “turns on” test by reasoning that if Congress has denied a cause of action for a federal statute, the issues in that statute should not support “turns on” jurisdiction, even if “turns on” jurisdiction otherwise exists (on the face of the well-pleaded complaint).<sup>101</sup> It is not clear from *Merrell*

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this opinion’s exercise of discretion to deny jurisdiction.

94. 478 U.S. 804 (1986).

95. 545 U.S. 308 (2005).

96. See *Merrell Dow Pharm.*, 478 U.S. at 805.

97. *Id.* at 806.

98. *Id.*

99. *Id.* at 806–07 (affirming the Sixth Circuit’s notation “that the FDCA does not create or imply a private right of action for individuals injured as a result of violations of the Act”).

100. *Grable*’s later interpretation of *Merrell Dow* itself. See *Grable*, 545 U.S. 308.

101. “Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and

*Dow* whether this principle is reserved for instances in which Congress *specifically intended* not to create a federal cause of action. That standard would require that Congress *affirmatively did not want* a federal cause of action. Certainly when that is the case, courts should not infer a cause of action; the courts' mission is to follow congressional intent in interpreting statutory remedies.

Even if the principle were limited to specific intent, however, a "turns on" test would not necessarily contradict congressional intent. Not wanting a federal cause of action is not the equivalent of not wanting cases in federal court that turn on federal law. If Congress created a federal cause of action for the category of cases at issue, they would all be eligible for federal question jurisdiction, whether they turned on state or federal law or simply on the particular facts. So, allowing a case to be heard because it turns on federal law is not equivalent to recognizing or creating a federal cause of action, as *Merrell Dow* may imply.

In any case, *Merrell Dow* may not have required specific intent but meant for its approach to apply *whenever Congress is silent* about whether a cause of action exists. Language in the opinion suggests this possibility,<sup>102</sup> which is much more restrictive of "turns on" jurisdiction. It could, in fact, be equivalent to a rule that a federal cause of action is always required, as the Court pointed out in *Grable*.<sup>103</sup> In any event, *Grable* reinterpreted *Merrell Dow* to "treat[] 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."<sup>104</sup>

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the federal system." *Merrell Dow Pharm.*, 478 U.S. at 814.

102. See *Merrell Dow Pharm.*, 478 U.S. at 812 ("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 private federal remedy for the violation of the federal statute. We think it would similarly flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a 'rebuttable presumption' or a 'proximate cause' under state law, rather than a federal action under federal law"); *id.* at 812 n.10 ("When we conclude that Congress has decided not to provide a particular federal remedy, we are not free to 'supplement' that decision in a way that makes it 'meaningless.'").

103. *Grable & Sons Metal Prods.*, 545 U.S. at 317 (2005) ("But an opinion is to be read as a whole, and *Merrell Dow* cannot be read whole as overturning decades of precedent, as it would have done by effectively adopting the Holmes dissent in *Smith* and converting a federal cause of action from a sufficient condition for federal-question jurisdiction into a necessary one." (internal citation omitted)).

104. *Id.* at 318. *Merrell Dow* also develops at some length the theme of discretion to decline jurisdiction that *Franchise Tax* initiated, and ties that discretion to the traditional requirement of a substantial federal question for district court jurisdiction. See *Merrell Dow Pharm.*, 478 U.S. at 810–12, 814 ("Far from creating some kind of automatic test, *Franchise Tax Board* thus candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction. . . . 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."). *Grable's* reaffirmance of *Franchise Tax* built upon only that one aspect of *Merrell Dow*, its requirement that the federal question be "substantial" in order for federal courts to exercise jurisdiction, and its inclusion of wide

*Grable* involved two private companies. In 1994 the IRS seized real estate that Grable owned in order to satisfy its federal tax delinquency. Grable received actual notice of the seizure by certified mail. When the company did not exercise its statutory right to redeem the property, the Government sold the property to Darue, whose title Grable questions in the suit, which was commenced five years later in Michigan state court. The complaint objected that the government sale was invalid because federal statutes required the IRS to have given the company notice not by certified mail, as had been done, but by personal service.<sup>105</sup>

Darue removed to federal court on the ground that Grable's complaint revealed a case that turned on federal law—the effect of the IRS's mistaken form of notice under federal statutes. On the merits, the district court held for Darue. Although the statute does require personal service, there was substantial compliance and no prejudice. The Sixth Circuit affirmed.<sup>106</sup>

The Supreme Court, in a unanimous opinion by Justice Souter, first held that in addition to a federal cause of action test, “in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues.”<sup>107</sup> In other words, said Souter, “Justice Holmes was still dissenting.”<sup>108</sup> As in *Franchise Tax* and *Merrell Dow*, the Court then emphasized judicial discretion, but in this case unlike the others, it exercised its discretion to accept jurisdiction.<sup>109</sup> The Court finally backed up the *Smith* approach by actually finding a case to be accepted into federal question jurisdiction under the “turns on federal law” category.

*Grable*'s effect on the pivotal federal question problem cannot be understood without also examining a different and striking part of the opinion: its endorsement and further development of the discretionary, “pragmatic” approach to federal question jurisdiction already seen in *Franchise Tax* and *Merrell Dow*. Although all three cases endorse judicial discretion, the Court's description of and basis for discretion to decline jurisdiction changes between them. What was in *Franchise*

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discretion within its definition of substantial. See *Grable & Sons Metal Prods.*, 545 U.S. at 318–19 (“Accordingly, *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. The absence of any federal cause of action affected *Merrell Dow*'s result two ways. The Court saw the fact as worth some consideration in the assessment of substantiality. But its primary importance emerged when the Court treated the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331. . . . *Merrell Dow*'s analysis thus fits within the framework of examining the importance of having a federal forum for the issue, and the consistency of such a forum with Congress's intended division of labor between state and federal courts.”). *Merrell Dow* also makes clear in a footnote that it does not reject all “turns on” jurisdiction, for it supports *Smith*. *Merrell Dow Pharm.*, 478 U.S. at 814 n.12.

105. *Grable & Sons Metal Prods.*, 545 U.S. at 310–11.

106. *Id.* at 311.

107. *Id.* at 312.

108. *Id.* at 318.

109. *Id.* at 319–20 (“Given the absence of threatening structural consequences and the clear interest the Government, its buyers, and its delinquents have in the availability of a federal forum, there is no good reason to shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of the state-law title claim.”).

*Tax* primarily an exercise of comity in cases initiated by states in their own courts (if you accept footnote 22 as the primary rationale) became much more full blown and generalized in *Merrell Dow*. This aspect of *Merrell Dow* was continued and developed in *Grable*.

In *Merrell Dow* the majority seemed to suggest that “turns on” jurisdiction requires a controlling issue that the Court considers important. Brennan, in dissent, objected that any test basing federal jurisdiction on “ad hoc evaluation of the importance of the federal issue is infinitely malleable.”<sup>110</sup> Such a vague and subjective test is also strikingly unsuitable for a jurisdictional issue, which stays open to be raised and reversed throughout the litigation.

The suggestion in *Merrell Dow* is that unless a “turns on” issue is “important” the issue is not a “substantial federal question,” as is prerequisite to original federal question jurisdiction. That suggestion departs from the usual definition of a substantial federal question necessary to confer federal question jurisdiction; in other contexts only a colorable or nonfrivolous claim is required.<sup>111</sup> A complaint can confer jurisdiction even if its claim is clearly incorrect.

*Merrell Dow*’s definition of “substantial” within § 1331 appears closer to the “substantial federal question” that the Supreme Court has held necessary for appeals coming to the Supreme Court from state courts.<sup>112</sup> Moreover, some of the other discretionary standards—such as important, or interesting and/or unsettled questions of federal law—seem more appropriate as standards for Supreme Court review than for district court jurisdiction. District courts have not typically chosen their cases in terms of interest or importance. Unlike the Supreme Court, they do not pick and choose their cases, but are charged with deciding all cases presented to them that fall within their jurisdiction.<sup>113</sup>

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110. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 821 n.1 (1986) (Brennan, J., dissenting).

111. *Bell v. Hood*, 327 U.S. 678, 682–83 (1946) (“Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.” (internal citation omitted)). *Bell* deals, however, with the assertion of a federal remedy in an attempt to satisfy the federal cause of action test. *Id.* at 678.

112. *See Zucht v. King*, 260 U.S. 174, 176 (1922) (“But, although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character.”).

113. In this respect, I agree with Professor Bickel that broad discretion is considerably less suitable for district courts’ assessments of jurisdiction than for Supreme Court decisions

*Grable* adopts yet another approach to exercising discretion; a balancing test to show which cases courts should accept as federal. Assuming that state claims “necessarily raise a stated federal issue, actually disputed and substantial,”<sup>114</sup> they must additionally “not distort any division of labor between the state and federal courts, provided or assumed by Congress.”<sup>115</sup> The Court cites *Merrell Dow* to say that “there must always be an assessment of any disruptive portent in exercising federal jurisdiction.”<sup>116</sup> It reframes the *Merrell Dow* decision from one that considered absence of a federal private right of action as proof of insubstantiality to one that “after closely examining the strength of the federal interest at stake and the implications of opening the federal forum, held federal jurisdiction unavailable.”<sup>117</sup> It was necessary to reject a private right of action in *Merrell Dow* because otherwise it “would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues. . . . And that would have meant a tremendous number of cases.”<sup>118</sup>

With this maneuver, *Grable* suggests that federal jurisdiction must not be granted if doing so will introduce a flood of cases concerning the same federal statute; for frequently occurring questions of federal law, not already before U.S. courts through prior decision or existing private rights of action, state forums will have to suffice. In *Grable*, then, the factors to guide the courts’ discretionary judgment have changed substantially.

*Grable*’s state claim, according to the Court, achieves federal jurisdiction because, although it raises important federal issues, its rarity as a quiet title case

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about which cases to review. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 131–33 (1962). An important reason is the reviewability of jurisdictional determinations and the disruption caused by reversal and redetermination. *But see* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 533, 566–70, 578 (1985).

114. *Grable & Sons Metal Prods.*, 545 U.S. at 314.

115. *Id.* at 310.

116. *Id.* at 314.

117. *Id.* at 316. The Court in *Merrell Dow* did say:

[T]he very reasons for the development of the modern implied remedy doctrine—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,” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377 (1982) (footnote omitted)—are precisely the kind of considerations that should inform the concern for “practicality and necessity” that *Franchise Tax Board* advised for the construction of § 1331 when jurisdiction is asserted because of the presence of a federal issue in a state cause of action.

*Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 811–12 (1986).

118. *Grable & Sons Metal Prods.*, 545 U.S. at 318. Similarly one might argue in *Franchise Tax* that adding state initiated, state declaratory proceedings into federal court whenever the defendant chose to remove might lead to many new federal cases. But it is not clear that such a prediction would be correct. The federal courts already hear such litigation when the defendant is the first to sue and seeks injunctive relief; indeed they might even hear a suit brought in federal court for an injunction that was brought after the state had sued in the state. *See infra* Part IV (explaining concurrent state-federal litigation). Moreover, the time and resources saved with fewer and less complicated jurisdictional issues should be part of the balance of considerations.

that turns on federal law “will portend only a microscopic effect on the federal-state division of labor.”<sup>119</sup> For a state claim to gain jurisdiction, then, it seemingly must raise questions important enough to demand a federal forum under circumstances anomalous enough to ensure its idiosyncrasy.

An obvious objection to all of the vague standards for discretion in ruling on federal question jurisdiction is that it would raise havoc for such issues to be raisable and renewable at any stage of federal review.<sup>120</sup> Nonetheless the Court claims that discretion limits which cases can enter federal court through a “turns on federal law” category. Cases that turn on federal law still warrant federal jurisdiction, but to receive it they must be state claims in which the complaint necessarily presents important federal questions that control the case, but that predictably will not arise with any frequency. As *Grable* states,

[F]ederal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.

But even when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts . . . . [T]here must always be an assessment of any disruptive portent in exercising federal jurisdiction. . . . [T]he 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.<sup>121</sup>

Moreover such discretion apparently can be exercised even at the Supreme Court level, after years of federal litigation.

Despite its amorphous and unworkable discretionary test, *Grable* does show us something: there are some state causes of action in which a properly pleaded complaint (other than a declaratory judgment complaint) goes far toward revealing the nature of the controversy. *Grable*, a quiet title action, was such a case. Quiet title actions, especially those that can be characterized as actions to remove a cloud on title, traditionally have required the plaintiff to plead the nub of the controversy,

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119. *Grable & Sons Metal Prods.*, 545 U.S. at 315.

120. My esteemed colleague David Shapiro eloquently defends and praises the use of discretion in federal jurisdictional decision making, offering many examples at all stages of the judicial process. His praise extends to discretion on the part of district judges to decline jurisdiction “based on considerations of judicial administration and the degree of federal concern.” Shapiro, *supra* note 113, at 568. That article puts to one side, however, the questions of when discretion should be exercised, *id.* at 562 n.115, including questions concerning continuing review of jurisdictional issues. It is principally those issues that make me disfavor discretion in district court jurisdiction, even though it is fully appropriate at other stages, like Supreme Court decisions concerning which cases to review.

121. *Grable & Sons Metal Prods.*, 545 U.S. at 313–14 (internal citations omitted).

so the disputed federal issue appeared on the well-pleaded complaint.<sup>122</sup> Actually, the traditional rule had been codified in Michigan, so it was a statute that permitted and required the plaintiff to plead the federal question. Very few of the traditional causes of action require such pleading of the whole controversy; injunction may be the primary other example. But these cases do show that there is still some room for “turns on” jurisdiction to operate, if only in a small space.

Justice Souter noticed that quiet title actions had traditionally been heard in federal courts,<sup>123</sup> but it is not clear that he appreciated that the “turns on” category was practically limited to them. That is not because other actions do not reveal that federal law is pivotal, but only because they cannot show that from the well-pleaded complaint alone.

*Grable* itself was a comparatively easy case, because the state cause of action that required pleading the central federal issue was based upon traditional legal and equitable requirements. Indeed *Grable* could have invoked federal jurisdiction itself by asking for a federal declaratory judgment and stating that the alternative coercive action was quiet title, thus satisfying *Skelly Oil*'s requirement for declaratory judgment jurisdiction. Removal then would be proper because the case could originally have been brought in federal court; the removal and original jurisdiction would remain coterminous.

The problem cases for “turns on” jurisdiction arise when a required state pleading shows a pivotal federal question that would not appear on the complaint under traditional common law pleading but that is appropriate now because state law has departed from common law requirements. *Franchise Tax*'s treatment of state declaratory judgment actions might suggest that all nontraditional state remedies will be precluded from expanding federal question jurisdiction, not only state declaratory judgments. Indeed *Skelly Oil*'s treatment of declaratory judgments might suggest that none but traditional categories would be consulted. If so, quiet title actions that turn on federal law seem almost the only cases that today can qualify for the tiny “turns on” category. But if instead state changes in pleading rules can make cases qualify for federal question jurisdiction, states could expand federal jurisdiction significantly.

It is state rules that brought the federal issue onto the well-pleaded complaint in both *Smith* and *Merrell Dow*, among others. Another notable case in which state law made federal law central is *Moore v. Chesapeake & Ohio Railway Company*.<sup>124</sup> The state of Kentucky had copied federal rules that governed interstate railway workers (under the Federal Safety Appliance Acts) and applied them by statute to the state-regulated intrastate railway workers. Moore, an injured intrastate railway worker, sued under Kentucky law claiming that violation of the federal acts would constitute negligence per se under state law and would bar defenses of contributory

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122. See *Hopkins v. Walker*, 244 U.S. 486, 491 (1917); *Wilson Cypress Co. v. Del Pozo y Marcos*, 236 U.S. 635, 643–44 (1915); *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 528 (1903).

123. *Grable & Sons Metal Prods.*, 545 U.S. at 315 (“This conclusion puts [the Court] in venerable company, quiet title actions having been the subject of some of the earliest exercises of federal-question jurisdiction over state-law claims.”).

124. 291 U.S. 205 (1934).

negligence and assumption of risk. The Supreme Court held that there was no jurisdiction in the federal district courts to hear the claim.

*Moore* was decided not long after *Smith*, and commentators have long considered the two cases inconsistent. In fact, Justice Brennan in *Merrell Dow* called them irreconcilable and described *Moore* as a “sport.”<sup>125</sup> He further said it had “long been in a state of innocuous desuetude” and “ought to be overruled.”<sup>126</sup>

This issue of states having the ability, by their lawmaking, to confer federal court jurisdiction is central and important, but *Grable* and quiet title do not involve that issue and do not suggest the answer.<sup>127</sup>

The reason quiet title actions may stand alone, unless state laws are permitted to move cases into federal jurisdiction, is that it is difficult to find other traditional actions that require the plaintiff to plead the nub of the controversy. Declaratory judgment actions have been eliminated by *Skelly Oil* because they are not “traditional”; a special rule has been adopted for them, jurisdiction is decided according to traditional coercive actions that could or would have been brought had there been no declaratory judgment. Injunctions also generally require pleading of the controversy, and *Ex parte Young*<sup>128</sup> contains language suggesting that there was federal jurisdiction of that injunctive action because the case turned on federal law.<sup>129</sup> If so, injunctions could be conceptualized like quiet title and contribute to the “turns on” test. (Moreover injunctive actions that turn on federal law are much more numerous than quiet title ones that do, and so would contribute many more cases to “turns on” jurisdiction.) But since 1908, when *Young* was decided, many have explained that decision, and its federal question jurisdiction, as a Court ruling that the Fourteenth Amendment creates a cause of action to enjoin state officials from unconstitutional conduct. (Section 1983, the Civil Rights Act, also creates a federal cause of action, but the *Young* Court did not advert to it, and the statute was not given much attention until the 1960s.)

More recent cases provide further evidence that injunctions to enforce federal rights are not deemed to invoke “turns on” jurisdiction but rather reflect a “federal cause of action” test for jurisdiction. Injunctions to enforce the Constitution are allowed against both state and federal officers, but when an injunction is sought to enforce a federal statutory right, a central inquiry is whether the particular federal statute has created, or contemplates, a federal injunctive cause of action.<sup>130</sup> Even actions for violation of federal law that § 1983 appears explicitly to allow against

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125. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 822 n.1 (1986).

126. *Id.* at 821–23 n.1 (Brennan, J., dissenting). I myself do not consider *Moore* to be a “sport.” I suggest later that it was correctly decided and indeed should not qualify for federal question jurisdiction even under the proposed reforms. See *infra* text accompanying note 146. In addition, it may not satisfy the well pleaded complaint rule.

127. I later suggest that some of these cases would be appropriate for federal jurisdiction under a “turns on” test and that some would not, and I attempt to set out some appropriate dividing lines. See *infra* text accompanying notes 145–49.

128. *Ex parte Young*, 209 U.S. 123 (1908).

129. *Id.* at 144 (“The sufficiency of rates with reference to the Federal Constitution is a judicial question, and one over which Federal courts have jurisdiction by reason of its Federal nature.”).

130. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694 (1979).

state officials are permitted only by interpreting the particular federal statute claimed to be violated; if injunction does not fit with that statute's scheme, the statute is considered silently to revoke the general § 1983 provision.<sup>131</sup> Injunctions, therefore, no longer seem supportive of “turns on” jurisdiction, although they may have been at one time.

The final modern case to be considered is *Empire Healthchoice Assurance, Inc. v. McVeigh*.<sup>132</sup> That case shows that Supreme Court Justices still disagree concerning both federal question jurisdiction and federal common law, but it does not directly undermine *Grable*. Justice Ginsburg, writing for the Court, does describe *Grable* as exemplifying a “special and small category”<sup>133</sup> and, again, a “slim category,”<sup>134</sup> but she does not contradict its holding. The five justice majority simply thought the case turned on state rather than federal law, and believed in addition that federal common law should not be created to govern the case.

In *McVeigh*, the federal government had contracted with Blue Cross to provide a nationwide health plan for federal employees.<sup>135</sup> The plan was administered by local companies, and Empire was the administrator for New York State.<sup>136</sup> The contract provided that Empire should make a reasonable effort to recover amounts paid out in benefits, and employees were told they must reimburse the Company for benefits if they recover damages for their injury.

Joseph McVeigh was involved in an accident and received medical benefits through Empire. He later died, and his administratrix, Denise McVeigh, filed a suit in state court (without any assistance from Empire) against the alleged tortfeasors who caused the injury. The suit ended in a settlement.<sup>137</sup> Empire then sued in federal court to recover the medical benefits it had paid for McVeigh, but the Company refused to offset the amount it sought by deducting the litigation expenses McVeigh had incurred in procuring the settlement.<sup>138</sup> Whether such an offset was appropriate appears to be the central issue on the merits. The district court did not reach the merits but dismissed for want of federal jurisdiction.<sup>139</sup> The Second Circuit affirmed,<sup>140</sup> and the Supreme Court agreed in a 5–4 opinion.<sup>141</sup>

Both Empire and the United States as amicus curiae attempted to stretch *Grable* to allow jurisdiction any time “a federal element” was present on the well-pleaded complaint.<sup>142</sup> That, however, is not the appropriate test. The Court may have

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131. See, e.g., *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

132. 547 U.S. 677 (2006).

133. *Id.* at 699.

134. *Id.* at 701.

135. See *id.* at 682.

136. See *id.* at 687.

137. See *id.*

138. See *id.* at 687–88.

139. *Id.* at 688.

140. *Id.* at 688–89.

141. See *id.* at 701.

142. That test is closer to the “original ingredient” view of federal jurisdiction, which describes the scope of constitutional federal question jurisdiction. In the early days of statutory federal question jurisdiction, the statute and the Constitution were called

broadened what has to appear on the complaint to include pivotal questions of federal law as well as federal causes of action, but that does not mean that “any federal element” is sufficient for jurisdiction.<sup>143</sup>

The lesson of our trip through this extremely complicated jurisprudence is that the universe of cases in which the well-pleaded complaint (other than a declaratory judgment complaint) reveals that the controversy “turns on” federal law is not an entirely empty one. But the federal question cases in that universe are few and far between, making unnecessary, discretionary jurisdictional rules that can disrupt a litigation in its final hours. Although at least *Grable* falls within federal jurisdiction under the “turns on” test, the vast majority of cases that turn on federal law still cannot get into federal court on that basis. It remains unclear whether state causes of action that do not comport with traditional causes of action will be permitted to place controversies in federal court, on removal or originally, by requiring the plaintiff to set forth the whole controversy or by requiring the plaintiff to plead federal issues that are embedded in substantive state law.

#### *D. Current Requirements for General Federal Question Jurisdiction: A Summary*

The current criteria for general federal question jurisdiction (§ 1331), which preceded even *Franchise Tax* and *Grable*, as simply stated as possible, are:

General federal question jurisdiction exists:

- (1) when there is a federal cause of action, other than an action for a declaratory judgment;
- (2) in the rare case that does not involve a qualifying federal cause of action but in which a pivotal question of federal law nonetheless appears on the face of a well-pleaded complaint (other than a declaratory judgment complaint); or
- (3) when a state cause of action, sued on in state court, is “clearly preempted” by federal law and the case is removed by the defendant.

Those are the three basic rules. In addition, there is special provision for declaratory judgments:

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coextensive, but it has since been accepted that the statutory grant is far narrower than what the Constitution would permit.

143. *Empire Healthchoice*, 547 U.S. at 701 (“In sum, *Grable* emphasized that it takes more than a federal element ‘to open the “arising under” door.’ This case cannot be squeezed into the slim category *Grable* exemplifies.” (internal citations omitted)). The arguments for jurisdiction on other bases were stronger: (1) the argument that four Justices supported that federal common law should govern the entire controversy, or at least the controlling issues; and (2) the position of *Empire* and the United States that federal law preempted the controversy so that it fell within the subcategory of federal cause of action concerning federal preemption. Neither argument convinced the Court majority, which held that carriers seeking reimbursement had no right to sue in federal court. *Id.*

- (4) A declaratory judgment merits federal question jurisdiction when the coercive action that would otherwise have been brought would have qualified for federal question jurisdiction.

And finally, the new *Franchise Tax-Merrell Dow-Grable* twist:

- (5) In the second category above, the Supreme Court and lower courts may exercise discretion to dismiss from federal court cases that otherwise would be included. The content of the allowable discretion is still evolving and remains unclear; to date, the definition and features of that discretion differ from one Supreme Court decision to another. *Grable*, most recently, frames it as an “actually disputed and substantial”<sup>144</sup> federal issue that will not overburden the federal courts.

*Franchise Tax* shows that discretion is also appropriate in declaratory judgment cases that are removed because the defendant could bring a coercive federal action against the plaintiff.

*E. How Changing the Removal Rules Can Help: The Resulting Criteria for Jurisdiction*

Even if *Skelly Oil* and all the existing case law remains, allowing the parties to remove based on what the initial pleadings disclose, when the case at that stage meets the tests for federal question jurisdiction, would admit some cases that would not otherwise qualify for federal jurisdiction. It would admit to federal court a significant number of cases that “turn on federal law”<sup>145</sup> and that functionally belong in the federal question jurisdiction. Cases like *Duke Power*, and even *Mottley*, involve only federal issues—important ones in *Duke Power*—and yet are not eligible for federal question jurisdiction under conventional interpretation of current federal rules. The proposed changes would thus make the “turns on” category a sensible and significant category of federal question jurisdiction. It would include not only some state causes of action with embedded federal elements but also cases in which the pivotal federal issue arises in defense.

Even if the proposed removal reforms were enacted, the statement describing federal jurisdiction would not be as simple and precise as one might desire. Yet the system would be both clearer and more logical than the rules it replaces.

The tests for original federal question jurisdiction could have only two parts instead of three, and statements (4) and (5) could be eliminated. The new descriptive statement would read:

There is original federal question jurisdiction when (1) the well-pleaded complaint reveals a federal cause of action (created either by

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144. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

145. Most examples involve a state cause of action that incorporates federal law. There may be a few cases in which the pleading rules require a plaintiff to plead enough to show that the controversy turns on, or is likely to turn on, federal law. *See, e.g., Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180 (1921). Such state pleading requirements are often the subject of efforts to remove a case from state to federal court.

positive federal law or by the traditional common law forms of action). The declaratory judgment procedure does not count as a federal cause of action for purposes of this rule. (2) There also is jurisdiction when a case is likely to turn on federal law. Appropriate pleading of a declaratory judgment action can be considered, in its own right, in determining whether a case is likely to turn on federal law.

There is removal jurisdiction (1) by the defendant when the plaintiff could have brought the case originally in federal court but did not; or (2) by any party when the pleadings reveal that the case is likely to turn upon federal law.

The third part of the rule that exists today—that a defendant can remove when the plaintiff's cause of action, sued upon in state court, is “clearly preempted” by federal law—would not need to be separately stated. It could be conceptualized as a subset of the federal cause of action rule, as I have considered it earlier. But it would also fall within the “turns on” federal law category, which would now be a genuine part of federal question jurisdiction.

Similarly the fourth part of today's rule, stating a special procedure for declaratory judgment actions, would not be necessary; declaratory judgment actions would be covered by the second part of the new rule.

Supreme Court and other federal court discretion would be replaced by a further refinement of the “turns on” rule that removes from its scope certain identifiable categories of cases and reserves “turns on” jurisdiction for cases most appropriate to the federal forum.

Devising a fully rational federal question jurisdiction is beyond the scope of this Article. To dispose of the current quagmire, further work will need to be done. The chief concern will be defining appropriate and easily administrable contours for the “turns on” test and deciding whether to apply it broadly or narrowly. These are the same issues currently being considered concerning the preemption category of federal question jurisdiction. Appropriate contours can become apparent over time through case by case decision making.

Two important issues for “turns on” jurisdiction are (1) how likely it must be that federal law is controlling and (2) whether it must be *a* controlling issue or *the* controlling one. If a strict approach were taken on these questions, as I suggest would be appropriate at least as a starting point, that might eliminate *Merrell Dow* and *Moore* from original federal jurisdiction. *Empire Health* was in fact eliminated because the Court majority was not convinced that the case would or should turn on federal law, although federal interests were involved in the case.

Obviously some leeway would have to be given to mispredictions by the district judge, who initially would have to decide the probability of pivotal federal issues simply from the pleadings. If the case developed differently, and the federal issues fell out of the case early, the district judge would have discretion to leave state issues to a state tribunal.<sup>146</sup>

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146. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (“That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. . . . Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a

These factors focus on the importance of the federal issue to the particular case, demanding that it appear from the pleadings that it is very likely to be dispositive. If so, the case would raise a “substantial” federal question and would “arise under” federal law for purposes of § 1331. There would be no assessment of the importance of the issue in other respects; nor would a court speculate about the number of cases that will raise the same or comparable issues. Courts would not exercise general discretion about whether to admit a “turns on” case to federal district court.

It also will be important to create exceptions to the “turns on” rule. *Franchise Tax* can be interpreted to create one such exception. According to my interpretation, the Court essentially ruled that it did not like the way the *Edelmann* rule works out in state-initiated, state-declaratory proceedings, even though the Court supported that rule for the general run of cases. It therefore adopted the rule but made an exception for state-initiated declaratory proceedings first filed in state court.<sup>147</sup>

Whether or not one agrees that comity required that abdication of jurisdiction, the deference to states does not seem to harm jurisdictional policy, though it takes from lower federal courts a particular determinative federal issue. The category excepted is clear and easy to apply; in that sense, the criteria for “discretion” in *Franchise Tax*, if they were better spelled out, would be much more satisfactory than those in *Merrell Dow* and *Grable*. Moreover the cases *Franchise Tax* excepts from original jurisdiction, and *Franchise Tax* in particular, are not the kind of litigation that is likely to be lost or overlooked when the losing party seeks Supreme Court review. If the state courts in *Franchise Tax* upheld their tax assessments despite the serious and important argument that ERISA disallows them, the federal issue would be conspicuous in a petition for review, and the Supreme Court would have authority to decide it at that point.

Beyond any current exceptions from “turns on” jurisdiction, courts should look for categories of cases that both can be clearly defined and that are appropriate for exclusion. Undoubtedly, as experience is gained with applying the “turns on” test, further categories of cases that do not require original federal jurisdiction will become evident and can be omitted from federal jurisdiction.

Some exceptions have already been suggested. Probably the controlling federal issue should be required to be a substantive rather than a procedural one. The ALI suggested several more specific categories of federal defenses that should not be subject to removal, in order to prevent overuse and abuse of the process. One example is a claim that a judgment from another state or from a federal court bars a state proceeding; another is that a particular state’s law must under the U.S. Constitution be the rule of decision; others are defenses that one cannot constitutionally be subjected to jurisdiction by the particular state court.<sup>148</sup> Such exceptions are necessary to keep the jurisdiction within reasonable contours. The more specific and clear the exclusions are, the fewer problems they will cause the new jurisdiction.

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jurisdictional sense, the state claims should be dismissed as well.”).

147. See *supra* text accompanying notes 92–93.

148. See AM. LAW INST., *supra* note 4, at 193–94.

Another very important limit that should be adopted to create a workable “turns on” test is a requirement that there be a direct federal interest in providing an answer to the controlling federal question. Some such limit is necessary to prevent state legislatures’ choices of pleading and substantive rules to control and over-expand federal jurisdiction. Therefore when a state adopts federal law simply for state convenience in filling out its own law, and federal law does not apply of its own force to the transaction at issue, it should not serve, through the “turns on” test, to transfer state litigation to federal courts. Without such a limitation, the “turns on” category could become boundless. The requirement of a direct federal interest, further explained below, also would exclude from federal jurisdiction most of the cases that have caused the justices to feel the need for discretion to limit the jurisdiction.

The suggested category for exclusion is not an amorphous one, even though the term “direct federal interest” may be. What should be required is that the controlling federal law that gives jurisdiction apply, of its own force, to the controversy or transaction at issue, even if that federal law does not include a federal cause of action. It is fairly easy to see in which pile a controversy falls. In *Smith*, *Merrell Dow*, and *Grable* the central federal law did apply, of its own force, to the controversy and the transaction at stake, even though there was no federal cause of action. If, as was alleged, the bonds that were challenged in *Smith* were inconsistent with the U.S. Constitution, federal law did forbid them, even if it did not create a federal cause of action. Federal law applied to and regulated the branding of the drug in *Merrell Dow*; it decided whether the sale it made in *Grable* was effectual or not, even if there was no federal cause of action. When federal law regulates directly in that way and that same federal law is dispositive of the case, the case would be eligible for “turns on” jurisdiction, under the proposed approach.

Just as “direct” can be a vague and unhelpful term, so can “of its own force.” When Holmes insisted on the exclusiveness of the federal cause of action as the test for federal jurisdiction, he said, “the law must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States.”<sup>149</sup> To him the law did not apply “of its own force” unless a federal remedy allowed the particular litigation to be brought. I am using “of its own force” in a broader sense, not requiring a federal cause of action, but requiring that federal law, standing alone, would determine the legality or illegality of the matter at issue. It would apply to the controversy, even without state law incorporating it or referring to it in its own law.

On the other hand, if a state copies federal income tax law to use as the state’s income tax code, it should not be able thereby to have litigation turning on the meaning of that code transferred to the original federal jurisdiction.<sup>150</sup> If the controversy does end up turning on the incorporated federal law, the Supreme Court can review the state courts’ results if it wishes, but there is neither original

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149. *Smith*, 255 U.S. at 215 (Holmes, J., dissenting).

150. This is probably the distinction the *Merrell Dow* Court was making in its footnote 12. See *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 814 n.12 (1986) (“In *Moore*, in contrast, the Court emphasized that the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action.”).

nor compulsory jurisdiction. On this basis, *Moore* would be excluded from federal original jurisdiction (as it was), even after adoption of the proposed reforms.

### III. DIVERSITY JURISDICTION AND FORUM SHOPPING

The second context in which to examine the effect of changing removal provisions involves particularly cases that fall within the federal diversity jurisdiction, 28 U.S.C. § 1332. State courts also have concurrent jurisdiction of diversity cases, and in the first instance, at least, a plaintiff can pick a state or federal forum. If he chooses the federal court, the case will be tried there. If he chooses a state court that has jurisdiction (the place where the accident occurred, for example, or the plaintiff's residence), the defendant has the option to remove to federal court. However under current law, if the plaintiff chooses the defendant's home state the defendant has no opportunity to select federal court, and the plaintiff's choice will prevail.

This situation exists because of explicit provisions in 28 U.S.C. § 1441—defendants have a right to remove if the plaintiff could have brought the case in federal court instead of the state court he has chosen. But defendants lose that right if the plaintiff brings the suit in the any of the defendants' home states.

The reason for this limitation on removal is fairly self-evident. The presumed reason for giving federal courts jurisdiction over cases usually involving primarily state law is the danger that a state court may be biased, especially in favor of its own citizen.<sup>151</sup> When a citizen is sued in her own state, there is little likelihood of state court bias against her because of her statehood, so there is little need to allow her to remove to federal court. The plaintiff has chosen the particular state forum, so it is unnecessary to consider any possibilities for bias against him. Accordingly the possibility of bias does not warrant intruding upon the limited resources of federal courts.

This analysis suggests it would not be worth extending the opportunity to remove to a defendant sued in her home state. But when one looks beyond the assumed primary purpose of federal diversity jurisdiction to other effects that nonsymmetrical removal can have, it is less clear that § 1441(b) adopts the correct policy.

The proposed change in diversity removal would take away the plaintiff's ability to pin the defendant into state court by suing the defendant in her own state. The problem with giving plaintiffs more choices of forum for the lawsuit than defendants has long been noticed by the courts. It also has long been recognized to exist primarily when there is a large difference between the systems that have concurrent jurisdiction and especially when their laws are likely to yield different results in the litigation.

If courts are thought to differ between themselves, even in the substantive law they apply, plaintiffs may easily attempt to control which substantive law is applied by picking the forum in which the applicable law appears most favorable to him. Even if the court has no bias toward the defendant, indeed even if the judge is

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151. *Contra* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

favorably inclined toward her, when the law is unfavorable to her position as compared to federal law or the law of other states, the plaintiff's ability to select that law without her input can place her at a disadvantage. The defendant will be unable to remove even though the plaintiff's reason for choosing her home state is because her state's law (or its mode of applying a shared law) is peculiarly favorable to the plaintiff.

Hence the plaintiff has strategic choices that are not available to the defendant, and if there are differences in the law to be applied in the various available fora, there can be both serious disadvantage and unfairness to the defendant.<sup>152</sup> Symmetrical access to federal court for both plaintiff and defendant would reduce forum shopping and unfairness, and for that reason should be seriously considered, even though it may not be necessary to prevent state court bias against its resident. By symmetrical access I mean that both parties should have identical opportunities to access federal jurisdiction in each case.

#### *A. The Persistent Problem of Forum Shopping*

Since at least the late nineteenth century, the Supreme Court has been deeply concerned with federal-state forum shopping—that is, picking between the federal and state courts that coexist within each jurisdiction in order to alter the outcome of a case. The forum shopping and jurisdictional schemes we have had typically have given nonsymmetrical opportunities for access to plaintiffs and defendants.

In *Swift v. Tyson*<sup>153</sup> in 1842, Mr. Justice Story ruled that “general federal common law” would apply, especially in areas of commercial and contract law. The rule applied as long as (1) states had not passed statutes controlling a subject, and (2) the subject did not concern strictly local matters, such as real estate. Story's reason for adopting the federal common law approach, somewhat ironically, was to increase uniformity and avoid variation by state. I say ironically because when *Swift* was overruled ninety-six years later—in *Erie Railroad Co. v. Tompkins*,<sup>154</sup> a case in which its continuing validity had not been questioned, criticized, or argued—the central attack was that it made impossible uniform outcomes between state and federal courts.

*Erie*'s criticism of *Swift* was well taken, because under the *Swift* regime state courts followed state decisional law across the board, whereas federal courts respected it only if it involved immovables or some other very localized matter. It was not unusual therefore for each jurisdiction to apply a different substantive law to a transaction. The national uniformity that Story had anticipated concerning subjects like contracts and commercial law had not developed.

The *Swift* rule had always paid deference to state statutes, ignoring only state decisional law or common law. When there were statutes, local state and federal decisions were similar; therefore, there would be “vertical” similarity between state

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152. Such disadvantage and unfairness will not by any means exist in every case in which the plaintiff chooses to litigate in the defendant's home state. The difference in law may be negligible and the plaintiff may have other reasons for choosing state court—reasons the defendant may or may not share.

153. 41 U.S. (16 Pet.) 1 (1842).

154. 304 U.S. 64 (1938).

and federal courts (although there still would be little nationwide similarity, sometimes called “horizontal” similarity, either between states or between federal courts). As long as no state statute or local rule governed, federal courts could be uniform among themselves on (federal) common law issues, but the various state courts continued to decide upon their common law rules for themselves, neither necessarily following each other’s decisions nor following federal decisions. Accordingly there could be horizontal (federal) but not vertical (federal-state) uniformity.

It is curious that Story could have thought that *Swift* would produce uniformity, when failure to do so was a main criticism hurled at it in *Erie*. But Story apparently had believed that the Supreme Court would lead by persuasive force, as it interpreted general common law in a variety of subject matter areas; the states would choose to follow the Court’s precedents because of the quality of Supreme Court reasoning and because of the Justices’ prestige. Whereas Professor Crosskey believes the common law should have been enforced against the states,<sup>155</sup> Story had not anticipated that this would be necessary.

One reason Story’s prognosis of uniformity could not come to pass is that more and more state statutes were enacted, subject to deference under *Swift*’s rule. Statutes were especially prevalent in the commercial arena, where uniformity was deemed particularly important.

Moreover, whatever persuasive force the Supreme Court might have been able to exert over state judiciaries on common law matters was reduced when the Court stopped hearing many of these common law questions in favor of other subjects.

In *Erie*, Brandeis’s central criticism of *Swift* was this lack of uniformity that the *Swift* system caused—to the point that persons, for example parties to a contract, could not know which rules would govern their behavior until they knew which court, state or federal, would hear their case.<sup>156</sup> Moreover, they were often not in control of the variables that would put them in the federal arena or keep them outside of it, so reasonable planning with an eye to the applicable law was not possible.

Brandeis was concerned not just about the confusion and irrationality of the system, but also about its unfairness. Some of the “mischievous results” Brandeis saw concerned:

grave discrimination by non-citizens against citizens. [*Swift*] made rights enjoyed under the unwritten “general law” vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. . . . The discrimination resulting became in practice far-reaching.<sup>157</sup>

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155. II WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 913 (1st ed. 1953).

156. *Erie*, 304 U.S. at 74–75.

157. *Id.* (footnote omitted).

It was largely in order to halt this unfairness that the *Swift* system was declared unconstitutional and the rule of *Erie* took its place. As with *Swift*, the principal purpose of *Erie* was to make possible federal-state uniformity, especially in diversity litigation. And like *Swift*, *Erie* has failed at this task.<sup>158</sup> Despite Brandeis's intentions when he authored *Erie*, absence of uniformity, and resultant possibilities for forum shopping by those with the most control over which court to select, have been the result of *Erie*'s system. Various factors have contributed: a key reason, for example, is the substance-procedure distinction, and the rule that the forum may apply its own doctrines if they count as "procedural," even if they may affect the outcome of the case.<sup>159</sup>

*Erie* did not decide whether state and federal courts would also differ concerning which state's law should apply. *Erie* made clear that state law is to rule in federal as well as state court, but it did not indicate *which* state's law would control, or even which system the federal courts would follow to *ascertain* which law controlled a case involving diverse parties. Three years later, however, in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,<sup>160</sup> the Supreme Court adopted the system that has remained with us ever since.

The current system attempts to guarantee that the state and federal courts in one jurisdiction will both turn to the same state's substantive law. *Klaxon* instructed the federal court to apply the same conflict of laws rule (the rule choosing which law to apply) as the rule used by the state court in its jurisdiction. The theory was that if both were to apply the same conflicts rule in the same fashion, then both the state and federal court in that jurisdiction would be applying the same substantive rules. (Of course, flexible conflicts rules might still be applied differently by different courts.)

But there is a fundamental problem with this system—more than one state is, by hypothesis, involved in a diversity case, so the plaintiff almost always has the choice of at least one other state in which he can sue. In another state (whether he goes to state or federal court), he will potentially acquire an entirely different choice-of-law approach, which will send him to an entirely different state's substantive law. Because the plaintiff can select the jurisdiction in which the suit is to take place, and hence the choice-of-law rule that will apply, he may (if he is far-sighted enough) greatly affect even the applicable substantive law, to the detriment of the defendant.<sup>161</sup>

*Erie* was prevented from achieving the uniformity it sought, therefore, both by the substance-procedure dichotomy, which led to federal-state divergences, and by the *Klaxon* holding, which led to forum shopping between federal courts and

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158. See Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1141–42 (1989).

159. In the context of *Erie*, and the Federal Rules of Civil Procedure, the federal courts will apply any promulgated federal rule that purports to be procedural as long as the rule is "arguably procedural," regardless of the role the rule plays in the particular case. That is, the Court defers to the decision maker that adopted the federal rule and if the rule is valid on its face applies it, without questioning its effect in the particular application or worrying that the rule produces a different outcome than would obtain in state court. See *Hanna v. Plumer*, 380 U.S. 460 (1965).

160. 313 U.S. 487 (1941).

161. See, e.g., *Ferens v. John Deere Co.*, 494 U.S. 516 (1990).

between courts of different states. Any “grave discrimination by non-citizens against citizens” because of citizens’ lesser strategic choices—the primary policy problem with the *Swift* regime according to Brandeis<sup>162</sup>—continued unabated by the *Erie* doctrine’s acceptance. It is true that for Brandeis the concern was between differences in state and federal courts, but the “unfairness” he describes is precisely the same when the manipulation is achieved by a change in state jurisdiction rather than a change from state to federal jurisdiction.

The most apparent alternative to *Klaxon*’s deference to the conflicts law of the state in which the federal district court is located was creation of a federal common law conflicts rule that all federal courts would follow. That rule would tell federal judges which state law to choose in which circumstances to govern interstate controversies, so that any federal court in theory would find applicable the same state substantive law.

That alternative approach could have better served the cause of uniformity and the defeat of forum shopping. A federal rule could have resulted at least in uniformity between federal courts. But even if all federal courts applied the same test or principle to lead to the same applicable substantive law, the federal courts might be applying different rules from those of the state courts within their jurisdictions, the problem *Erie* sought to prevent.

Especially as things have evolved since *Klaxon*, including the fact that travel from one jurisdiction to another has become commonplace for lawyers and businesses, *Klaxon* leaves the opportunity for interstate forum shopping open for exploitation. That is especially troubling when there is a large difference between the relevant states’ conflicts or substantive rules. If, instead, there were one federal conflicts doctrine, it is not unlikely that some, even many, states might decide to follow the federal approach. One reason is that conflict of laws jurisprudence remains relatively underdeveloped. The alternative to following the federal approach would be, for some states, to cherish a few private precedents that are not of sufficient frequency or breadth to give guidance concerning the whole body of doctrine and the range of conflicts problems that can arise. The persuasive force that was not sufficient for the Court to lead the nation in commercial and other more general fields of law, as Story had hoped in *Swift*, might have been more effective, and indeed might still be, if the federal courts were to attempt to develop conflict of laws alone as a federal common law field.

While *Klaxon* had its supporters,<sup>163</sup> most commentators have believed it was a missed opportunity to strike a blow at forum shopping and that a federal choice of law rule, imposed by Congress if not by the Supreme Court, would be the wisest course. Nonetheless this result did not carry. A principal reason for ambivalence toward reform was a fear that a federal choice-of-law rule adopted out of a desire for consistency and uniformity might revert to the “old-fashioned” type of conflicts rules—like the place of the wrong is the jurisdiction whose rules govern a tort, the

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162. See *Erie*, 304 U.S. at 74.

163. See David F. Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732 (1963); see also David F. Cavers, *Change in Choice-of-Law Thinking and Its Bearing on the Klaxon Problem*, in AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS: TENTATIVE DRAFT NO. 1154, 161 (1963).

place of the making of a contract is the law that governs a contract, the place where the marriage was performed is the law that governs the legality of the marriage, and so on.<sup>164</sup> Most scholars since at least the 1960s have preferred “interest analysis” to such seemingly clear-cut rules.<sup>165</sup>

Many feared that interest analysis might not be the chosen approach because it is more uncertain and amorphous; it requires analyzing the interests of all relevant states in the transaction the litigation concerns. Some also feared statutory adoption of some version of interest analysis other than the particular one to which they had devoted all of their scholarly energies. Many different and interesting wrinkles had been added to the analysis first put forward by Brainerd Currie<sup>166</sup> and much discussed and developed since.

In fact, Congress could have enacted a statute that should have been perfectly satisfactory to the interest analysis scholars, simply instructing federal courts to apply a federal choice of law rule and to base that rule upon interest analysis, leaving the courts to work out over time the details of the doctrine in practice. Instead, however, no legislation was forthcoming. The *Klaxon* rule continued in force, and each jurisdiction continued sporadically to develop its rules—some following interest analysis, in several different forms, and others applying traditional classical approaches involving classification of cases (tort, contract, etc.) and clear rules.<sup>167</sup> Few jurisdictions have sufficient cases to develop fully their own version of interest analysis, even when that is the path they choose for their conflict of laws doctrine.

#### *B. How Changing Federal Court Access Could Help*

If it were a priority to get rid of forum shopping, of plaintiff advantage in choosing the law, and, most important, of uncertainty concerning which law will control a planned transaction, these goals could surely be accomplished. They would require, first, the overturning of *Klaxon*, by either the Supreme Court or by Congress,<sup>168</sup> so that all federal courts (and perhaps other courts) would be following the same choice-of-law approach. But such a reform would also require change in current provisions so that the defendant can remove and have access to federal court on par with the plaintiff; she could no longer be pinned into her home state.

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164. See generally RESTATEMENT OF THE LAW OF CONFLICT OF LAW 377, 395 (1934).

165. See Cavers, *supra* note 163; see also Brainerd Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960).

166. See Currie, *supra* note 165.

167. Clear rules did not always prove clear in application. For example, a passenger in a train that has an accident has elements of contract (purchase of ticket) and of tort. Moreover the place where the negligence took place may differ from the place where the accident ultimately occurred, leaving room for argument within tort concerning different jurisdictions. Despite such imperfections, the traditional rules strived for certainty and were indeed more definite than the principles of interest analysis.

168. There is not even pretense of it being a constitutionally required holding, unlike *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

In fact, the problem of forum shopping implicates removal even more than it does choice of law. The discrepancy in favor of plaintiffs that Brandeis complained of in *Erie* was a function not of choice of law under *Swift*, but of the removal rule's refusal to let defendants choose federal court on par with the plaintiffs. Reforming removal so as to make the parties' choices symmetrical (to always give both parties the same choices) would more directly balance the scales between them, and at least as important, would leave each with a law—the federal law—to count on, because it would be within each party's ability to make that be the applicable rule.

Removing the longstanding discrimination is thus attainable, if that is the paramount priority. It could be accomplished by both overturning *Klaxon* and changing the provision prohibiting removal by a defendant sued in her own state under § 1332. The difficult question is whether any ill effects of such a change—such as more cases in federal court, and unnecessarily, if state court bias is the yardstick—would be outweighed by the more successful resolution of Brandeis's concerns about fairness.

Not only could overturning *Klaxon* and changing the removal rule affect forum shopping, fairness between the parties, and ability to know what law will govern particular transactions; the difficulties now experienced because of the substantive-procedure dichotomy and its rules would disappear as well. Because all could rely on the ability to go to federal court (as long as they could rely on the lawsuit being diverse), it would be within their power to opt for federal procedures as well as federal substantive rules. Even in instances where the federal rules are not the rules one would prefer on the merits, there is an advantage in being able to know what law will apply absent unanimous consent to an alternative.

Does this proposal for removing “grave discrimination by non-citizens against citizens”<sup>169</sup> really warrant allowing defendants to remove from their own state? Despite Brandeis's statement that such imbalance in selecting the forum “rendered impossible equal protection of the law,”<sup>170</sup> surely it does not violate the Equal Protection Clause in any literal sense. The real issue is how important Brandeis's concerns are, in how many cases they arise, and how those concerns should weigh against a reluctance to increase federal dockets. Finally it is an open question how great an increase the change would entail.

Another final factor relevant to whether the advantages of such a proposal are worth its costs is a recognition that, even with the proposed change, the unfairness problem with forum shopping would not be entirely solved. Persons could rely upon federal law applying, absent unanimous consent to an alternative, but only if they could reliably predict that the case would satisfy the requirements for the federal diversity jurisdiction (or another category of federal jurisdiction). Even when a prediction concerning the jurisdictional amount seems reliable, a plaintiff still could engage in strategic and other choices to pin a defendant into state court. For example, complete diversity is required for the diversity jurisdiction, not by the Constitution but by Supreme Court interpretation of the diversity statute.<sup>171</sup> In structuring the lawsuit, the plaintiff may have choices about how many and which

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169. *Erie*, 304 U.S. at 74.

170. *Id.* at 75.

171. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

parties to include as defendants, and could therefore avoid the possibility of removal to federal court by adding as a defendant a person from the plaintiff's own state. Accordingly, the proposal would cut back significantly on plaintiff's greater opportunities to control the choice of forum (and potentially of applicable law), but it would not avoid the problem in every case.

A different reason, however, favors adopting the proposed change in removal rules. This advantage, while little discussed, could be just as important as the unfairness and "grave discrimination" between noncitizens and citizens that worried Brandeis.<sup>172</sup> This reason for favoring the change is the difference it could make in concurrent litigation of the same matter in state and federal court—under the diversity and/or the federal question jurisdiction. The grave problems that exist with our current policies concerning concurrent litigation, and the benefits that changing the removal rules would create, is the subject of the next Part of this Article.

#### IV. CONCURRENT FEDERAL-STATE JURISDICTION

One of the strangest aspects of our jurisdictional system is the set of rules that have come to govern duplicative, concurrent, in personam jurisdiction.<sup>173</sup> These rules apply both in diversity and in federal question cases. The problem arises when a plaintiff who has the option of going to federal court instead sues in state court in a manner that does not allow the defendant to remove. One common example would arise in a case that qualifies for federal diversity jurisdiction except the plaintiff has sued the defendant in her home state, thus preventing her from removing to federal court. In a federal question case, the plaintiff may have sued on a contract when he could have sued on a federal cause of action; or he may himself have had no choice about forum, because the federal issues in the case arise only in defense and/or reply, as in *Louisville & Nashville Railroad Co. v. Mottley*.<sup>174</sup>

In all these examples, the defendant is defending in state court a suit she would prefer to have in federal court but that she is unable to remove.<sup>175</sup> Under our current

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172. In federal question cases as well as diversity cases, one party—the plaintiff—often has an advantage over the other in choosing or avoiding a federal forum. Because the plaintiff is the drafter and the master of the well-pleaded complaint, and it is that document only that can enable access to federal court, the plaintiff has significantly more control over the choice of forum than does the defendant. The issue is different from *Erie* and *Klaxon*, because in theory both forums are to apply the same, federal law (though not the same procedure in most instances). But state law, and choices between various state laws, may also pertain to the case, and even apart from differences in law, there can in practice be various differences and possible advantages for one party or the other in state or federal court.

173. The problem of duplicative litigation does not arise in in rem cases because "the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other." *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939); *United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463, 477 (1936); see also *Donovan v. City of Dall.*, 377 U.S. 408, 412 (1964) (dictum).

174. 211 U.S. 149 (1908).

175. See 28 U.S.C. § 1441(b) (2006) (A diversity action is "removable only if none of the . . . defendants is a citizen of the State in which such action is brought.").

system, believe it or not, the state defendant is permitted to herself bring essentially the same dispute to federal court in a separate lawsuit, though not by removal, and, if you believe what you read, the federal court has a “virtually unflagging obligation . . . to exercise the jurisdiction given [it]”<sup>176</sup> even in concurrent, in personam cases. In addition, “the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention.”<sup>177</sup>

The Supreme Court so stated in 1976 in *Colorado River Water Conservation District v. United States*.<sup>178</sup> Granted, the Court there found that such circumstances do sometimes exist.<sup>179</sup> It in fact abstained to avoid duplication on the facts of the case before it, dismissing the federal suit.<sup>180</sup> The case involved Colorado’s system for rationing water, a continuing scheme involving litigation in several Colorado districts.<sup>181</sup> The United States was a defendant in some of those cases, due to its consent to suit in state court in such circumstances in the McCarran Amendment.<sup>182</sup> The Court’s rationale for deferring to ongoing state proceedings essentially was that interference with the state’s complex project by adding in federal court litigation was unnecessary and unwise.<sup>183</sup> Insofar as the Court did state an unusually strong case for noninterference, the holding may still be consistent with the Court’s invocation of a strong presumption against staying federal proceedings and for a federal duty to adjudicate.

Despite the disposition of the particular case, the rule thus appeared to be that the federal court need not, and usually should not, defer even to a duplicative state proceeding that has been filed before the federal action. (Later I will discuss the current status of the rule on deference and its nuances.) Moreover, it is up to each state to determine what to do when an earlier-filed but not completed federal suit is addressing the same problems as a state case, or even substantially duplicates the state case in parties and claims. It may either defer or continue. Each state may have a consistent policy, usually articulated by its legislature or its courts, or its courts may make the judgment in an ad hoc fashion.

Both state and federal proceedings therefore may continue, no matter how duplicative they are. Two trials may proceed, even if both are complex, expensive, and lengthy. But if they come out inconsistently both cannot control. Which should, or will?

In our system the first decision that is final controls. In fact, the other proceeding should stop once one decision is final, because the final one can make irrelevant whatever follows, through res judicata and other doctrines. But there is

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176. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (citation omitted).

177. *Id.* at 818.

178. *Id.*

179. *Id.*

180. *See id.* at 819–20.

181. *See id.* at 804.

182. 43 U.S.C. § 666 (2006).

183. *Id.* at 817–21.

more to it than that; federal courts' jurisprudence would not rest with such a simple resolution.

Two issues have been central: What does "final" mean, and which system will define it? The resolution has been that federal law defines finality for federal cases (at least for federal question cases, compare *Semtek*,<sup>184</sup> discussed below) but that state law controls when its litigation is "final" and thus subject to res judicata effect in state and federal court. (It probably would be impermissible for a state to adopt a different definition of finality when the issue is res judicata vis-à-vis a pending federal proceeding than when it is vis-à-vis a state proceeding, because a state is not allowed to discriminate against the federal government,<sup>185</sup> except in exceptional circumstances.)<sup>186</sup>

The point has a practical dimension as well as raising questions of federalism. The federal government for these purposes considers litigation "final" when the district judge has entered a final judgment in a trial, even if that judgment is the subject of appeal.<sup>187</sup> Some states, by contrast, do not consider their judgments final for res judicata purposes until the judgment has been considered by the highest available state court, or until the time for appeal has lapsed. Obviously these state rules regarding finality have not been adopted with a race to judgment in mind; they are requiring for themselves a marathon, when their federal opponent must run only half the distance. The finality rules become even more bizarre when courts start applying them to *issues* that are finally litigated as distinct from final *judgments*.

These, then, are the rules concerning which decision controls (in somewhat focused and oversimplified form): whichever tribunal finishes first may control the case, and each system can decide for itself at which point its cases shall be final for res judicata purposes, state and federal.<sup>188</sup>

#### A. Current Law: Allowing and Even Encouraging Duplication

But there is another important trick, one that surfaced in 1986 in *Parsons Steel, Inc. v. First Alabama Bank*.<sup>189</sup> That case tells us that even if the federal proceeding finishes first, the successful litigant cannot obtain a federal injunction against a duplicative state proceeding *if* the state court has already ruled that res judicata does not apply.<sup>190</sup> If the state court has ruled on the issue of whether the federal judgment is controlling, the state court's ruling of finality is itself res judicata, and its correctness or incorrectness must be questioned, if at all, by appealing within the state court system. The only possibility for federal input into the decision will then be a grant of certiorari by the U.S. Supreme Court. A losing party can request

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184. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

185. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

186. *See, e.g., Smith v. Reeves*, 178 U.S. 436 (1900) (holding that a state can limit to state court its waiver of sovereign immunity against a state cause of action).

187. *See Semtek*, 531 U.S. at 505–06.

188. Of course, federal law, or federal courts, would not tolerate an outrageous rule of finality, made for purposes of strategic advantage by a state's legislature.

189. 474 U.S. 518 (1986).

190. *Id.* at 525.

review if the case ends up turning on a federal question (like the failure to respect the prior federal judgment). Review might well be granted. Conflicting state and federal judgments pertaining to the same matter would be likely to attract the Court's attention. It obviously would be unusual for state courts to persist to this stage, in the face of a controlling federal decision.

The *Parsons* holding was surprising because the Anti-Injunction Act,<sup>191</sup> which forbids federal courts from enjoining ongoing state proceedings, contains three exceptions, one of which (“to protect or effectuate its judgments”) the Court has interpreted to apply only to a federal court's ability to enjoin a state proceeding when a federal proceeding is final and entitled to res judicata effect.<sup>192</sup> (Another one allows injunctions against continuation of a state proceeding that has been removed to federal court.)<sup>193</sup> Despite falling within the clear exception, *Parsons* did not allow a federal court to issue an injunction to protect and enforce its final federal judgment.<sup>194</sup>

Consequently, *Parsons* teaches us that litigants who like the result of a race won in federal court should go immediately to the *federal* court to enjoin an ongoing state proceeding, before asking the state court to halt. Once announced, this rule may prove easy to follow, but before it was announced, litigants might reasonably have assumed that basic politeness required asking the state judge to halt his case before bringing an injunctive proceeding against him.

Of course the state court in such a situation might rule that res judicata required it to stop. Practicality should require that ruling, unless the object is to harass the party who won in the already-final litigation. Presumably in the end, even if the resolution has to take place at the Supreme Court level, a prior federal court judgment that was entitled to finality under current law would make the state proceeding irrelevant.

If, instead, the state court has continued its litigation, at least three possible explanations exist: (1) the state court's defiance of the rules, probably out of sympathy for the party who lost in federal court; (2) the state court's misapplication of the same res judicata rules that the federal court is applying (assuming that the federal court is applying them correctly—an additional possibility is that the state court has it right and the federal court has it wrong); (3) the state court's application of different rules of res judicata than the federal court is applying. The last two possibilities remind us that in federal court jurisprudence it is always important to separate out two questions: which *court* should decide and which *law* should apply, and the answer to one can easily differ from the other. After all, as we saw in Part III, the aim is to have the same law apply, at least to “substantive” matters, wherever a particular controversy is litigated.

The set of rules about which law applies might not help at all because of not knowing whether to treat res judicata rules as substantive or procedural. Probably they are procedural by mainstream definition. Surely they also are outcome determinative.<sup>195</sup>

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191. 28 U.S.C. § 2283 (2006).

192. *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 294–95 (1970).

193. *Id.* at 294.

194. *Parsons*, 474 U.S. at 525.

195. *Cf. Hanna v. Plumer*, 380 U.S. 460 (1965).

Federal statutory rules can apply in state courts even if “procedural,” but the federal res judicata rules that exist are not codified; they are common law rules developed by courts over time. They are similar in substance to the rules some states have adopted, but other states’ res judicata rules vary. Common variations, in addition to the time of finality, concern which claims must be brought together in a single litigation (some states allow much more splitting of lawsuits than the federal system and some other states do), and whether or not “mutuality” is required in order for a party to be bound by an issue she fully litigated in another proceeding. The issue concerning mutuality is: can the prior outcome be used against a defendant if she lost, even by a plaintiff who was not a party and thus would not have been bound by the outcome if she had won? The federal system and some states answer this question in the affirmative; they do not require mutuality for res judicata to operate.<sup>196</sup> Other states would answer no, that a party who could not be bound by a prior judgment cannot use that judgment to bind another. These and other doctrinal differences in various laws of res judicata can lead to directly opposite outcomes, both between states and in the federal-state context, depending upon whether a state’s law governs the issue or the federal court’s res judicata law does.

One additional complication therefore is to determine which law applies, if there is to be any difference between the law applied and the forum applying it. That is, this would not be an issue if the conclusion were simply that because the issue is procedural and there is no codified federal rule, a state court can apply its law on this issue and a federal court can apply its law. If this were the case, then by finding a court with jurisdiction, we would find the correct law to apply (and uniformity would suffer). That approach, unlike the Supreme Court’s resolution of this issue in *Semtek*, would have federal res judicata rules govern the effect of federal diversity suits as well as federal question suits, when the suits within federal court jurisdiction were the first final ones. Federal res judicata would control the effect of the first suit whether the subsequent suit was in state or federal court. (Therefore the effect of a judgment, after it was rendered, could not be changed by changing the federal-state forum.)<sup>197</sup> Suits decided by state courts similarly would be governed by their state’s rules of res judicata, unless and until Congress enacted legislation to the contrary. Since our country began, Congress has in fact had legislation that has been interpreted to support the current approach; to require that each state’s rules of res judicata control the effect of its own judgments in subsequent litigation in federal court and in other state courts.<sup>198</sup>

In *Semtek* the Supreme Court adopted a different approach. Instead of holding that res judicata was a procedural matter to be left to the rules of the initial forum, Justice Scalia, writing for a unanimous Court, ruled that federal diversity cases

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196. See, e.g., *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979) (allowing offensive nonmutual collateral estoppel).

197. One could argue that the court hearing the second litigation should control res judicata rather than the court hearing the first litigation; after all, it is the second court’s resources that are at stake. But res judicata generally looks to the issue as one of the effects of the first judgment and whether it undercuts that judgment for the second court to assert jurisdiction or rule in a contrary fashion.

198. 28 U.S.C. § 1738 (1948).

should be governed by state res judicata rules.<sup>199</sup> Scalia claimed that it was already established that federal law defined the effect of federal judgments (even though Congress has not acted, so that judge-made “federal common law” controls) when the judgments lay within the courts’ federal question jurisdiction.<sup>200</sup>

Scalia confuses the analysis somewhat by insisting on describing the Court’s decision to use state res judicata rules for diversity cases as an exercise of “federal common law,” on the ground that the Court had power to and could have created federal rules but chose not to.<sup>201</sup> It is the use of that term that is unusual, arguably inappropriate, and surely confusing. Usually, even when federal courts’ ability to choose the governing rule may be recognized because of strong federal interests potentially involved, if the choice is made to have state rules govern instead, those rules are not described as federal common law.<sup>202</sup> Instead, they may be called “federally incorporated state law,” or “state law operating by federal choice,” or “state law that does not operate of its own force.” “Federal common law” is more appropriately used to describe the law made when the court *does* choose the federal alternative and sets about creating a federal law that will control nationwide.<sup>203</sup>

More important than this needless confusion in terminology is the essential holding attributed to *Semtek*—that state res judicata rules govern the res judicata effect of federal diversity decisions. Superficially that appears correct; after all, there is usually greater state interest than federal in the law applied in diversity cases, and federal question cases are more likely to involve federal law than are diversity cases. But when one considers the interaction between res judicata rules and the forum’s rules on what to plead and join, it seems clear that the forum should govern many issues of res judicata that appear in diversity cases as well.<sup>204</sup>

199. Scalia explained, “Since state, rather than federal, substantive law is at issue there is no need for a uniform federal rule. And indeed, nationwide uniformity in the substance of the matter is better served by having the same claim-preclusive rule (the state rule) apply whether the dismissal has been ordered by a state or a federal court.” *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001).

200. *See id.*

201. *Id.* (“In short, federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity.”).

202. *See, e.g., De Sylva v. Ballentine*, 351 U.S. 570 (1956).

203. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). *See generally* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986).

204. Account must be taken both of the differing doctrines that may appear under the heading of “res judicata” and the differing uses of the relevant terms. As Justice Stewart summed up in *Allen v. McCurry*,

The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

449 U.S. 90, 94 (1980) (citation omitted). Justice Stewart then added in a footnote that “[t]he

The Court in *Semtek* had recognized that “federal reference to state law will not obtain . . . in situations in which the state law is incompatible with federal interests,”<sup>205</sup> as is true in general in cases involving state law operating by federal choice,<sup>206</sup> but insofar as *Semtek* is taken as a general rule pertaining to applying state res judicata principles in diversity cases, the general rule is questionable.

In contradiction to an approach of applying state res judicata rules in diversity cases, the claim preclusion aspect of res judicata, for one example, should be determined by federal rules whenever a case is tried in federal court if the determinative issue is whether the claim should have been brought in the prior, first lawsuit. Because the federal court follows federal rules of procedure (and states follow state rules), it is federal law in diversity litigation that determines what claims should be joined or otherwise are considered waived. A common federal test requires all issues “with a common nucleus of operative facts” to be presented in the same federal lawsuit; if they are not included, they are forfeited and cannot be litigated at another time or in another court. To do so would be to disrespect the federal judgment and would allow the federal court to issue an injunction to enforce its judgment.

There is a different problem with state res judicata for diversity cases when the issue is collateral estoppel, also referred to as issue preclusion. I doubt that the choice of the issue preclusive effect of a federal judgment should be made by topic of jurisdiction—federal question or diversity. Because it is the effect of a decided case that is at issue, an approach is available that is more sensible than sorting the cases according to the jurisdictional heading under which each case was filed. Decisions about issue preclusion can be made at the end of the litigation—at a time when it is fully apparent what the case was actually about—including whether it was more closely related to state or federal law, or which, if either, it turned upon.

Perhaps instead of sorting cases by federal question or diversity jurisdiction, the trial judge at the conclusion of each case could declare a case either state or federal for issue preclusion purposes. That ruling would determine which jurisdiction’s collateral estoppel law controlled its effect.

My general point is that deciding this issue according to its jurisdictional heading—federal question or diversity—creates a system that is neither simple nor rational. An initial critique might be that, as the concurrent jurisdiction examples above reveal, the actual jurisdictional heading can be happenstance. I do not want to make that argument though, because I do not regard that as much of a detriment. (Indeed, a happenstance system has the benefit that *each* of the systems will get some of the cases; that sounds like concurrent jurisdiction to me.) But the example I am going to give now is meant to go one step further—to be your worst nightmare—assuming of course that you dream about this stuff and do not value chaos and irrationality in your civil procedure system.

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Restatement of Judgments now speaks of res judicata as ‘claim preclusion’ and collateral estoppel as ‘issue preclusion.’ Some courts and commentators use ‘res judicata’ as generally meaning both forms of preclusion.” *Id.* at 94 n.5 (citation omitted). Our discussion uses the term “res judicata” in this latter, broadest sense.

205. *Semtek*, 531 U.S. at 509.

206. *See De Sylva*, 351 U.S. 570; *Reconstruction Fin. Corp. v. Beaver*, 328 U.S. 204 (1946).

A plaintiff can actually set up a case so that state law will be dispositive in federal court and vice versa:

Lennon B. has copyrighted a song “Visualize” and licensed Paul B. to perform it, with his group, at its debut performance at Central Park. The song is a great hit. Lennon claims that Paul has continued to perform it, without seeking permission from, or paying any royalties to, Lennon. Lennon hires his brother, a well-known state court litigator, to handle his claim. He sues Paul B in the New York state courts for breaching his contract by using and performing the song generally, rather than for the limited use for which it was licensed.

28 U.S.C. § 1388 gives exclusive jurisdiction to the federal district courts of claims “arising under” the Copyright Act. Lennon, however, has sued in contract, a subject over which state, not federal courts, have jurisdiction.<sup>207</sup> Federal courts could not hear a contract claim unless the parties were of diverse citizenship and the amount in controversy was at least \$75,000.<sup>208</sup>

If Lennon had wanted to use federal courts rather than state courts, he could have sued Paul in federal court for infringing his copyright, alleging that each and all of the uses other than the authorized one constituted an infringement. Under established interpretation, infringement is indeed the only major federal cause of action under the copyright laws.<sup>209</sup> When the Supreme Court initially decided that issue, even infringement was implied and not explicit, and rights to sue in other forms could equally well have been inferred as necessary or useful remedies to enforce the federal statute. In any event, with infringement as his cause of action, Lennon is properly in federal court. In fact, he could not proceed in state court with a suit so crafted, because § 1338 gives exclusive jurisdiction to federal courts of suits “arising under” the Copyright Act, as infringement suits undoubtedly do.

Each suit therefore—the state contract action and the federal infringement action—is proper in the forum in which it sits and could not be brought or transferred to the other under current law. At the same time, the two suits are substantially duplicative.

Nor does the form in which the suits are brought say anything about what issues will be important or controlling. In the first place, at the outset of the case (when only the complaint has been filed) there is no way to know whether the determinative issue is really legal or factual. Moreover, until the issues are joined, there is no way to know what the dispute is about; usually one cannot know whether the claims have even *prima facie* merit.

But a suit filed as a state contract action certainly can end up deciding federal law and doing so in a way that the only available federal judicial input lies in the Supreme Court of the United States. It can do that even with respect to matters that Congress has deliberately placed within the exclusive federal jurisdiction,

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207. Contract claims are “a state cause of action”; copyright infringement claims are “a federal cause of action.” See *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964).

208. 28 U.S.C. § 1332 (2006).

209. See *T.B. Harms*, 339 F.2d 823.

presumably in pursuit of the greater uniformity or expertise that Congress expected federal courts to bring to the field. To pursue the hypothetical case above:

In Lennon's NY state contract action, Paul B. answers that Lennon's copyright is invalid because the work was already in the public domain. Lennon in reply defends his copyright.

The state court judge will decide whether the particular federal copyright is valid, despite Congress's grant of exclusive jurisdiction to the federal courts in § 1338. A state judge may therefore hold the copyright invalid, subject only to Supreme Court review. If a particular judgment is heavily based on facts and does not seem to have broad relevance beyond the particular case, Supreme Court review may not be likely.

Similarly, Lennon's infringement action, brought because he chose federal court, could turn out to revolve upon factual niceties; or it could revolve around niceties of state law and have little or nothing to do with copyright or any other federal law. One example:

Lennon sues for infringement. Paul answers that the proper interpretation of the contract is that he was permitted use for a year and not just for one performance. The fact finder, whether federal judge or jury, is called upon to decide the dispute about the meaning of the contract, although that state law issue has little relation to federal law or policy.

I imagine that the point has been adequately made that the jurisdictional heading does not always have much relation to what happens in a lawsuit. This suggests, contrary to *Semtek*, that federal collateral estoppel (regardless of which court was applying that law) should apply to a contract suit within the federal diversity jurisdiction that has held a copyright invalid—or that, as a principal holding, has *upheld* a disputed federal copyright for that matter. Moreover, to any extent that state collateral estoppel rules do ever govern federal diversity suits, as *Semtek* suggests they should, they also should logically govern federal infringement suits that have ended up turning on state contract law.

If state collateral estoppel rules are ever to govern the effect of diversity litigation, the safe course for a litigant during the initial suit would be to assume the applicability of the broadest form of collateral estoppel, whether that is state or federal. This strategy would be the self-protective one for the litigant who does not wish to be surprised by a ruling of preclusion because the final word on which law applied would not come until the end of the litigation. When state and federal rules differ, the federal rule concerning relitigation is likely to be the stricter.<sup>210</sup>

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210. Current (and long-standing) interpretation of the "full faith and credit" statute, 28 U.S.C. § 1738, does not allow the approach of applying federal res judicata law to state court rulings on essentially federal issues. (This is a matter for another day, but I do believe that this long-standing interpretation is demonstrably erroneous, because § 1738 was intended to apply only to cases within the diversity jurisdiction. There was no general federal question at the time of the original full faith and credit provision—the predecessor of the not-much-

A different possibility would segregate issues to be controlled by state law from those controlled by federal law, in order to treat those differently. It may sometimes be unduly complicated to have a system in which state and federal issues have different preclusive effects, even though appearing in the same case. But *Semtek* suggests that approach may be desirable because federal res judicata rules in fact seem appropriate for some issues in a case and not others. The rule that Scalia adopts in *Semtek*, for example, is perfect for the type of issue that was determinative in that case, even if the rule cannot properly be generalized to all res judicata issues and all federal diversity litigation.

In *Semtek*, the question was the effect of an expired state statute of limitations, applied by a federal court in a diversity case to dismiss the suit, on the ability of the plaintiff to commence the suit anew in another state with jurisdiction whose statute of limitations had not expired. Would the second suit be inconsistent with the federal court's application of the state statute in the first suit?

The policy behind the statute of limitations applied in the first suit is clearly central to the inquiry. The relevant state was California. States can have different reasons for adopting statutes of limitation. The dominant intent might be to give repose to possible defendants after a certain number of years, in which case the state policy would counsel that no further litigation was consistent with application of its statute. But the intent might also be more of an administrative one, not wanting to trouble California courts with stale claims. If this is the intent, it is not inconsistent for another interested jurisdiction to consider the case on the merits.

Scalia was correct then in looking to California policy rather than some federal procedural rule in deciding whether the second suit could continue. This suggests that courts, where practicable, should look issue by issue when the question is res judicata and in effect apply a federal common law of interest analysis in determining whether state or federal law applies to particular res judicata problems. In effect, the court making the decision whether a second suit can proceed must examine what aspect of the prior judgment might be disrespected if the second proceeding went forward. If the second proceeding might not give appropriate effect to state policy and the state laws that were applied, then state law is likely to be determinative; if it might negate the federal procedures or other federal rules that applied in the diversity case, federal res judicata is likely to control. The general inquiry may over time result in clear subrules, such as the suggestion that the forum's rules should govern when joinder of parties or claims is the question and that state's rules should govern when the issue is the effect of federal court dismissal under the state's statute of limitations.

In short, the basic rule for concurrent, in personam jurisdiction is that state and federal lawsuits, though duplicative, can both continue. Indeed, the federal suit *should* continue (at least according to language in *Colorado River*). Whether the

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changed rule that persists today. That statute's approach makes perfect sense with respect to the diversity jurisdiction—or, we should instead say today, for cases that have turned upon state law—for the same reasons favoring Scalia's approach in *Semtek*. But federal laws have their own policies about the circumstances in which they apply and the effects they should be given and how those considerations should weigh in against other applicable policies.) The Court's approach leaves room for incorporating exceptions, but it should be basic, for the reasons that Scalia gives in *Semtek*, that it is part of a federal enactment and of federal policy whether lawsuits to enforce the enactment are subject to revision by later-brought actions.

state court favors continuing, and in what circumstances, is a matter of state law. If duplicative suits occur, which result in the end controls depends upon a race to judgment in which state and federal standards intertwine to define rules for the race and how and where the winner's judgment will be enforced. But the essential rule is that duplication continues and the first to finish wins.

This is self-evidently an entirely crazy system, and it is hard to believe that it really exists. In a day of scarce resources, to have two ongoing suits only one of which can matter, in a system that could hardly be thought to respect the dignity of anyone, let alone the state and federal courts, it seems this cannot be. Nonetheless, the reality is that concurrent lawsuits are no rare phenomenon, as one can see even in Supreme Court litigation.<sup>211</sup>

Why would a litigant want to pursue duplicative litigation? A defendant's fervent desire to be in another court than the one the plaintiff has already chosen may sometimes be the answer, but the time and expense that will be involved would deter most from bringing their own, separate duplicative suit. Occasionally a party may deliberately double the costs of litigation, for himself and the other party, because of the ability to outspend and thus destroy the opposition. That tactic, which amounts to harassment, can be used either by a defendant or by a plaintiff who brings duplicative actions in state and federal court.

Duplicative litigation is so inefficient and the reasons for pursuing it sufficiently dubious that one would not expect the Supreme Court to promote duplication. But in some ways the Supreme Court's jurisprudence since *Colorado River* has done just that, although Chief Justice Rehnquist fought hard for a retreat and his position may still prevail.

The Supreme Court's 1976 *Colorado River* doctrine, described above, seemed to encourage duplication. *Colorado River* was confusing because the Court clearly articulated a rule disapproving of abstention "just" to avoid duplicative litigation but also found that very particularized circumstances justified abstaining in that specific case.<sup>212</sup> Unless the *Colorado River* facts are deemed to be exceptionally compelling, the result in *Colorado River* is inconsistent with most of the reasoning, making it difficult to ascertain whether it really is impermissible to abstain only to avoid the costs of duplication. The arguable tension between language and result make murky when abstaining just to avoid the usual costs of duplication is illegitimate.

Not only is the opinion confusing, but also in a series of opinions the Justices have continued to differ markedly in their enthusiasm for *Colorado River*'s holding; they continue to disagree fundamentally about whether federal courts should have discretion to abstain in favor of pending, or even later-filed, state civil proceedings.<sup>213</sup>

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211. See, e.g., *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518 (1986); *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281 (1970); *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968); *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511 (1955).

212. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

213. The same issues exist in state criminal proceedings or state civil enforcement proceedings that are concurrent with federal cases considering some of the same issues. For those cases, the Court has adopted a rule deferring to those state proceedings, see *Hicks ex*

*Will v. Calvert Fire Insurance Co.*<sup>214</sup> rejected duplicative litigation, even at the cost of denying federal court to a suit brought under a federal statute granting exclusive federal jurisdiction. The district judge granted a motion to stay an action involving claims under the Securities Exchange Act of 1934 while substantially identical claims were being litigated in state court, but the federal plaintiff obtained a writ of mandamus ordering the district judge to proceed.<sup>215</sup> In an opinion by Justice Rehnquist, the Supreme Court reversed.<sup>216</sup> Rehnquist distinguished *Colorado River*'s "virtually unflagging obligation" language on the grounds that the district court there had dismissed the case outright, whereas here, the court had granted a stay, which was open to reconsideration if circumstances changed.<sup>217</sup> If that distinction were sufficient to avoid any non-abstention policy of *Colorado River* and courts routinely stayed duplicative federal proceedings, the *Colorado River* doctrine would have very limited effect. Rehnquist noted as well that mandamus was an extreme remedy, available only where the litigant's right was "clear and indisputable," which he found not to be the case here.<sup>218</sup>

Justice Brennan, the author of *Colorado River*, dissented. He distinguished *Colorado River*'s result by focusing on the exclusive federal jurisdiction that federal statutes granted over one of the claims in *Will*.<sup>219</sup> Brennan considered that grant of jurisdiction as evidence of a policy favoring federal adjudication of securities claims, which distinguished it from the McCarran Act at issue in *Colorado River*, which encouraged unitary state adjudication of water rights.<sup>220</sup>

The tension between a rule that federal courts must (usually) continue and one that judicial discretion prevails persisted, at least until Justice O'Connor's unanimous opinion<sup>221</sup> in *Wilton v. Seven Falls Co.*<sup>222</sup> *Wilton* held that *Colorado River* had no impact on declaratory judgment actions, which were still governed by a discretionary standard enunciated many years earlier in *Brillhart v. Excess Insurance Co.*<sup>223</sup> Declaratory judgment actions proceed only at the discretion of the judge.<sup>224</sup> Declaratory judgment cases then, if duplicative, could be disposed of in accordance with Rehnquist's approach, despite any suggestion of *Colorado River* to the contrary.<sup>225</sup>

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*rel. Feiock v. Feiock*, 485 U.S. 624 (1988); *Samuels v. Mackell*, 401 U.S. 66 (1971); *Younger v. Harris*, 401 U.S. 37 (1971), that is not appropriate in the usual civil setting, *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989). For criticism of this set of rules, even as applied to federal suits that might interfere with state criminal proceedings, see Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM & MARY L REV. 683, 701–20 (1981).

214. 437 U.S. 655, 659 (1978).

215. *Id.* at 657–60.

216. *Id.* at 667.

217. *Id.* at 664–65.

218. *Id.* at 666.

219. *Id.* at 673 (Brennan, J., dissenting).

220. *Id.*

221. The vote was 8–0, with Justice Breyer not participating.

222. 515 U.S. 277 (1995).

223. *Id.* at 286–87 (citing *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942)).

224. The *Wilton* Court pointed to the Declaratory Judgment Act's "textual commitment to discretion." *Id.* at 286.

225. See *Will*, 437 U.S. at 665 (dictum) ("[A] busy federal trial judge . . . is . . . entrusted

Accordingly, the much-debated and important issue may have been resolved, for the moment at least, in favor of the *Colorado River* approach of very limited discretion as the usual rule for injunctive proceedings but not for declaratory ones.

The problem with such a resolution is first, that it is unclear how to apply it, and second, that some possible applications make very little sense. The ambiguity arises because parties usually can and often do ask for injunctive and declaratory relief simultaneously. Does this remove or allow judicial discretion to decline jurisdiction? If by simply joining a request for declaratory relief to an injunctive action, one could avoid the *Colorado River* presumption that the federal court proceed, then the *Colorado River* rule would be readily avoidable. Moreover, the result would be irrational and arguably unfair, in placing this aspect of the right to federal jurisdiction in total control of the plaintiff, who has the choice of which form of relief to seek.

Only the Ninth Circuit has interpreted *Wilton* in this way that so largely negates *Colorado River*. That court held that *Colorado River* applies only in cases in which the nondeclaratory claim is “independent of the request for declaratory relief.”<sup>226</sup> If a request for declaratory relief overlaps with a request for an injunction, full judicial discretion trumps any presumption *Colorado River* created.

Most circuits, however, have adopted the opposite approach. Some say that *Colorado River*'s standard of obligation to decide applies, regardless of the presence of a declaratory judgment, in any case that includes a nonfrivolous claim for damages, injunction, or other nondeclaratory relief.<sup>227</sup> In those cases, even the declaratory judgment itself will proceed in federal court. As the Fourth Circuit said in *Chase Brexton Health Services, Inc. v. Maryland Department of Health & Mental Hygiene*,<sup>228</sup> “when a plaintiff seeks relief in addition to a declaratory judgment, such as damages or injunctive relief, both of which a court *must address*, then the entire benefit derived from exercising discretion not to grant declaratory relief is frustrated, and a stay would not save any judicial resources.”<sup>229</sup> *Chase Brexton* was a § 1983 action<sup>230</sup> for injunctive and declaratory relief, and the court held that the *Colorado River* standard of obligation to hear the case governed the entire action, because the claims were “so closely intertwined” that the court could not decide one without the other.<sup>231</sup> Presumably, if a declaratory judgment claim is separate and independent, it could be stayed while other claims proceeded; perhaps full judicial discretion applies to such declaratory actions.

Often cases allowing *Wilton* discretion have been actions in which only declaratory relief was requested or appropriate, and that factor should limit the *Wilton* rule. It appears that simply choosing declaratory relief when injunctive or monetary relief could also be available will not cut short federal courts' obligation to hear the case. It is primarily in cases in which the declaratory plaintiff could not

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with wide latitude in setting his own calendar.”).

226. *United Nat'l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1114 (9th Cir. 2001).

227. *See, e.g., Kelly Inv., Inc. v. Cont'l Common Corp.*, 315 F.3d 494, 497 n.4 (5th Cir. 2002) (damages); *Vill. of Westfield v. Welch's*, 170 F.3d 116, 124 n.5 (2d Cir. 1999) (damages).

228. 411 F.3d 457 (4th Cir. 2005).

229. *Id.* at 466.

230. 42 U.S.C. § 1983 (2006).

231. *Chase Brexton*, 411 F.3d at 466–67.

have brought a coercive suit that courts have found the *Wilton* discretion to be relevant. A frequent example is an action by an insurance company seeking a declaration that it has no duty to defend or indemnify an insured.<sup>232</sup> One appellate court also applied *Brillhart* and *Wilton* in an interpleader action.<sup>233</sup> If confined to cases in which only declaratory relief can be sought, the category of cases governed by *Wilton* is much reduced.

It is a fair reading of the law at this time that *Colorado River*'s encouragement of duplicative litigation remains the rule, except in cases in which only declaratory relief is sought.<sup>234</sup> Today, a district court judge following the rules should fulfill her "virtually unflagging obligation" to exercise jurisdiction in all but purely declaratory cases, without regard to the cost of duplicating an already commenced state proceeding.

This is our current complex of rules concerning concurrent, in personam jurisdiction. Simplification is obviously desirable. In a race to judgment system, such as we now have, we also need a sensible formula for which result should control. But more boldly, one might ask whether a race to judgment system makes sense at all. I believe that the legitimacy of duplicative litigation should be narrowed or eliminated. Not only is it wasteful but also the reasons for initiating duplicative litigation often seem illegitimate, so it is difficult to be sympathetic to hearing the later-filed suit. One way to avoid duplication in many cases is by

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232. See, e.g., *Scottsdale Ins. Co. v. Detco Indus., Inc.*, 426 F.3d 994 (8th Cir. 2005) (insurance); *Verizon Commc'ns, Inc. v. Inverizon Int'l, Inc.*, 295 F.3d 870 (8th Cir. 2002) (trademark); *State Auto Ins. Cos. v. Summy*, 234 F.3d 131 (3d Cir. 2001) (insurance); *Capitol Indem. Corp. v. Haverfield*, 218 F.3d 872 (8th Cir. 2000) (insurance); *Agora Syndicate, Inc. v. Robinson Janitorial Specialists, Inc.*, 149 F.3d 371 (5th Cir. 1998) (insurance); *Nat'l Union Fire Ins. Co. v. Karp*, 108 F.3d 17 (2d Cir. 1997) (insurance); *Exxon Corp. v. St. Paul Fire & Marine Ins. Co.*, 129 F.3d 781 (5th Cir. 1997) (insurance); *Youell v. Exxon Corp.*, 74 F.3d 373 (2d Cir. 1996) (insurance); *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255 (4th Cir. 1996) (insurance company's suit for declaration that policy was void).

233. See *NYLife Distribs., Inc. v. Adherence Grp., Inc.*, 72 F.3d 371 (3d Cir. 1995) (2-1), *reh'g denied* (1996). *But see* *W. Side Transp., Inc. v. APAC Miss., Inc.*, 237 F. Supp. 2d 707 (S.D. Miss. 2002) (holding that *Colorado River*, rather than *Wilton*, applies in an interpleader action where claims for injunctive relief are also present).

234. Is it the practice as well? Lower court judges' discrete use of avoidance techniques prevents the courts from having to hear some duplicative suits. Partly because if they are apprised of the pending litigation and if there is no unusual reason making the later forum the more appropriate one, judges' inclination would usually be to avoid duplicative litigation where possible. Many would just dismiss the later-filed litigation because that is sensible; without a challenge on appeal, that would be the end of it. State rules vary, as discussed, but some at least would defer to avoid duplication or allow the state judge the discretion to do so. In federal court, even if the *Colorado River* principle against abstaining to avoid duplication were argued, the judge could invoke an exception. (More than the order of filing is usually required to avoid the wastefulness of needless duplication.) Or a district court judge may invoke an inapplicable but suitably amorphous abstention doctrine as a reason not to proceed, when the real reason is to avoid duplication. See *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968). Many cases of duplication may thus be avoided, although not always with the doctrinal purity one might desire. But many also continue, and *Colorado River* encourages them to do so.

making the same changes in the removal rules, in diversity and federal question cases, as have been advocated in Parts II and III.

*B. How Removal Can Help*

The issue of duplicative federal-state litigation is important, both in theory and in practice, and our current resolution is overcomplicated, inefficient, and not conducive to producing justice. How would this system be affected by reforming removal so that resident defendants also could remove in diversity suits, and so that in federal question cases, either party could opt for federal court on the basis of a federal cause of action or because the case otherwise appeared to turn on federal law, based not only upon the complaint but also upon the defendant's answer and the plaintiff's reply? Those are the essential removal reforms here proposed for diversity and federal question jurisdictions.

Seemingly, the amended removal procedures would resolve the problem, allowing defendants as well as plaintiffs to participate in the choice between federal and state jurisdiction. The proposed removal reforms would cure the problem, because a case brought in state court that could also be brought in federal court, by plaintiff or defendant on the basis of all of the jurisdictional papers eventually filed, could be removed from state to federal court. Thus a suit could end up in federal court, at the choice of either party, regardless of where the suit began. So the duplicative suits could be consolidated into one. An additional advantage would be a possible reduction in litigation, as the advantage currently arising from being the first to sue would be removed.<sup>235</sup>

The consolidated suit that would replace the repetitive ones would be a federal suit. With respect to removal, federal law could temper the national intrusion, preferably in the new removal statute itself. One approach would be to set strict limits upon removal—for example a requirement that removal be requested promptly after the possibility for federal jurisdiction has become known—fairly soon after it becomes apparent that the case would/could/might turn on federal law, for example. A timely and disciplined intervention of federal power, made at the initiation of litigation and before too much cost and effort has been invested in the state proceeding, may be far less abrasive and obnoxious to the state system than the kind of preempting the judgment by winning the race that can occur currently.

Of course another possible replacement for a race to judgment system is a race to the courthouse system, a system scholars call *lis pendens*. Under that approach, the first suit to commence is the one to continue. That system, like the removal reforms, would have to be put in place by Congress, so that both the state and federal systems would comply. It would be far more efficient than our current approach, because there would be only one trial. It also would have the advantage over the proposed removal reforms of having some of the affected cases end up in

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235. This is one advantage of the proposed system over a *lis pendens* system, which would have the forum chosen by the first to sue. In many ways, that system also could lead to greater efficiency than we now have. Like the removal reforms that are proposed, such a system could be brought about only through congressional enactment.

state court and some in federal court, instead of all having the option to go to federal court as with the proposed approach.

In other ways, however, changing removal rules is a better reform. It allows more prelitigation certainty, because either party has the option of invoking federal jurisdiction so both can count on a federal (but not a state) rule applying. It discourages forum shopping and eliminates unfairness between the parties, in exactly the sense that Brandeis found so objectionable in *Erie*. It also is less likely to provoke or accelerate litigation than a first-to-file rule would do.

These advantages make removal reform a better approach than *lis pendens* for our federal-state system. But there will always be some cases that escape the removal reforms, for example a case brought in state court with incomplete diversity that substantially duplicates a case in the federal diversity jurisdiction. Congress should legislate *lis pendens*, or a race to the courthouse approach, for federal-state duplicative litigation that could not be removed even under the proposed removal reforms.

#### CONCLUSION

The proposed removal changes will not only simplify federal-state procedural law; they will also be more efficient, rational, and just than the rules that currently prevail. The reform will allow federal question jurisdiction to fulfill its original purpose of allowing into federal court cases that turn on federal law. It will take a giant step toward enabling Brandeis's vision of fairness between plaintiff and defendant, as articulated in *Erie*; and concurrent, duplicative state-federal litigation, with its tangled web of jurisdictional rules, can become an anachronism, replaced by one lawsuit, a federal one, unless both parties prefer a state court that the plaintiff has chosen.