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# The Supreme Court's Cloaking Device: "[C]ongressional judgment about the sound division of labor between state and federal courts" 1

Donald L. Doernberg  
*Elisabeth Haub School of Law at Pace University*

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# The Supreme Court’s Cloaking Device: “[C]ongressional judgment about the sound division of labor between state and federal courts”<sup>1</sup>

Donald L. Doernberg\*

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

\* Copyright © Donald L. Doernberg. All rights reserved. Professor of Law *Emeritus*, Elisabeth Haub School of Law at Pace University; Visiting Professor of Law, McGeorge Law School, University of the Pacific. B.A. Yale University 1966; J.D. Columbia University 1969. John Knobel, McGeorge Law School Class of 2020, provided truly remarkable research, planning, and editing assistance throughout, and I am extraordinarily grateful to him. The same is true of Lindsay Christenson, U.C. Davis Class of 2019. Cyndy Pope, my wife and the world’s most demanding close editor, was instrumental in polishing the text.

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I. INTRODUCTION: RETURN OF THE ROMULANS<sup>2</sup>

Cloaking devices<sup>3</sup> are making news. Irony aside, technology once limited to science fiction exists today, for example in the United States' B-2 aircraft, known as the stealth bomber.<sup>4</sup> New, non-military applications are coming. For example, Toyota has received a patent<sup>5</sup> for a device that makes the supporting pillars of car windshields and rear windows seem invisible to the driver, eliminating blind spots.

Over the last thirty-five years, the United States Supreme Court has developed and deployed its own fully operational cloaking device. It works reasonably well; it does not quite make what the Court is doing invisible,<sup>6</sup> although it makes it difficult to detect. Close examination penetrates the Court's cloaking device to reveal what is really happening, much as Toto, Dorothy's dog in *The Wizard of Oz*,<sup>7</sup> pulled aside the "wizard's" curtain, revealing him as a fraud. The parallel ends there, however. There was nothing of substance going on behind the "wizard's" curtain; it was literally all smoke and mirrors. There is quite a lot going on behind the Supreme Court's cloaking device; it attempts to conceal that the Court is routinely making policy decisions about how far federal-question jurisdiction should extend, all the while attributing its own policy decisions to Congress.<sup>8</sup>

The Court has struggled with born-again<sup>9</sup> statutory federal-question jurisdiction almost from its 1875 inception. The statute tracks the Constitution's language,<sup>10</sup> but the Supreme Court has never accorded the statute the same scope,

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2. The Romulans were hostile humanoid inhabitants of another planet in the galaxy in the television series *Star Trek*. They developed a cloaking device that made their spacecraft almost impossible to detect. See, e.g., *Star Trek: The Enterprise Incident* (NBC television broadcast Sept. 27, 1968). More recently, the widely read *Harry Potter* books feature an "invisibility cloak." See, e.g., J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* 201 (1997).

3. Cloaking devices are a kind of stealth technology, for example, "the use of advanced design and specialized materials to make an aircraft difficult or even impossible to detect by radar." See, e.g., E.D. HIRSCH, JR., JOSEPH F. KETT & JAMES TREFIL, *THE NEW DICTIONARY OF CULTURAL LITERACY* 604 (3d ed. 2002). See generally Sharad Kumar, Shashank Mishra, & Shashank Gupta, *Stealth Technology: The Fight Against Radar*, 1 INT'L J. OF ADVANCES IN ELEC. AND COMPUT. SCI. 44 (2014), available at [http://www.iraj.in/journal/journal\\_file/journal\\_pdf/12-101-141777681744-49.pdf](http://www.iraj.in/journal/journal_file/journal_pdf/12-101-141777681744-49.pdf) (last visited Sept. 10, 2018) (hereinafter Kumar, Mishra & Gupta).

4. See, e.g., Eric Schmitt, *Key Senate Backer of Stealth Bomber Sees It in Jeopardy*, N.Y. TIMES, Sept. 14, 1991, at A1; Kumar, Mishra & Gupta, *supra* note 3.

5. U.S. Patent No. 9,971,162 (issued May 15, 2018).

6. See *supra* note 3.

7. *THE WIZARD OF OZ* (Metro Goldwyn Mayer 1939).

8. Psychologists recognize this as "projection": "the tendency to ascribe to another person feelings, thoughts, or attitudes present in oneself, . . . such an ascription relieving the ego of a sense of guilt or other intolerable feeling." *THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE* 1150 (Jess Stein, ed. 1969). See *infra* text accompanying notes 228–235.

9. The first statute to confer federal-question jurisdiction wholesale was part of the famous Midnight Judges Act that led to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132. It was the Federalists' last-ditch attempt to hold on to power in advance of Jefferson's accession to the presidency. Rebirth occurred almost three-quarters of a century later. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470, the true ancestor of today's 28 U.S.C. § 1331 (2012).

10. See U.S. CONST. art. III, § 2, cl. 1 (extending the judicial power to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under

which Chief Justice Marshall expounded in *Osborn v. Bank of the United States*.<sup>11</sup> The Court's varying statutory interpretations have caused trouble aplenty, leading one frustrated district judge to remark, "Many criteria have been laid down for determining when a suit arises under federal law. They can be classified, but they cannot be harmonized."<sup>12</sup> Since then, things have gotten worse,<sup>13</sup> leading Chief Justice Roberts, writing for a unanimous Court exactly 100 years later, to observe with respect to state-created causes of action that nonetheless qualify for federal-question jurisdiction, "In outlining the contours of this slim category, we do not paint on a blank canvas. Unfortunately, the canvas looks like one that Jackson Pollock got to first."<sup>14</sup>

Early on, the Court interpreted the statute with explicit reference to Congress's intent:<sup>15</sup>

The intention of congress [*sic*] is manifest, at least as to cases of which the courts of the several states have concurrent jurisdiction, and which involve a certain amount or value, to vest in the circuit courts of the United States full and effectual jurisdiction, as contemplated by the constitution, over each of the classes of controversies above mentioned. . . .<sup>16</sup>

Only four months later, the Court seemed less certain about Congress's intent.

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their Authority . . ."); see also Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

[T]he circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority.

*Id.*

11. 22 U.S. (9 Wheat.) 738 (1824). Marshall's was a breathtakingly broad reading, extending even to issues that neither party raised (the Bank's capacity to sue), merely because the issue might be present in another case. The Chief Justice posited a contract case, though the case before the Court did not sound in contract. See *id.* at 823–24.

12. *McGoon v. N. Pac. Ry.*, 204 F. 998, 1000 (D.N.D. 1913).

13. For general historical discussion of the development of statutory federal-question jurisdiction, see, e.g., Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987); William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967).

14. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). "Slim category" refers to "hybrid cases," in which the plaintiff's claim sounds in state law but depends on an interpretation of federal law to succeed. The clearest examples are negligence *per se* cases where the statutory standard of conduct is federal. See, e.g., John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145, 151 (2006).

15. The Court did not rely upon any extensive record. The legislative history of the 1875 statute consists of a single sentence the president *pro tempore* of the Senate uttered indicating that the bill extended to the constitutional limits. See 2 CONG. REC. 4986–87 (1874) (statement of Senator Carpenter). However, in early cases under the statute, the Court routinely cited cases interpreting the Constitution's arising-under language, suggesting that the Court took Carpenter's statement seriously at one time. See, e.g., *Starin v. N.Y.*, 115 U.S. 248, 257 (1885); *Ames v. Kan. ex rel. Johnston*, 111 U.S. 449, 469–72 (1884); *R.R. Co. v. Miss.*, 102 U.S. 135, 140–41 (1880).

16. *In re Hohorst*, 150 U.S. 653, 659 (1893), *superseded by statute*, Act of Mar. 3, 1897, ch. 395, 29 Stat. 695, as recognized in *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1518 (2017).

*Tennessee v. Union & Planters' Bank*<sup>17</sup> was the Court's first articulation of the well-pleaded-complaint rule<sup>18</sup> in its modern form. Noting that lower courts exercised federal-question jurisdiction even when the federal issue arose in the answer rather than the complaint, the Court said of federal trial courts, "it is . . . essential to their jurisdiction that the plaintiff's declaration or bill should show that *he asserts* a right under the constitution [*sic*] or laws of the United States."<sup>19</sup> But the Court's reliance on Congress was far more speculative; it noted what "Congress . . . *may* have had in mind, . . ."<sup>20</sup> instead of Congress's "manifest" intent.

By the time of *Louisville & Nashville R. Co. v. Mottley*,<sup>21</sup> the case most commonly associated with the well-pleaded-complaint rule,<sup>22</sup> the Court was not mentioning Congress's jurisdictional intent at all. That omission continued in a series of well-known cases throughout most of the first half of the twentieth century, as the Court continued to tinker with federal-question jurisdiction while reinforcing the well-pleaded complaint rule as foundational.<sup>23</sup>

The Court's perception of congressional intent did play a part in *Skelly Oil Co. v. Phillips Petroleum Co.*,<sup>24</sup> which involved whether the Declaratory Judgment Act<sup>25</sup> expanded subject-matter jurisdiction by allowing federal-question jurisdiction in cases that could not have qualified for it without the Act.<sup>26</sup> The Court held that Congress intended no such expansion, but the Court's unsupported

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17. 152 U.S. 454 (1894).

18. The well-pleaded-complaint rule, which antedates *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908), requires that the allegation of the federal issue be essential for the complaint to state a claim supporting relief. If the complaint, without the federal allegation(s) would nonetheless survive a motion to dismiss for failure to state a claim, the federal matter is not well pleaded. *Mottley* is the case most often associated with the rule.

19. *Union Planter's Bank*, 152 U.S. at 461 (emphasis added). The Court made it more explicit in *Third St. & Suburban Ry. v. Lewis*, 173 U.S. 457, 459 (1899) (finding no federal trial-court jurisdiction "unless [the federal matter] appears by the plaintiff's statement to be a necessary part of his claim").

20. *Union Planter's Bank*, 152 U.S. at 462 (emphasis added). Bear in mind Justice Scalia's admonition about the inherent limitations of legislative history. They underlay Justice Scalia's disdain for legislative history and tendency to attempt to infer Congress's intent from statutory language only. *Pa. v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part), *overruled by Seminole Tribe v. Fla.*, 527 U.S. 44 (1996) ("It is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.").

21. 211 U.S. 149 (1908).

22. See Doernberg, *supra* note 13, at 618.

23. See, e.g., *Moore v. Chesapeake & Ohio Ry.*, 291 U.S. 205 (1934); *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180 (1921); *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916). But see *Gully v. First Nat'l Bank*, 299 U.S. 109, 114 (1936) (passing mention of "this legislative policy," referring to statutes not automatically conferring subject-matter jurisdiction merely because one party is a federally chartered corporation).

24. 339 U.S. 667 (1950).

25. Act of June 14, 1934, ch. 512, 48 Stat. 955 (current version at 28 U.S.C. §§ 2201–2202 (2012)).

26. A complaint seeking a declaratory judgment may necessarily contain one or more allegations of federal law that would not be well pleaded in an action between the same parties seeking coercive (damages or injunctive) relief. For an example of this phenomenon, see DAVID P. CURRIE & DONALD L. DOERNBERG, *FEDERAL COURTS IN A NUTSHELL* 50–53, 61–65 (5th ed. 2016).

assertion about Congress's intent was wrong. Congress understood perfectly well that the Act would permit some new cases to reach the federal courts, particularly cases concerning allegations of patent infringement.<sup>27</sup>

The Court has considered congressional intent with respect to federal-question jurisdiction three times since *Skelly Oil*,<sup>28</sup> twice refusing to find jurisdiction. Despite disparate results, all three cases have one important thing in common. None cites any legislative history, even when discussing congressional intent. The sole reference to congressional intent in *Gunn v. Minton*<sup>29</sup> simply quotes the language from *Grable* that appears in the title of this Article. *Grable* cites no legislative material either, seemingly even acknowledging the omission:

Because arising-under jurisdiction to hear a state-law claim always raises the possibility of upsetting the state-federal line drawn (*or at least assumed*) by Congress, the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction.<sup>30</sup>

For its part, *Merrell Dow* bathes the reader in platitudes, waxing eloquent about the Court's treatment of the arising-under language of the statute while citing only the Court's own opinions.<sup>31</sup> Those opinions cite other opinions; none cite any

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27. See Donald L. Doernberg & Michael B. Mushlin, *History Comes Calling: Dean Griswold Offers New Evidence About the Jurisdictional Debate Surrounding the Enactment of the Declaratory Judgment Act*, 37 U.C.L.A. L. REV. 139 (1989); Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 U.C.L.A. L. REV. 529, 562–68 (1989) [hereinafter *Trojan Horse*]. See also *infra* note 154.

28. See *Gunn v. Minton*, 568 U.S. 251 (2013); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005); *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986).

29. *Gunn*, 568 U.S. at 258.

30. *Grable*, 545 U.S. at 314 (emphasis added).

31. *Merrell Dow*, 478 U.S. at 810–11 (footnote and citations omitted).

In undertaking this inquiry into whether jurisdiction may lie for the presence of a federal issue in a nonfederal cause of action, it is, of course, appropriate to begin by referring to our understanding of the statute conferring federal-question jurisdiction. We have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system. “If the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words . . . . The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation.” In *Franchise Tax Board*, we forcefully reiterated this need for prudence and restraint in the jurisdictional inquiry: “We have always interpreted what *Skelly Oil* called ‘the current of jurisdictional legislation since the Act of March 3, 1875’ . . . with an eye to practicality and necessity.”

In this case, both parties agree with the Court of Appeals' conclusion that there is no federal cause of action for FDCA violations. For purposes of our decision, we assume that this is a correct interpretation of the FDCA . . . . In short, Congress did not intend a private federal remedy for violations of the statute that it enacted.

legislative history materials.<sup>32</sup> “[A]y, there’s the rub.”<sup>33</sup>

The problem is not the absence of legislative history from Congress’s consideration of federal-question jurisdiction and diversity jurisdiction<sup>34</sup> or even non-jurisdictional statutes into which the Court has implied a jurisdictional message from Congress.<sup>35</sup> The difficulty is rather that none of the legislative history supports the Court’s continuing assertion that Congress has in mind some carefully calibrated policy for distributing judicial workload between federal and state judiciaries for cases presenting issues of federal law. The Court asserts that it defers to that legislative judgment, but the legislative history is inconsistent with the Court’s assumption.

That assumption is the Court’s cloaking device. Behind it, the Court has actively created its own balance, attributing it to Congress. There is good reason for that. The Justices often emphasize that the Court is not, and under the Constitution cannot be, a policy-making body.

Each side offers plausible reasons why its approach might make for the more efficient policy. But who should win that debate isn’t our call to make. Policy arguments are properly addressed to Congress, not this Court. It is Congress’s job to enact policy and it is this Court’s job to follow the policy Congress has prescribed.<sup>36</sup>

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*Id.*

32. See, e.g., *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005) (relying upon *Merrell Dow*, 478 U.S. 804); *Merrell Dow*, 478 U.S. 804 (relying upon *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983)); *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354 (1959), *superseded by statute*, Pub. L. 98-426, 98 Stat. 1639 (1984); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950) (relying upon *Colegrove v. Green*, 328 U.S. 549 (1946)); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

33. WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 1.

34. “Diversity jurisdiction” is a commonly used shorthand for what is more properly “diversity and alienage jurisdiction,” reflecting the difference between cases the federal courts can hear because (1) the parties are citizens of different states or (2) at least one of the parties is an alien or a foreign government. CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 23, at 143 n.1 (7th ed. 2011). This Article follows that convention. Diversity jurisdiction antedates federal-question jurisdiction. The Judiciary Act of 1789, ch. 20, 1 Stat. 73, created diversity jurisdiction but not federal-question jurisdiction; diversity jurisdiction has existed ever since. Periodically, Congress considers restricting or eliminating diversity jurisdiction, see *infra* text accompanying notes 109–136, but has only ever passed two kinds of modifications relevant here. One is to increase the required amount in controversy, from the original requirement of more than \$500, Judiciary Act of 1789, ch. 20, § 11 1 Stat. 73, 78, to today’s 28 U.S.C. § 1332 (2012), which requires more than \$75,000. The second is the expansion of corporate citizenship to make corporations citizens both of their states of incorporation and of the states where their principal place is. Act of Jul. 25, 1958, § 2, 72 Stat. 415, 415 (current version at 28 U.S.C. § 1332(c) (2012)). See *infra* text accompanying notes 115–120.

35. See, e.g., *25Skelly Oil Co.*, 339 U.S. at 671 (discussing the Declaratory Judgment Act, Act of June 14, 1934, ch. 512, 48 Stat. 955 (current version at 28 U.S.C. §§ 2201–2202 (2012))); *Merrell Dow*, 478 U.S. 804 at 801–11 (discussing the Federal Food, Drug, and Cosmetic Act of 1938, 50 Stat. 1040, codified as amended, 21 U.S.C. §§ 301–399d (2012)); *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314, 320 (2005) (discussing the Internal Revenue Code of 1954, 68A Stat. 5, codified as amended, 26 U.S.C. §§ 1–8023).

36. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1357–58 (2018).

Nonetheless, under the guise of following an unstated (and unlocatable) congressional policy, the Court has fashioned its own policy controlling the federal judiciary's jurisdiction. It is understandable that this arouses "a sense of guilt or other intolerable feeling"<sup>37</sup> in the Court. Justices across the spectrum have declared many times that policy is Congress's realm.<sup>38</sup>

This Article proceeds in three parts. Part I briefly explores how Members of Congress, witnesses (including some judges), and agencies drastically oversimplify the choice-of-law process. Their remarks refer to a situation that does not exist and avoid recognizing the true complexity of the choice-of-law problem and its inherent relationship to federal-question jurisdiction. Part II canvasses the history of the two primary jurisdiction statutes,<sup>39</sup> 28 U.S.C. §§ 1331 and 1332, from their inception to the present. Congress periodically considers abolishing or sharply curtailing diversity jurisdiction,<sup>40</sup> but federal-question jurisdiction has

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37. See *supra* note 8.

38. See, e.g., *Omnicare, Inc. v. Laborers Dist. Council Indus. Pension Fund*, 135 S. Ct. 1318, 1331 (2015) (Kagan, J.) ("Congress gets to make policy, not the courts."); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) (Roberts, C.J.) ("Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices."). See also *SAS Inst.*, 138 S. Ct. at 1357–58; *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 519 (2008) (Stevens, J., concurring in part and dissenting in part) ("The congressional choice not to limit the availability of punitive damages under maritime law should not be viewed as an invitation to make policy judgments on the basis of evidence in the public domain that Congress is better able to evaluate than is this Court."); *FCC v. Beach Commc'n, Inc.*, 508 U.S. 307 (1993) (Thomas, J.) ("[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."); *Roberts v. La.*, 428 U.S. 325, 363 (1976) (White, J., dissenting) ("The plurality claims that it has not forgotten what the past has taught about the limits of judicial review; but I fear that it has again surrendered to the temptation to make policy for and to attempt to govern the country through a misuse of the powers given this Court under the Constitution."); *Furman v. Ga.*, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting) ("We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these."). See *infra* text accompanying notes 230–253.

39. See *U.S. District Courts—Judicial Business 2016*, Table 4, ADMIN. OFF. OF THE U.S. CTS., <http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2016> (last visited Aug. 20, 2018) (on file with *The University of the Pacific Law Review*). That Table notes the total number of civil case filings from 2012 to 2016 and the number of such filings that were federal-question or diversity cases: 82.3% in 2012, 83.1% in 2013, 84.8% in 2014, 84.7% in 2015, and 79.4% in 2016. With the exception of 33 "local jurisdiction" cases, all of the remaining civil filings were actions by or against the federal government for which 28 U.S.C. §§ 1345, 1346 (2012) are the jurisdictional foundations.

Many other sections of Title 28 also confer jurisdiction in specialized areas, see, e.g., 28 U.S.C. §§ 1333 (admiralty), 1334 (bankruptcy), 1335 (interpleader), 1336 (Surface Transportation Board orders), 1337 (commerce), 1338 (copyrights, patents, trademarks, and unfair competition), 1339 (postal service matters), 1340 (internal revenue and customs), 1343 (civil rights cases (now all within § 1331 as well)), 1344 (election disputes), 1345 (United States as plaintiff), 1346 (United States as defendant), and others in scattered sections, but the vast bulk of federal judicial business reaches the courts under the two primary statutes.

40. See, e.g., Diversity of Citizenship Jurisdiction/Magistrates Reform—1979, H.R. 1046 and H.R. 2202, 96th Cong. (1979); Federal Courts Improvement Act of 1979, S. 677 and S. 678, 96th Cong. (1979); Federal Diversity of Citizenship Jurisdiction, S. 2094, S. 2389, and H.R. 9622, 95th Cong. (1978); Diversity of Citizenship/Magistrates Reform, H.R. 761, H.R. 5546, H.R. 7493, and H.R. 9123, 95th Cong. (1977); Jurisdiction of Federal Courts Concerning Diversity of Citizenship, H.R. 2516 and H.R. 4497, 85th Cong. (1957); Diversity Jurisdiction, Multi-Party Litigation, Choice of Law in the Federal Courts, S. 1876, 92d Cong. (1971); H.R. 1987, 82d Cong. (1951).

been an unchallenged fixture since 1875. Part III analyzes what the Supreme Court is doing behind the cloak and argues that the Court is improperly placing its own policy imprint on federal-question jurisdiction with no evidence that Congress intended any such thing.

## II. THE CONFLICTS FALLACY

### A. *The Constitution and Choice of Law*

The Constitution explicitly addresses conflicts of law<sup>41</sup> in two places. First, the Full-Faith-and-Credit Clause<sup>42</sup> requires states to credit “public Acts, Records, and judicial Proceedings of every other State.”<sup>43</sup> That language does not, however, enlighten state courts about what to do when those sources appear incompatible, either with each other (because several states other than the forum may have connections with the dispute or the parties) or with the law of the forum. The Supreme Court’s jurisprudence is less than supremely helpful.<sup>44</sup>

The second provision is the Supremacy Clause;<sup>45</sup> it is a specific choice-of-law provision. When there is a clash between federal law and state law, federal law wins. But that simple statement masks the problems. “Clash” means different things in different contexts; some clashes must be quite direct,<sup>46</sup> others not so

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41. Three eminent scholars point out that “conflicts of law” is insufficiently descriptive, appearing to be both over- and under-inclusive and resting on unstated questionable assumptions. PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* §§ 1.1–1.2, at 1–3 (5th ed. 2010). Nonetheless, as they point out, the term is well established in the United States and in general usage. *Id.* This article will follow that convention.

Choice of law, the largest branch of conflicts of law, comes in two flavors. “Vertical choice of law” asks whether state or federal law governs a particular issue. *Empire Health Assur., Inc. v. McVeigh*, 547 U.S. 677, 691 (2006). “Horizontal choice of law” involves “determining which of the conflicting rules of two or more states or countries should govern. . . .” Joseph P. Bauer, *Shedding Light on Shady Grove: Further Reflections on the Erie Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 939 (2011).

42. U.S. CONST. art. IV, § 1.

43. This is “horizontal choice of law.” *See supra* note 41.

44. *See, e.g.*, *Carroll v. Lanza*, 349 U.S. 408 (1955); *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493 (1939); *Alaska Packers Assoc. v. Indus. Accident Comm’n*, 294 U.S. 532 (1935); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932).

45. U.S. CONST. art. VI, § 2, cl. 2 (“This Constitution, and the *Laws of the United States which shall be made in Pursuance thereof*; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”) (emphasis added).

46. *Compare* *Hanna v. Plumer*, 380 U.S. 460, 470, 472 (1965) (Federal Rule of Civil Procedure applying “with unmistakable clarity” trumps a conflicting state rule because “in direct collision with the law of the relevant State”) with *Walker v. Armco Steel*, 446 U.S. 740 (1980) (Federal Rule 3 contained “no indication that the Rule was intended to toll a state statute of limitations,” so “no direct conflict between the Federal Rule and the state law”).

much.<sup>47</sup> Some state laws clash with constitutional provisions,<sup>48</sup> others with statutes.<sup>49</sup> Those are the relatively easy cases. Sometimes, however, there are clashes between state laws and important federal interests not embodied in the Constitution, federal statutes, the Federal Rules of Civil Procedure, or other federal regulatory material. Then the Court reverts to what Chief Justice Warren referred to as “the typical, relatively unguided *Erie* choice [of law].”<sup>50</sup> In such cases, the Court decides whether federal interests are so important that the Court should create federal common law that displaces otherwise applicable state law.<sup>51</sup> To say the least, that is a messy area.<sup>52</sup>

The Court has also held that the Fourteenth Amendment’s Due Process Clause sometimes bears on choice-of-law questions, though it says nothing explicit about them. For example, a state having no connection with the parties’ dispute cannot apply its own law in deciding the rights and obligations of the parties to a

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47. See, e.g., *Stewart Org. Inc. v. Ricoh Corp.*, 487 U.S. 22, 26 (1988) (interpreting federal statute lacking “direct collision” to overcome an explicit state law). Comparing *Hanna* and *Stewart* is instructive. The issue in *Hanna* was how to make service of process, and Federal Rule 4 in effect said, “Do it this way.” State law prescribed a different method.

In *Stewart*, state law explicitly made contractual choice-of-forum clauses unenforceable. Federal law, 28 U.S.C. § 1404 (2012), allowed transfer of actions “[f]or the convenience of parties and witnesses, in the interest of justice. . . .” It said nothing about contractual choice-of-forum clauses. The Court nonetheless ruled that the clause was relevant to defendant’s motion to transfer. Section 1404 clearly was not “in direct collision with the law of the relevant State,” nor did it speak “with unmistakable clarity”—or indeed at all—to the enforceability of such clauses. If the *Stewart* Court had used the *Hanna* approach, it would have come out the other way. Similarly, if the *Walker* Court had used the *Stewart* approach, it would have come out the other way, because FED. R. CIV. P. 3 is the stopping point for federal statutes of limitation. See *West v. Conrail*, 481 U.S. 35, 39 (1987).

48. See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996) (describing how the Seventh Amendment precludes appellate review of reasonableness of damages awards, despite state statutory specification of an appellate court for that function).

49. See, e.g., *Stewart*, 487 U.S. at 26 (interpreting federal statute to overcome explicit state law barring judicial enforcement of choice-of-forum provisions in contracts).

50. *Hanna*, 380 U.S. at 471.

51. See, e.g., *Boyle v. United Tech. Corp.*, 487 U.S. 500, 522–23 (1988) (uniquely federal interest in price of materiel requiring recognition of federal-contractors-immunity defense); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964) (dominant federal interest in international relations requiring recognition of act-of-state doctrine); *U.S. v. Clearfield Trust Co.*, 318 U.S. 363, 367 (1943) (dominant federal interest in uniformity of rules governing federal checks). But see, e.g., *Bank of Am. Trust & Savings Ass’n v. Parnell*, 352 U.S. 29, 33 (1956) (*Clearfield*’s dominant interest not extending to questions of ownership of federal commercial paper); *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964) (question of ownership of copyright not dominant federal interest).

52. Sometimes the Supremacy Clause, even when the Court does not cite it, prevents principles from a federal source from applying. That certainly is the case when the Court declares a federal statute unconstitutional, see *supra* note 45, but probably its best-known impact came in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Court, overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), refused to apply a common-law rule that the lower federal courts had adopted: “There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.” *Erie*, 304 U.S. at 78. Make no mistake: *Erie* was a Supremacy-Clause decision, though Justice Brandeis cited neither that nor any other provision of the Constitution. But the Court’s message was clear: no federal law—statutory or common law—can exist outside of the areas that the Constitution commits to the federal government, primarily in Article I. See U.S. CONST. art. I, § 8, cl. 1–18. That was constitutional supremacy in action.

contract.<sup>53</sup> But the Clause does permit a state with even minimal connections to apply its law.<sup>54</sup>

The Supreme Court once read the Full-Faith-and-Credit Clause<sup>55</sup> to compel a state to apply the law of another state in preference to its own.<sup>56</sup> But that was a single case; a few years later, the Court began to retreat from so literal a reading.<sup>57</sup> The retreat came in stages. First, the Court ruled that the forum need not apply sister-state law unless the other state's interests outweighed the forum's.<sup>58</sup> Then it said that a state need not apply sister-state law if doing so would ignore the forum's fully constitutional policy.<sup>59</sup> The Court did not speak of weighing one state's interest against the other's.

Finally, a fractured Court appeared to converge the conflict-of-laws analyses under the Due Process and the Full Faith and Credit Clauses.<sup>60</sup> The four-to-three plurality essentially sought "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."<sup>61</sup> Justice Powell, although dissenting about how the plurality's technique applied to the case, appeared to accept the plurality's theoretical approach. Under that approach, the default appears to be that a state

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53. *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930) (despite assignment of an insurance contract to a Texas citizen, a Texas statute deeming contractual provisions limiting time to sue to less than two years unenforceable is not applicable to a Mexican insurance contract issued in Mexico to a Mexican resident, covering tugboats in specified Mexican waters). *Accord Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985).

54. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 303 (1981). "In effect, the *Hague* decision seems to suggest that the Court will not involve itself in the choice-of-law process so long as the forum has the most minimal contacts that might support the application of the *lex fori*." HAY ET AL., *supra* note 41, § 3.26, at 192.

55. U.S. CONST. art. IV, § 1.

56. *See, e.g., Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932) (compelling New Hampshire to recognize a Vermont worker-compensation statute (precluding common-law remedies) rather than entertaining a negligence action under New Hampshire law when employer-employee relationship formed in Vermont).

57. In *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935), the Court noted, "A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. Unless by force of that clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another."

*Id.*

58. *Id.* at 550 (permitting the application of California's worker compensation law rather than Alaska's when employment relationship formed in California for work in Alaska, despite the parties' contractual agreement that Alaska law governed).

59. *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 502-03 (1939) (allowing application of forum (state-of-injury) law rather than the law of the state where employer-employee relationship formed). *See also Carroll v. Lanza*, 349 U.S. 408, 410 (1955) (acknowledging *Pacific Employers'* departure from *Bradford Electric*). A state may not, however, simply refuse to entertain an action based on a sister-state's law simply because the forum's law does not support the action. *See Hughes v. Fetter*, 341 U.S. 609, 612-13 (1951) (compelling Wisconsin to recognize a claim between Wisconsin residents under Illinois's wrongful-death statute for death occurring in Illinois even though the Wisconsin wrongful-death statute applied only to in-state deaths).

60. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981). Justice Stevens continued to analyze separately but concurred in the judgment.

61. *Id.* at 313.

may choose to apply a law to an issue unless the party opposing its application can show that the choice is arbitrary or fundamentally unfair. That standard, apart from being amorphous, is also quite generous. In short, the Constitution controls very little in the choice-of-law arena, with the result that the laws of several states are constitutionally available to a court in choosing the law that governs an issue.<sup>62</sup>

### *B. Non-Constitutional Choice of Law*

Choice of law in the United States has undergone great change. The originally dominant theory relied almost exclusively on territoriality. The law of the place where a tort happened (*lex loci delicti*) or where the parties entered into or were to perform a contract (*lex loci contractus*) governed.<sup>63</sup> Those were the only contacts between a dispute and a state that mattered. That approach began to give way in the mid-twentieth century as state courts experimented with approaches other than territoriality for choosing an applicable law, considering things such as the “center of gravity” of a dispute or “grouping of contacts.”<sup>64</sup>

In 1963, the watershed case of *Babcock v. Jackson* set off the American choice-of-law revolution in state courts by asking the question “[s]hall the law of the place of the tort invariably govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy?” The Court of Appeals of New York, much to the delight of conflict of laws scholars, adopted what came to be known as the “most significant relationship” test.<sup>65</sup>

The movement toward non-territorial approaches gained momentum, causing the American Law Institute to embark on a second attempt to restate the law of conflicts. That project began in 1952 but the Institute’s membership did not adopt the Restatement until 1971,<sup>66</sup> a time span that reflects the complexity of the field.

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62. It is important to note that choice of law proceeds on an issue-by-issue basis; it is common for the laws of more than one government to govern various issues in a single case. *See infra* text accompanying notes 69–95.

63. *See generally* RESTATEMENT OF CONFLICT OF LAWS, chs. 8, 9 (AM. LAW INST. 1934). *See, e.g.*, *Auten v. Auten*, 124 N.E.2d 99, 101 (N.Y. 1954) (quoting *Swift & Co. v. Bankers Trust Co.*, 19 N.E.2d 992, 995 (N.Y. 1939)). Most of the cases rely upon the generally accepted rules that “All matters bearing upon the execution, the interpretation and the validity of contracts . . . are determined by the law of the place where the contract is made,” while “all matters connected with its performance . . . are regulated by the law of the place where the contract, by its terms, is to be performed.”

64. *See, e.g., Auten*, 124 N.E.2d at 101–02.

65. David A. Moore, *Hubbard v. Greeson: Indiana’s Misapplication of the Tort Sections of the Restatement (Second) of Conflict of Laws*, 79 IND. L.J. 533, 534 (2004) (footnotes omitted) (citing *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963)).

66. Even then, it was what its Reporter Willis Reese called “a transitional document.” It offered both a substantial number of specific rules, which were typically described as presumptions, and a general methodology, the “most significant relationship” test. The “most significant relationship” test relied on seven factors which attempted to incorporate insights from several of the different developing schools of choice of law. *Conflict of Laws*, ALI ADVISER, <http://www.thealiadviser.org/conflict-of-laws/> (last visited Aug. 3, 2018) [hereinafter ALI

It received a mixed reception; judges liked it, but many scholars did not.<sup>67</sup> The Institute is now working on a Third Restatement, a project still in its early days.<sup>68</sup>

It is beyond the scope of this Article to delve into the workings of conflicts theory today, but there is one concept common to all the post-territorial approaches that one must understand when evaluating Congress's jurisdictional legislation. *Dépeçage*<sup>69</sup> is almost invariably present, irrespective of a state's approach to conflicts issues. The laws of more than one jurisdiction often apply in a single case. For example, New York distinguishes between conduct-regulating rules and loss allocating rules.<sup>70</sup> The law of the place where the conduct occurs governs whether the conduct constitutes negligence, but whether the tortfeasor is liable or immune may depend on the law of some other jurisdiction.<sup>71</sup>

*Dépeçage* in vertical choice-of-law cases dates at least from *Swift v. Tyson*.<sup>72</sup> Though *Erie R. Co. v. Tompkins*<sup>73</sup> overruled *Swift*, under the 96-year *Swift* regime federal courts in diversity cases applied what the Supreme Court called "general

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ADVISER] (on file with *The University of the Pacific Law Review*).

67. *Id.* (noting that the Second Restatement "has some significant failings"). One master of the subject noted that with its multifaceted general presumptions, methodology, and imprecise factors to consider, "[t]he Second Restatement is the most widely used alternative to the traditional approach, although this may be only because it is so amorphous that courts commit themselves to nothing by adopting it." LARRY KRAMER, *TEACHER'S MANUAL TO ACCOMPANY CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS* 89 (6th ed. 2001).

68. ALI ADVISER, *supra* note 66.

69. The French term "dismemberment" is defined as "[a] court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis." BLACK'S LAW DICTIONARY 469–70 (8th ed. 2004). The term applies equally well to an admixture of state and federal law. *See* SYMEON SYMEONIDES, WENDY COLLINS PERDUE & ARTHUR T. VON MEHREN, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 259 (2d ed. 2003).

70. *See generally* HAY ET. AL., *supra* note 41, §§ 17.36–17.38, at 874–84.

71. *See, e.g.,* *Schultz v. Boy Scouts of Am.*, 480 N.E.2d 679 (1985) (tortious acts committed in New York, but New Jersey law of charitable immunity prevented recovery when all parties were citizens of that state).

[T]he relative interests of the domicile and locus jurisdictions in having their laws apply will depend on the particular tort issue in conflict in the case. Thus, when the conflicting rules involve the appropriate standards of conduct, rules of the road, for example, the law of the place of the tort "will usually have a predominant, if not exclusive, concern" . . . because the locus jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future assume critical importance and outweigh any interests of the common-domicile jurisdiction . . . Conversely, when the jurisdictions' conflicting rules relate to allocating losses that result from admittedly tortious conduct, as they do here, rules such as those limiting damages in wrongful death actions, vicarious liability rules, or immunities from suit, considerations of the State's admonitory interest and party reliance are less important. Under those circumstances, the locus jurisdiction has at best a minimal interest in determining the right of recovery or the extent of the remedy in an action by a foreign domiciliary for injuries resulting from the conduct of a codomiciliary that was tortious under the laws of both jurisdictions . . . Analysis then favors the jurisdiction of common domicile because of its interest in enforcing the decisions of both parties to accept both the benefits and the burdens of identifying with that jurisdiction and to submit themselves to its authority.

*Id.* at 95–96 (citations omitted) (quoting *Babcock v. Jackson*, 191 N.E.2d 279, 287 (N.Y. 1963) citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. d, at 417–18, and § 146 cmts. d, e, at 431–33 (AM. LAW INST. 1969)).

72. 41 U.S. (16 Pet.) 1 (1842).

73. 304 U.S. 64 (1938).

law” to the rights and duties of the parties, but applied state procedural law, originally because of the Process Act of 1789’s command<sup>74</sup> and later because of the Conformity Act of 1872.<sup>75</sup> That was *dépeçage*. When *Erie* came along, *dépeçage* continued, but with roles reversed: ordinarily, in most diversity cases, state law governed the rights and duties of the parties.<sup>76</sup>

This is true generally, but certainly not invariably, and this is where some of the oversimplification inherent in the Conflicts Fallacy occurs. Even some extraordinarily knowledgeable witnesses before Congress have succumbed. For example, District Judge Elmo B. Hunter, a particularly distinguished jurist, testified in Congress, “These cases involve solely matters of State law and State subjects.”<sup>77</sup> That may simply be a shorthand description of the general case for

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74. See Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93 (federal procedure to “be the same in each state respectively as are now used or allowed in the supreme courts of the same”).

75. See Conformity Act of 1872, ch. 255, §5, 17 Stat. 196, 197 (1872) (federal procedure to “conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding”).

76. Nonetheless, the Federal Rules of Civil Procedure govern almost all aspects of shepherding the cases through the federal judicial system. Imagine being a law student returning for the second year of study in the fall of 1938 after that tectonic shift came along!

77. See, e.g., *Court Reform and Access to Justice Act, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong., at 4–5 (1987) (statement of Hon. Elmo B. Hunter) [hereinafter HSubcommCCLAJud100]. See also COURT REFORM AND ACCESS TO JUSTICE ACT OF 1988, H.R. REP. NO. 100–899, pt. 1, at 44 (1988).

For example, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), was a contract dispute between an arm of the Cuban government and a private individual. It was a diversity case and would turn on the act-of-state doctrine: “[T]he courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.” *Underhill v. Hernandez*, 168 U.S. 250 (1897). The Cuban government had expropriated a sugar crop and refused to release it until the buyer signed a new contract with the bank. Both contracts had been negotiated and signed in New York. The central issue was whether the Cuban government had seized the existing New York contract rights or the sugar crop that was in Cuba. The Supreme Court ruled that the seizure had occurred in Cuba and applied the act-of-state doctrine—a federal doctrine—to the clearly substantive-law question of whether the Cuban seizure was lawful or unlawful. Unlawful seizure would have been a complete defense, but the act-of-state doctrine prevented that. The Court justified its decision on the ground that the case involved foreign relations, which are a dominant federal interest. The federal rule thus ousted the New York law that might otherwise have applied. See also *Boyle v. United Tech. Corp.*, 487 U.S. 500, 513 (1988) (preventing recovery on a state wrongful death claim by applying a federal common-law immunity for government contractors).

There are two issues lurking in these kinds of cases. The first is whether federal or state law should apply to a particular issue. Where there is federal law—including federal common law—it applies because of supremacy. See U.S. CONST. art. VI, cl. 2. The second question is whether state or federal courts should adjudicate such cases. Abolishing diversity jurisdiction, see *supra* text accompanying note 40, would send cases like *Banco Nacional* and *Boyle* to the state courts in the first instance. When there is extant federal law, that is not a problem; the Supremacy Clause requires state courts to honor federal law’s precedence. Where there is no federal law, however, and there are recognizable federal interests bearing on an issue, protection of which might require federal common law, what should a state court do? There appear to be two choices: (1) the state court can try to anticipate whether a federal court would create a common-law rule and then try to anticipate what the rule would be and how to apply it, or (2) the state court can simply apply state law to the critical issue. Either may fail to accord proper weight to the federal interests. Thus, one unintended but practical consequence of abolishing diversity jurisdiction would be to put additional pressure on the Supreme Court to review such cases. That is not necessarily bad, but the oversimplification of viewing state claims never involving federal issues prevents one from even perceiving the problem. As Robert Heinlein so memorably said, “TANSTAAFL” (an acronym for

convenience of brevity. That is all well and good for those who grasp the nuances of Conflicts, but many do not—perhaps including many Members of Congress who will vote for or against jurisdiction-modifying statutes.

Accordingly, it is a grave mistake to speak simply of “state cases” or “federal cases.” As the American Law Institute has recognized, “The transaction or event that has connections to only one jurisdiction is now a rarity. Allocating authority among different state and national sovereigns in a sensible and predictable way is more important than ever. Yet sadly, our legal system is increasingly poorly equipped to do so.”<sup>78</sup> And therein lies the problem; courts decide many cases using the law of more than one jurisdiction. Even what seem like garden-variety tort cases often involve federal law, as the Supreme Court recognized in a 2005 federal-question jurisdiction case.<sup>79</sup> A consumer suffers injury from an impure or improperly labeled food or drug; the Food, Drug, and Cosmetic Act of 1938<sup>80</sup> may govern some of the issues in the resulting litigation, particularly whether there has been misbranding or mislabeling, predicates for negligence *per se*. Similarly, the persons suffering injuries in a car accident may seek recovery for negligence against the manufacturer, alleging that the vehicles did not comply with federal safety standards under the National Traffic and Motor Vehicle Safety Act of 1966<sup>81</sup> or the Highway Safety Act of 1966.<sup>82</sup> That is *dépeçage*.<sup>83</sup>

Nor are contracts—ordinarily thought of as state-law matters—exempt from the influence of federal law, as the Cuban-sugar-expropriation case shows.<sup>84</sup> The Truth-in-Lending Act<sup>85</sup> regulates how commercial lenders conduct their businesses; violation of the Act may be a defense to an action to collect the loan.<sup>86</sup> The Supreme Court has interpreted the Federal Arbitration Act<sup>87</sup> to invalidate contract provisions that it feels are inconsistent with federal arbitration policy, even if state contract law permits such provisions.<sup>88</sup> And that is *dépeçage*.

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“There ain’t no such thing as a free lunch.”) ROBERT HEINLEIN, *THE MOON IS A HARSH MISTRESS* 91 (1966), available at [https://ia601600.us.archive.org/12/items/TheMoonIsAHarshMistress\\_201701/TheMoonIsAHarshMistress.pdf](https://ia601600.us.archive.org/12/items/TheMoonIsAHarshMistress_201701/TheMoonIsAHarshMistress.pdf) (last visited Sept. 17, 2018) (on file with *The University of the Pacific Law Review*). See also HSubcommCCLAJud100, *supra* note 77, at 275 (statement of Stephen J. Markman, Assistant Attorney General).

78. ALI ADVISER, *supra* note 66.

79. See *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 318 (2005) (“The violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings.”) (quoting RESTATEMENT (THIRD) OF TORTS § 14 cmt. a, at 195 (Tent. Draft No. 1, AM. LAW INST., 2001)).

80. Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, 52 Stat. 1050, codified as amended, 21 U.S.C. §§ 301–399d (2012).

81. Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified as amended at 15 U.S.C. §§ 1381–1431 (2012)).

82. Pub. L. No. 93-87, 87 Stat. 290 (1966) (codified as amended at 49 U.S.C. §§ 101–80504 (2012)).

83. See *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 96th Cong. 26 (1979) [hereinafter HSubcommCCLJud96] (statement of Daniel J. Meador, Assistant Attorney General).

84. See *supra* text accompanying note 77.

85. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–65 (2012)).

86. See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455, 457 (1981).

87. 9 U.S.C. §§ 1–16 (2012).

88. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011) (finding the Federal

By the same token, actions arising under 28 U.S.C. § 1331 (federal-question-jurisdiction), including actions where federal law creates the plaintiff's cause of action, often contain issues of state law. *Wilson v. Garcia*<sup>89</sup> held that state statutes of limitation apply in actions under the Civil Rights Act of 1871,<sup>90</sup> but when such actions accrue is a question of federal law.<sup>91</sup> In *Smith v. Kansas City Title & Trust Co.*,<sup>92</sup> the plaintiff-shareholder sought to enjoin a state corporation's investment in federal bonds, claiming that the bonds were unconstitutional. Federal law obviously would determine the constitutional question, but Smith's rights as a shareholder and the corporation's power to purchase securities depended entirely on Missouri law because the defendant was a Missouri corporation. And that is *dépeçage*.

Characterizing cases as "state cases" or "federal cases" simply will not do. The meaning of those terms is not clear. Depending on the speaker, the terms may refer to cases in which state or federal law creates the plaintiff's cause of action, but they also may refer to the judicial system trying the case. Worse, even if the speaker intends to refer to the law that creates the cause of action, that obscures the entire *dépeçage* process. It paints a false, monochromatic picture of a technicolor landscape, preventing meaningful discussion. Some Members of Congress (and witnesses) have asserted that federal courts should decide questions of federal law, and state courts should decide questions of state law.<sup>93</sup> That sounds plausible, provided one reads it quickly enough, but it ignores the vast number of cases that have both federal and state issues of law. It connotes that the courts of the jurisdiction creating potentially applicable law should interpret and apply that law—even if that would require several states' courts (or state and federal courts) to participate in adjudicating a single case.

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Arbitration Act preempts the California common-law rule that class-action waivers in contracts of adhesion are unconscionable).

89. 471 U.S. 261 (1985).

90. Ch. 22, 17 Stat. 13 (1871) (current version at 42 U.S.C. §§ 1983, 1985–1986 (2012)).

91. *See, e.g., Ruiz-Sulsona v. Univ. of Puerto Rico*, 334 F.3d 157, 159 (1st Cir. 2003).

92. 255 U.S. 180 (1921).

93. *See, e.g., HSubcommCCLJud96, supra* note 83, at 23 (statement of Hon. Elmo B. Hunter) ("The guiding principle is that there should be Federal court jurisdiction where Federal questions are at stake, and State court jurisdiction where State questions are at stake and State courts are available to provide an adequate forum."); *Jurisdictional Amendments Act of 1979, S. 679, Hearings Before the S. Committee on the Judiciary*, 96th Cong. at 21 (1979) [hereinafter SCommJud96] (statement of Daniel J. Meador, Assistant Attorney General) ("[T]he guiding principle on this question of allocation of judicial business is simply this, that generally speaking, State law matters belong in the State courts, and Federal law matters belong in the Federal courts. To paraphrase an ancient statement from high authority, 'We should render unto the State that which is State, and unto the Federal that which is Federal.'"). That sentiment sounds good and logical, but it begs the quite complex questions of what matters *are* state matters, what matters *are* federal matters, and most important, precisely what it is that makes them one or the other. *See also id.* at 51 (statement of Senator Howard F. Metzenbaum, Member, Committee on the Judiciary); *id.* at 55 (statement of Charles Wiggins); H.R. REP. NO. 108–144, at 26 (2003), *as reprinted in* 2003 U.S.C.C.A.N. 1–175 ("Federal courts must apply State substantive law in diversity cases."). *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988), and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), belie that confident, but erroneous, statement.

It is sometimes asserted that diversity cases only involve State issues and that Federal judges should not have to pass on State law. With deference to some very distinguished people who have come forward with this thesis, I believe that view is too simplistic. We have a complex government with dual principles of substantive law and procedural rules and court systems. Federal judges often have to apply State law in a Federal case. Take the Consumer Product Safety Act that is partially dealt with in two of the bills that are now before you. That law recognizes and it is not unusual in its approach—that any State law that has been overlaid by the Federal statute can still be invoked and in the Federal courts. It is not unusual to have a suit that involves both Federal issues and State issues. Thus a case that might otherwise involve only State issues, will turn on an affirmative defense that is wholly Federal, such as a plea of *res judicata* involving full faith and credit, discharge in bankruptcy, or a Federal statute, such as the Hepburn Act, which regulates the giving of free railroad passage . . . It seems to me that it is too simplistic to come forward with the idea that diversity cases are always going to involve just State issues and that Federal cases are always going to involve only Federal issues.<sup>94</sup>

The assumption that a single jurisdiction's law governs all of the issues in a case is the Conflicts Fallacy, and it represents a violation of a “quotation” many erroneously attribute to Albert Einstein: everything should be made as simple as possible, but not simpler.<sup>95</sup> The Conflicts Fallacy oversimplifies a complex set of problems. Against that backdrop, it is appropriate now to focus on federal jurisdictional statutes and congressional consideration of them.

### III. THE JURISDICTION STATUTES UNDERLYING MOST FEDERAL LITIGATION

#### A. *Federal-Question Jurisdiction (28 U.S.C. § 1331)*

Except for its tumultuous false start in 1801–1802,<sup>96</sup> federal-question jurisdiction has enjoyed a tame history in Congress. It began as part of a new statute that set out all the bases for subject-matter jurisdiction of the federal circuit courts.<sup>97</sup> The description of basic federal-question jurisdiction was simple:

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94. See *Federal Diversity of Citizenship Jurisdiction Hearings Before the Subcommittee on Improvements in Judicial Machinery of the S. Committee on the Judiciary*, 95th Cong. 133–34 (1978) [hereinafter SSubcommJMJud95] (statement of Prof. James W. Moore).

95. There is no evidence that Einstein actually said this, but he did express a similar thought: “It is essential for our point of view that we can arrive at these constructions and the laws relating them one with another by adhering to the principle of searching for the mathematically simplest concepts and their connections.” Albert Einstein, *On the Method of Theoretical Physics*, The Herbert Spencer Lecture Delivered at Oxford University (June 10, 1933), in, I PHILOSOPHY OF SCI., No. 2, at 168 (Univ. of Chi. Press, 1933).

96. See *supra* note 9.

97. The federal judicial structure has evolved since the early days. Congress originally created two levels of federal trial courts, known as the circuit courts and the district courts. The district court handled small cases.

[T]he circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. . . .<sup>98</sup>

There is no significant legislative history—no hearings, no committee reports, and no mention in the Congressional Record save the one sentence from the president *pro tem* of the Senate asserting that Congress intended statutory federal-question jurisdiction to be coextensive with the constitutional description,<sup>99</sup> to which Chief Justice Marshall had given broad construction in *Osborn v. Bank of the United States*.<sup>100</sup>

Congress has recodified federal-question jurisdiction since 1875, but the only substantive change came in 1980.<sup>101</sup> For 105 years, the federal-question statute had a jurisdictional-amount floor, which tracked the amount required for diversity jurisdiction.<sup>102</sup> Congress eliminated the amount-in-controversy requirement<sup>103</sup> for three reasons. First, the courts spent considerable time attempting to assign value in cases seeking equitable relief.<sup>104</sup> Second, Congress became uncomfortable with implicitly saying to some suitors that their federal rights were not valuable enough

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The circuit courts had both original jurisdiction and appellate jurisdiction over district-court decisions. Appeals from the circuit courts, whether their jurisdiction was original or appellate, ran to the Supreme Court. In 1891, the Evarts Act, Act of Mar. 3, 1891, ch. 517, 26 Stat. 826, created the three-tier structure in effect today. See generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 1.4, at 20–33 (5th ed. 2007).

98. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

99. See *supra* note 15.

100. 22 U.S. (9 Wheat.) 738 (1824).

101. There have been proposals from time to time to allow removal of cases if the defendant raises a federal defense or files a federal counterclaim. See *infra* note 146. None have survived the legislative process.

102. See *infra* text accompanying notes 115–118.

103. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. 96-486, § 2(a), 94 Stat. 2369 (1980) (current version at 28 U.S.C. § 1331 (2012)). As Dean Chemerinsky has pointed out, removing the requirement effectively made several other statutes, which conferred original jurisdiction on the district courts without any amount-in-controversy requirement, superfluous. See CHEMERINSKY, *supra* note 97, § 5.1, at 267.

104. See *Diversity of Citizenship Jurisdiction/Magistrates Reform, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. the Judiciary*, 95th Cong. 258 (1977) [hereinafter HSubcommCCLJud95] (statement of Rep. Robert F. Drinan, Member, House Committee on the Judiciary)

I am very pleased that this proposal to eliminate the \$10,000 limitation in Federal question cases has the approval of the Judicial Conference of the United States, the American Law Institute, the Department of Justice, and the public interest lawyers. It might be an amendment we should have enacted 20 years ago

See also, e.g., *Administrative Procedure, Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 46 (1975) (statement of Robert A. Anthony, Chairman, Administrative Conference of the United States); H.R. REP. 96-1461, at 2 (1980); H.R. REP. NO. 95-893, at 25 (1978) (letter of Erwin N. Griswold to Rep. Robert W. Kastenmeier); SCommJud96, *supra* note 93, at 177 (statement of Prof. Alan B. Morrison); *id.* at 306 (letter of Prof. Kenneth L. Karst to Rep. Robert W. Kastenmeier); ABOLITION OF DIVERSITY OF CITIZENSHIP JURISDICTION, H. REP. NO. 95-893, at 302 (1978) (letter of Erwin N. Griswold); S. REP. NO. 96-827, at 1, 3–5 (1980).

to qualify for federal adjudication.<sup>105</sup> Third, Congress received assurances from many knowledgeable sources that the effect on the federal docket would be minimal.<sup>106</sup>

Apart from the disappearance of the amount-in-controversy requirement, today's federal-question statute reads remarkably like its 1875 ancestor: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."<sup>107</sup> The wording is simple. The Supreme Court's interpretations of it have been anything but simple, particularly since 1986.<sup>108</sup>

### B. *Diversity and Alienage Jurisdiction (28 U.S.C. § 1332)*

Diversity jurisdiction has a much more exciting history than federal-question jurisdiction. There is rampant speculation about why the Framers included diversity jurisdiction in the Constitution and why the first Congress granted it in

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105. See, e.g., HSubcommCCLJud95, *supra* note 104, at 165 (1977) (statement of Hon. Edward T. Gignoux); *id.* at 229 (prepared statement and testimony of Prof. Charles Alan Wright), *id.* at 247 (statement of Rep. Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary); *id.* at 263–64 (1977) (statement of Prof. Lucas A. Powe, Jr.); CONG. REC. 29787 (Nov. 17, 1980) (statement of Rep. Robert W. Kastenmeier); H.R. REP. 96-1461, at 1–2, *as reprinted in* 1980 U.S.C.C.A.N. 5063–64; ABOLITION OF DIVERSITY OF CITIZENSHIP JURISDICTION, H. REP. NO. 95-893, at 282 (1978); FEDERAL QUESTION JURISDICTIONAL AMENDMENTS ACT OF 1980, S. REP. NO. 96-827, at 3 (1980).

106. See, e.g., SCommJud96, *supra* note 93, at 52 (statement of Senator Howard F. Metzenbaum, Member, Senate Committee on the Judiciary) ("There is no valid reason for retaining the amount in controversy requirement in any Federal question case. Elimination of this requirement will result in only a slight increase in the number of suits in Federal courts and will give every citizen the right to litigate his or her Federal claims before a Federal tribunal.").

The likelihood that any increase in Federal caseloads resulting from the elimination of the jurisdictional amount will be slight is reinforced by an examination of the effects of the 1958 change in the jurisdictional amount. In that year the jurisdictional amount was increased from \$3,000 to \$10,000 for both diversity and Federal question cases. With respect to diversity cases, the change had the apparent effect of decreasing filings the following year by over 30 percent. On the other hand, Federal question filings decreased by less than 1 percent. We conclude from this that the number of Federal question cases affected by the jurisdictional amount in 28 U.S.C. § 1331 would be few. As to those few cases, we believe there should be no price on entrance to the Federal courts for a case that arises under the Constitution, laws, or treaties of the United States.

*Id.* at 32 (statement of Daniel J. Meador, Assistant Attorney General). See also *id.* at 108 (statement of Congressman M. Caldwell Butler); *id.* at 153 (statement of Prof. Herbert Wechsler); CONG. REC. 29787 (Nov. 17, 1980) (statement of Rep. Robert W. Kastenmeier); H.R. REP. 96-1461, at 2, *as reprinted in* 1980 U.S.C.C.A.N. 5063 (1980); H.R. REP. NO. 95-893, at 18 (1978) (letter from Prof. Charles Alan Wright to Rep. Robert W. Kastenmeier); HSubcommCCLJud96, *supra* note 83, at 137 (testimony of Daniel J. Meador, Assistant Attorney General); *id.* at 209 (testimony of Prof. Charles Alan Wright). See, e.g., HSubcommCCLJud95, *supra* note 104, at 272–73 (colloquy between Rep. George E. Danielson, Member, House Committee on the Judiciary, and John F. Spaniol, Jr., Assistant Director, Administrative Office of the U.S. Courts); ABOLITION OF DIVERSITY OF CITIZENSHIP JURISDICTION, H. REP. NO. 95-893, at 282 (1978). *But see* SSubcommJMJud95, *supra* note 94 (statement of the Defense Research Institute, predicting a large increase in complex class-action cases); S. REP. NO. 96-827, at 2, 5 (1980). *But see id.* at 10–11 (minority views of Senators Thurmond, Laxalt, and Dole).

107. 28 U.S.C. § 1331 (2012).

108. See *supra* text accompanying notes 9–14.

the Judiciary Act of 1789, but there is virtually no hard evidence.<sup>109</sup> “The greatest mystery, and the most heated controversy, surrounds the diversity jurisdiction . . . [T]here is to this day no consensus as to the historical justification or the contemporary need for diversity jurisdiction, though it was accepted without question at the Constitutional Convention.”<sup>110</sup>

That situation has given rise to numerous proposals over many years to curtail<sup>111</sup> or eliminate diversity jurisdiction.<sup>112</sup> Other than periodically raising the amount-in-controversy requirement,<sup>113</sup> Congress has enacted only one.<sup>114</sup> The congressional grant of diversity jurisdiction has undergone more changes than the grant of federal-question jurisdiction, but apart from the modernization of its language, the statute’s requirements have changed in a limited number of ways. One recurrent change increases the required amount in controversy. Congress began at \$500,<sup>115</sup> and from time to time has increased it, first to \$2,000,<sup>116</sup> then \$3,000,<sup>117</sup> and subsequently \$10,000,<sup>118</sup> \$50,000,<sup>119</sup> and \$75,000,<sup>120</sup> where it stands today. It is by no means clear that raising the jurisdictional amount has ever had any significant effect on the federal dockets. Because of inflation, higher dollar amounts may not reflect significant change in underlying claim value. Finally, plaintiffs can often, particularly in tort cases, to plead as much as necessary to qualify, and Congress has heard testimony to that effect.<sup>121</sup>

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109. For an excellent overview of the history of diversity jurisdiction and the arguments for and against it, see WRIGHT & KANE, *supra* note 34, §§ 1, 23, at 3, 143–53. See also Appendix, Part A.

110. WRIGHT & KANE, *supra* note 34, § 1, at 3. *But see, e.g.*, SCommJud96, *supra* note 93, at 145 (1979) (statement of Prof. Herbert Wechsler) (“I think there is no question that the fear of prejudice against the out-of-stater was the historic reason that led the First Congress to take up the option that article III confers.”).

111. For example, Congress has heard multiple witnesses and organizations suggest barring plaintiffs from filing diversity actions in their own states. See *infra* note 123.

112. See *supra* text accompanying note 40. See, e.g., *Federal Courts Improvement Act of 1979, Hearings Before the Subcomm. on Improvements in Jud. Machinery of the S. Committee on the Judiciary*, 96th Cong. 165–66 (1979) [hereinafter SSubcommIJMJud96] (statement of Hon. Henry J. Friendly); James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 14 & n.89 (1964) (gathering examples). There appears to be general agreement that even if Congress were to eliminate most diversity jurisdiction, it should retain the Federal Interpleader Act, 28 U.S.C. § 1335 (2012), and should create some sort of way to get mass tort cases into the federal courts. See Appendix, Part H. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of Title 28 of the U.S. Code) [hereinafter CAFA], helps to address the latter concern provided that someone files a class action and that the matter exceeds \$5,000,000 in controversy. See *infra* note 128.

113. See *infra* text accompanying notes 115–120.

114. See *infra* text accompanying notes 133–136.

115. Judiciary Act of 1789, ch. 20, §§ 11–12, 1 Stat. 73, 78.

116. Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, 552; Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 434.

117. Judiciary Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091.

118. Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415, 415.

119. Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 201, 102 Stat. 4642, 4646.

120. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205(a), 110 Stat. 3847, 3850.

121. See, e.g., HSubcommCCLJud96, *supra* note 83, at 36 (statement of Daniel J. Meador, Assistant Attorney General); HSubcommCCLJud95, *supra* note 104, at 194 (colloquy between Representative Robert F. Drinan and Daniel J. Meador, Assistant Attorney General); *Jurisdiction of Federal Courts Concerning Diversity*

The Judiciary Act of 1789, in addition to requiring that more than \$500 be in controversy, required that one of the parties be a citizen of the forum state, though that limitation did not apply in alienage cases.<sup>122</sup> Ironically, one of the oft-suggested (but never enacted) modern proposals to limit diversity jurisdiction would prohibit an in-state plaintiff from invoking diversity jurisdiction.<sup>123</sup> Until 1940, the District of Columbia and the various United States territories were not states for diversity purposes. In 1940, Congress explicitly allowed the federal courts to exercise jurisdiction between citizens of a state and citizens of those other enumerated areas.<sup>124</sup> Beginning in 1948, Congress has defined “states” to include the District of Columbia, Puerto Rico, and United States territories.<sup>125</sup>

Binary cases—cases with one plaintiff and one defendant—are straightforward, but there is an important additional requirement for cases with more parties. Early on, the Court announced the rule of complete diversity: cases with a plaintiff and a defendant from the same state do not satisfy the diversity statute.<sup>126</sup> Chief Justice Marshall made clear that he was construing the statute,<sup>127</sup> not the corresponding constitutional language, and the complete-diversity rule remains in place today.<sup>128</sup> Co-citizenship among plaintiffs or among defendants does not prevent diversity jurisdiction, but even one shared citizenship between opposing plaintiffs and defendants dooms it.<sup>129</sup>

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*of Citizenship, Hearing Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 85th Cong. 5 (1957) [hereinafter HSComm3Jud85] (statement of Representative William M. Tuck, Member, House Committee on the Judiciary); *id.* at 30–31, 33 (testimony of Hon. Albert B. Maris, Chairman, Comm. on Revision of the Laws of the Judicial Conf. of the United States); HSubcommCCLAJud100, *supra* note 77, at 101 (statement of Hon. Elmo B. Hunter, Jud. Conf. of the U.S.); HSubcommCCLAJud100, *supra* note 77, at 313 (statement of Hon. Abner J. Mikva).

122. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

123. *See, e.g.*, SSubcommJMJud95, *supra* note 94, at 16 (testimony of Rep. Robert W. Kastenmeier); *id.* at 73 (statement of Daniel J. Meador, Assistant Attorney General); *id.* at 81 (statement of Erwin N. Griswold, American College of Trial Lawyers); HSubcommCCLAJud96, *supra* note 83, at 85 (colloquy between Rep. Tom Railsback, Member, Committee on the Judiciary and Prof. Thomas D. Rowe, Jr.); HSubcommCCLAJud100, *supra* note 77, at 26 (prepared statement of Hon. Elmo B. Hunter, Judicial Conference of the U.S.); *id.* at 107 (statement of Hon. Elmo B. Hunter, Judicial Conference of the U.S.); *id.* at 321, 331 (statement of Hon. Patrick Higginbotham); COURT REFORM AND ACCESS TO JUSTICE ACT OF 1988, H.R. REP. NO. 100-899, pt. 1, at 760 (1988) (letter from Thomas M. Boyd, Acting Assistant Attorney General, to Senator Howell Heflin, Chairman, Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary).

124. Act of Apr. 20, 1940, Pub. L. No. 76-463, 54 Stat. 143.

125. Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415, 415 (current version at 28 U.S.C. § 1332(e) (2012)).

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

127. *Id.*

128. Because the Constitution does not require complete diversity, *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967), Congress can provide for so-called minimal diversity (diversity between any two parties) and has in two notable instances. First, the Federal Interpleader Act, 28 U.S.C. § 1335 (2012), confers jurisdiction on the district courts if any two claimants are diverse. Second, CAFA amended the diversity statute to permit class actions based on minimal diversity if more than \$5,000,000 is in controversy and “any member of a class of plaintiffs is a citizen of a State different from any defendant,” *Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 165 (2014) (quoting 28 U.S.C. § 1332(d)(2)(A)). *See infra* note 151.

129. The rule thus makes party alignment critical and affects litigators’ tactics. Congress recognized this in 1789, prohibiting diversity jurisdiction in cases involving assigned promissory notes unless the *assignor’s*

Corporations are a continuing problem in diversity litigation.<sup>130</sup> The Supreme Court originally said that corporations had no citizenship but rather took on the citizenships of their members,<sup>131</sup> but thirty-five years later the Court declared that corporations were citizens of the states that chartered them.<sup>132</sup> For diversity purposes, corporations have remained so ever since. In 1958, Congress conferred a second diversity citizenship on some corporations, making them also citizens of the states in which they have their “principal place of business.”<sup>133</sup> Congress did so to limit diversity filings, especially in cases where a corporation was effectively a local business that merely received its charter from another state.<sup>134</sup> This created a glaring anomaly when the opposing party was also from the state where the foreign corporation operated.<sup>135</sup> Many businesses incorporate in Delaware for a variety of reasons.<sup>136</sup> The effect on diversity jurisdiction was that for Delaware

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citizenship would have permitted diversity jurisdiction. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79. In 1875, Congress forbade diversity jurisdiction where “the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter. . . .” Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472 (current version at 28 U.S.C. § 1359 (2012)). The converse is not true; there is no formal prohibition of joining parties to make diversity jurisdiction unavailable, though party realignment is sometimes possible. See WRIGHT & KANE, *supra* note 34, §§ 30–31, at 177–90.

130. See Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. R. 499, 523 (1928) (“Corporate litigation . . . is the key to diversity problems. For legal metaphysics about corporate “citizenship” has produced a brood of incoherent legal fictions concerning the status of a corporation, defeated the domestic policies of states, and heavily encumbered the federal courts with controversies which, in any fair distribution of political power between the central government and the states, do not belong to the national courts.”).

131. *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809).

132. *Louisville, C. & C.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844). Professors Wright and Kane note that the Court subsequently changed its rationale while retaining the *Letson* result by borrowing *Deveaux*’s citizenship approach but conclusively presuming that all shareholders of the corporation to be citizens of the chartering state. See WRIGHT & KANE, *supra* note 34, § 27, at 166. What that accomplished is not clear.

133. Act of Jul. 25, 1958, § 2, 72 Stat. 415, 415 (current version at 28 U.S.C. § 1332(c) (2012)). Congress heard testimony from some of its own members suggesting removing corporations’ eligibility for diversity jurisdiction. See, HSComm3Jud85, *supra* note 121, at 4 (statement of Representative William M. Tuck, Member, House Committee on the Judiciary); JURISDICTION OF FEDERAL COURTS IN DIVERSITY OF CITIZENSHIP AND FEDERAL QUESTION CASES; PROHIBITING THE REMOVAL TO DISTRICT COURTS OF THE UNITED STATES OF ACTIONS COMMENCED IN STATE COURTS UNDER STATE WORKMEN’S COMPENSATION LAWS, S. REP. NO. 1830, at 1, 2, 4–5, as reprinted in 1958 U.S.C.C.A.N. 3099–3136. Congress’s passage of the amendment curtailed, but did not eliminate corporate diversity jurisdiction.

134. See HSComm3Jud85, *supra* note 121, at 8 (statement of Rep. Thomas Ludlow Ashley); *id.* at 14 (Report of the Committee on Jurisdiction and Venue, Judicial Conference of the United States); *id.* at 29 (statement of Hon. Albert B. Maris, Chairman, Committee on Revision of the Laws of the Judicial Conference of the U.S.).

135. See CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, VIKRAM DAVID AMAR, RICHARD D. FREER, HELEN HERSHKOFF, JOAN E. STEINMAN & CATHERINE T. STRUVE, 13F FEDERAL PRACTICE & PROCEDURE JURISDICTION § 3624 (3d ed. 2017), available at <https://1.next.westlaw.com/Document/163007124dca911dd8276a3d243f3ed86/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=%28sc.Category%29> (last visited Nov. 2018); HSComm3Jud85, *supra* note 121, at 28 (1957) (testimony of Hon. Albert B. Maris, Chairman, Committee on Revision of the Laws of the Judicial Conference of the United States).

136. See, e.g., William J. Carney & George B. Shepherd, *The Mystery of Delaware Law’s Continuing Success*, 2009 U. ILL. L. REV. 1, 3 (2009) (noting Delaware’s dominance in attracting corporations dating from

corporations, even if all of their operations were in a single other state, diversity jurisdiction existed for cases between the corporations and citizens of that state. Yet clearly, corporations with major business presences in various states are hardly “outsiders” that should worry about prejudice because of their Delaware citizenship. Congress’s introduction of corporate dual-state citizenship tended, therefore, to limit diversity jurisdiction when corporations were parties.

That is a brief history of the two most important federal subject-matter-jurisdiction statutes. The remaining question is whether their evolution reveals any reasonably sophisticated congressional “judgment about the sound division of labor between state and federal courts.”<sup>137</sup> It does not. To be sure, there are some recurrent themes in congressional discussions about diversity jurisdiction since 1875,<sup>138</sup> but it is a leap of faith to argue that Congress spends much time thinking about what kinds of cases *should* be in federal courts (and why) as a determinant of jurisdictional policy, especially for *federal-question* jurisdiction.

### C. *Congressional Intent—Themes*

Despite the absence of the grand plan to which the Supreme Court repeatedly adverts, Congress hears and talks about some consistent ideas when considering jurisdictional legislation.<sup>139</sup> Some come from Members of Congress. Others are from judges, representatives of the Department of Justice, litigators, and the professoriate.<sup>140</sup> But apart from the tautology that federal cases (or questions of federal law) belong in federal courts, and state cases (or questions of state law) belong in state courts, there is no evidence to support the Court’s musings. (The Court should get limited credit for not articulating the Conflicts Fallacy<sup>141</sup> that lies just under the tautology’s surface, but that provides no firm ground on which the Court can base its statements about of congressional intent.) Its assertions

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1911).

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

138. *See generally* Appendix.

139. In two instances, the Court has discerned congressional jurisdictional intent from statutes having nothing to do with jurisdiction. *See Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005) (Internal Revenue Code of 1954); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986) (Food, Drug, and Cosmetic Act of 1938). A more recent case speaks generally of “the federal-state balance approved by Congress,” but cites nothing to support the Court’s assertion that the jurisdictional result the Court reaches in that case is what Congress wanted. *See Gunn v. Minton*, 568 U.S. 251 (2013). I think of these cases as the crystal-ball cases. *See infra* text accompanying notes 159–231 for further discussion.

140. Nine areas receive repeated attention: (1) the historical basis for diversity jurisdiction, (2) the docket pressure that diversity jurisdiction generates in the federal courts, (3) concern about local prejudice against parties from other states, (4) the desirability of litigants having a choice of forum, (5) diversity jurisdiction as a “social service,” (6) differing jury pools in federal and state courts, (7) parity (or lack of parity) between state and federal courts, (8) how to handle mass-tort cases and cases involving parties from multiple states or nations, and (9) the desirability of retaining the Federal Interpleader Act, with its minimal diversity requirement, even if Congress were to eliminate or sharply curtail the remainder of diversity jurisdiction. Materials illustrating these themes appear in the Appendix. The materials are not exhaustive; the length would be prohibitive. They are, however, representative.

141. *See supra* text accompanying notes 41–95.

exemplify what then-Professor Frankfurter called, “the momentum of constant repetition.”<sup>142</sup> The Court ignores what some know as Souder’s Law: “repetition does not establish validity.”<sup>143</sup>

Most important, there are no themes with respect to federal-question jurisdiction; all relate to diversity.<sup>144</sup> Congress almost never discussed federal-question jurisdiction, and what little discussion there was focused almost exclusively on the amount-in-controversy requirement that Congress eliminated in 1980<sup>145</sup> and secondarily on whether Congress should allow removal when the defendant asserts a federal counterclaim or a federal defense.<sup>146</sup> Congress has acted with respect to federal-question jurisdiction twice in the past forty years, once to eliminate the amount-in-controversy requirement and once to codify the judicially created doctrines of pendent and ancillary jurisdiction as “supplemental jurisdiction.”<sup>147</sup> Eliminating the amount in controversy clearly expanded the federal-question jurisdiction docket to some degree.<sup>148</sup> Whether supplemental jurisdiction expanded the docket<sup>149</sup> or not is a matter of dispute among the

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142. Frankfurter, *supra* note 130, at 521.

143. See ARTHUR BLOCH, MURPHY’S LAW: THE 26TH ANNIVERSARY EDITION 72 (2003).

144. See generally Appendix. Appendix Part B, concerning docket pressure, could theoretically apply to federal-question jurisdiction, but none of the evidence suggests in any way that Congress has ever considered that as a reason for limiting federal-question jurisdiction, though it did consider it when expanding federal-question jurisdiction by eliminating the monetary jurisdictional floor. See *supra* text accompanying note 106.

145. See *supra* text accompanying note 103.

146. See, e.g., SCommJud96, *supra* note 93, at 149–50 (colloquy between Senator Max Baucus, Member, Committee on the Judiciary, and Prof. Herbert Wechsler); *id.* at 163–64 (Appendix C to statement of Daniel J. Meador, Assistant Attorney General); HSubcommCCLJud95, *supra* note 104, at 272 (statement of Joseph F. Spaniol, Jr., Assistant Director, Administrative Office of the U.S. Courts).

147. See Act of Dec. 1, 1990, Pub. L. No. 101-650, Title III, § 310(a), 104 Stat. 5113 (codified at 28 U.S.C. § 1367 (2012)).

148. See *supra* text accompanying notes 105–106.

149. When Congress enacted supplemental jurisdiction, Act of Dec. 1, 1990, Pub. L. No. 101-650, Title III, § 310(a), 104 Stat. 5113 (codified at 28 U.S.C. § 1367 (2012)), to replace the federal common law of pendent and ancillary jurisdiction, it appeared to reduce district courts’ discretion to dismiss state claims accompanying federal claims when both are “part of the same case or controversy under Article III. . . .” *Id.* United Mine Workers v. Gibbs, 383 U.S. 715 (1966), characterized pendent jurisdiction as “a doctrine of discretion, not of plaintiff’s right. . . .” *id.* at 726, and articulated four factors that district courts could consider in deciding to retain or dismiss what then were called pendent claims: whether exercising jurisdiction (1) would promote convenience, judicial economy, and fairness to litigants, *id.*, (2) require avoidable decisions on the interpretation of unclear state law, *id.*, (3) whether the state law claims “substantially predominate” over the federal claims, *id.* at 726–27, and (4) the likelihood of jury confusion if the claims were tried together. *Id.* at 727. The Court also noted that if the district court dismissed the federal claims before trial, it should also dismiss the state claims. *Id.* at 726.

The statute seems to make exercising supplemental jurisdiction the default, explicitly limiting the district courts’ discretion to factors that echo some of the *Gibbs* factors:

(c) The district courts may decline to exercise supplemental jurisdiction over a claim . . . if (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c) (2012). The first and fourth *Gibbs* factors have disappeared. The Circuits have split about the significance of this. See *infra* note 150.

circuits,<sup>150</sup> but it did nothing to contract it.<sup>151</sup>

It is noteworthy also that in 2005, Congress *increased* the federal courts' diversity docket load with CAFA. As Professor Purcell noted, "it moved against the general trend toward limiting diversity jurisdiction that had marked most reform campaigns since the late nineteenth century and, unlike the majority of those restrictive efforts, became law." Why did Congress, in an era of when the congestion of the federal docket was of such concern,<sup>152</sup> make it possible for nationwide class actions to be in federal court? CAFA supporters sought to blunt the strategy of class counsel to frame proposed nationwide classes so as to inhibit the removal of broad-reaching class actions to federal court and thereby to exploit particular state courts thought exceptionally amenable to class certification. CAFA authorizes a change in the forum that shall rule on the class certification question precisely in order to drive a change in result on that question in some instances.<sup>153</sup>

All the available evidence fails to offer even minimal support to the Court's assertion that Congress has calibrated the federal-state judicial balance carefully with respect to federal-question jurisdiction.<sup>154</sup> (The same is true of diversity

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150. See John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 943–44 n.381 (1998). According to the Ninth Circuit, "[b]"y selecting this statutory structure, it is clear that Congress intended section 1367(c) to provide the exclusive means by which supplemental jurisdiction can be declined by a court." *Exec. Software N. Am., Inc. v. United States Dist. Ct.*, 24 F.3d 1545 (9th Cir. 1994), *overruled on other grounds*, *Cal. Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008). But the Seventh Circuit has ruled that "[t]he legislative history indicates that the new statute is intended to codify rather than to alter the judge-made principles of pendent and pendent party jurisdiction. . . ." *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993). The Supreme Court has not resolved the split.

151. Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1856–57 (2008). The Federal Interpleader Act, see 28 U.S.C. § 1335(a)(1) (2012), authorizes federal jurisdiction if any two claimants are of diverse citizenship. Thus, Congress employed "minimal diversity" rather than the complete diversity that *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), mandated for cases eligible for federal jurisdiction under the then-diversity statute. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967), held minimal diversity constitutional. Complete diversity was the rule in ordinary diversity cases (including class actions) until Congress enacted CAFA. Professor Purcell has noted Congress's ability, using minimal diversity, to route almost any case to the federal courts "as long as the case involved, somehow and somewhere along the line, a diverse party." Purcell, *supra*, at 1857–58. See also *id.* at 1858–60.

152. See Appendix Part B.

153. Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1663 n.50 (2008) (footnote omitted). Congress's doing so is a clear repudiation of the idea that there is parity between state and federal courts. See Appendix, Part G.

154. There is no indication that Congress has thought about it at all, except perhaps in the limited context of the Declaratory Judgment Act making it possible for some cases to reach the federal courts that otherwise might not have, and in that context, the Court got the message wrong. See *Trojan Horse*, *supra* note 27 and accompanying text. See also *id.* at 562 n.154.

Representative Gilbert's comment during floor debate is perhaps the most graphic statement of this benefit of the declaratory judgment: "Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step." 90 CONG. REC. 2030 (1928). Gilbert's comment reflected the predicament of a manufacturer that received a cease-and-desist demand from a patentee asserting infringement. That left the manufacturer with a Hobson's choice: either cease manufacturing the product or continue, thus running the risk of ever-increasing damages (if the patentee was correct) until such time that the patentee elected to sue. The Declaratory Judgment Act allowed the

jurisdiction. Congress often *discusses* it,<sup>155</sup> but all it has ever actually *done* about it is to restrict it to some extent by adding a second possible corporate citizenship in 1958,<sup>156</sup> and increasing the amount-in-controversy requirement.<sup>157</sup>) In the absence of legislative history offering any hint about Congress's intentions with respect to federal-question jurisdiction, what is the source of the carefully calibrated balance to which the Court purports to defer?

#### IV. BEHIND THE CLOAK

The answer to the preceding question is clear: there is no balance except the Court's. If Congress has done any careful balancing with respect to federal-question jurisdiction, it has kept deathly silent about it for a very long time. That is not to say that Congress never thinks about what kinds of claims should be in the federal courts.<sup>158</sup> Many specialized jurisdictional statutes confer federal jurisdiction over particular types of claims irrespective of the amount in controversy, for example, admiralty,<sup>159</sup> bankruptcy,<sup>160</sup> interpleader,<sup>161</sup> commerce and antitrust,<sup>162</sup> intellectual property,<sup>163</sup> civil rights,<sup>164</sup> and state claims that ought to accompany related federal claims.<sup>165</sup> Congress reinforced those areas with statutes allowing removal from state to federal court.<sup>166</sup>

The congressional silence explains why the Court, when referring to the balance, *never* cites any legislative materials, relying instead on its own cases,

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manufacture to secure a judicial determination of the infringement claim before deciding what course to take.

155. See Appendix.

156. See *supra* text accompanying notes 132–136.

157. See *supra* text accompanying notes 115–121.

158. On occasion, Congress even hears testimony referring to the “appropriate allocation of judicial business among the State and Federal Courts.” SCommJud96, *supra* note 93, at 21 (statement of Daniel J. Meador, Assistant Attorney General); *id.* at 43 (statement of Hon. Elmo B. Hunter); *id.* at 60 (colloquy between Senator Howard F. Metzenbaum, Member, Committee on the Judiciary, and Charles Wiggins). One must note, however, that discussions of appropriate allocation concern whether Congress should retain diversity jurisdiction. They deal with federal-question jurisdiction only in the limited context of whether Congress should allow removal of cases on the basis of federal defenses or counterclaims to state-created claims. See *supra* note 146 and accompanying text.

159. See 28 U.S.C. § 1333 (2012).

160. See 28 U.S.C. § 1334 (2012).

161. See 28 U.S.C. § 1335 (2012).

162. See 28 U.S.C. § 1337 (2012).

163. See 28 U.S.C. § 1338 (2012).

164. See 28 U.S.C. § 1343 (2012).

165. See 28 U.S.C. § 1367 (2012).

166. See 28 U.S.C. § 1441–1447 (2012). Many of those provisions antedate Congress's grant of general federal-question jurisdiction in 1875 and so are now duplicative. See CHEMERINSKY, *supra* note 97, § 5.1, at 267. The jurisdiction statute for civil rights cases, 28 U.S.C. § 1343 (2012), is a good example. Congress enacted its predecessor as part of the Ku Klux Klan Act, Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified in 28 U.S.C. § 1343, 42 U.S.C. §§ 1983, 1985 (2012)), and it was necessary until 1875, when Congress enacted the predecessor of 28 U.S.C. § 1331, which granted general federal-question if the matter in controversy exceeded \$500. Thereafter, it retained independent jurisdictional function until 1980, when Congress's eliminated § 1331's jurisdictional-amount floor; the civil-rights-jurisdiction statute never had an amount-in-controversy requirement.

which in turn rely only on other cases.<sup>167</sup> At least the 2005 Court gets credit for admitting that *it* was assuming that *Congress* assumed the balance.<sup>168</sup> Since 1986, the Court has decided three cases in which it discussed the supposed congressional balance, each dealing with a different area of law.<sup>169</sup> Examining those cases is instructive.

A. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*

*Merrell Dow's* facts are straightforward; the Court's decision is not. Plaintiffs' children had deformities at birth, and Plaintiffs alleged that the pregnant mothers' ingestion of a Merrell Dow drug caused those deformities. Plaintiffs asserted numerous claims, but only one is important for present purposes. It alleged that the defendant had misbranded the drug, violating the Food, Drug, and Cosmetic Act of 1938.<sup>170</sup> That was negligence *per se* under state law. Thus, that count of the complaint was a hybrid claim,<sup>171</sup> sounding in state law but with a necessary element of federal law.<sup>172</sup> More than sixty years earlier, the Court had allowed federal-question jurisdiction in a hybrid case that the *Merrell Dow* majority cited,<sup>173</sup> *Smith v. Kansas City Title & Trust Co.*<sup>174</sup> *Merrell Dow* certainly did not overrule *Smith*, and only three years earlier a unanimous Court had cited *Smith* with approval.<sup>175</sup> Why, then, did the Court refuse jurisdiction in *Merrell Dow*?

The majority's statement of the issue forecast the decision: "whether the incorporation of a federal standard in a state law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one 'arising under the Constitution, laws, or treaties of the United States.'"<sup>176</sup> That is, to be sure, a reference to congressional intent, for which the Court cited nothing other than its own cases.

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167. See *supra* text accompanying notes 29–33.

168. See *supra* text accompanying note 30.

169. See *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (patent law); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) (Internal Revenue Code of 1954); *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986) (Food, Drug, and Cosmetic Act of 1938).

170. FDCA, Pub. L. No. 716, 52 Stat. 1040, (codified as amended, 21 U.S.C. §§ 301–399d (2012)).

171. See *supra* note 14.

172. The remaining claims sounded in state law without federal components. Had the Court allowed federal-question jurisdiction for the negligence-*per-se* count, they would have qualified as pendent claims. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Today they would be proper supplemental claims. See 28 U.S.C. § 1367 (2012).

173. *Merrell Dow*, 478 U.S. at 809 n.5.

174. See *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 199 (1921) ("The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.").

175. See *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) ("We have often held that a case 'arose under' federal law where the vindication of a right under state law necessarily turned on some construction of federal law, see, e.g., *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 . . . (1921); *Hopkins v. Walker*, 244 U.S. 486 . . . (1917).").

176. *Merrell Dow*, 478 U.S. at 805 (citation omitted).

The Court could have cited something from the legislative materials underlying FDCA. An early draft of a bill that eventually became FDCA did include a private right of action,<sup>177</sup> but it was not in later versions of the bill. That might have provided some ammunition for the majority's finding of congressional intent, yet the majority did not mention its disappearance. That may have been because the voluminous legislative materials on the bills<sup>178</sup> that resulted in the FDCA in 1938 contain little explanation, and what little there is hardly supports the Court's statement that,

[w]e 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.<sup>179</sup>

Had legislative materials demonstrated the "congressional conclusion," the Court would have been remiss in not citing them.<sup>180</sup> But there was nothing

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177. *See A Bill to Prevent the Manufacture, Shipment, and Sale of Adulterated or Misbranded Food, Drugs, and Cosmetics, and to Regulate Traffic Therein; to Prevent the False Advertisement of Food, Drugs, and Cosmetics, and for Other Purposes, Hearing on S. 1944 Before a Subcommittee of the S. Committee on Commerce*, 73d Cong. § 24 (1933) [hereinafter SSubcommCommerce73FDCA] ("A right of action for damages shall accrue to any person for injury or death proximately caused by a violation of this Act.").

178. *See id.*; *A Bill to Prevent the Manufacture, Shipment, and Sale of Adulterated or Misbranded Food, Drugs, and Cosmetics, and to Regulate Traffic Therein; to Prevent the False Advertisement of Food, Drugs, and Cosmetics, and for Other Purposes, Hearing on S. 2800 Before the S. Committee on Commerce*, 73d Cong. (1934) [hereinafter SSubCommCommerce74FDCA].

179. *Merrell Dow*, 478 U.S. at 814 (footnote omitted). Some lower federal courts interpreted *Merrell Dow* as rejecting jurisdiction in hybrid cases and returning to the rule of *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."). *See, e.g.*, *Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994) ("Under *Merrell Dow*, therefore, "if federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question."). *Accord*, *Rogers v. Platt*, 814 F.2d 683, 688 (D.C. Cir. 1987); *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988); *Oliver v. Trunkline Gas Co.*, 796 F.2d 86, 88–89 (5th Cir. 1986).

180. The Court is certainly not reluctant to cite legislative history when it supports the Court's decisions. In its 2017 Term, the Court relied on legislative history three times. *See Marinello v. U.S.*, 138 S. Ct. 1101, 1107 (2018) (citing House and Senate Reports); *Merit Mgmt. Gp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 889 (2018) (citing a Senate Report); *Epic Sys. Corp. v. Lewis*, 138 U.S. 1612, 1634 (2018) (citing the Congressional Record). In each of the three Terms in which the Court decided *Gunn v. Minton*, 568 U.S. 251 (2013), *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg. Co.*, 545 U.S. 308 (2005), and *Merrell Dow*, it cited legislative history. *See FTC v. Activis, Inc.*, 570 U.S. 136, 153 (2013) (citing the Congressional Record); *Amgen Inc. v. Conn. Retirement Plans and Trust Funds*, 568 U.S. 455, 476 (2013) (citing hearings and the House Conference Report); *Cutter v. Wilkinson*, 544 U.S. 709, 716, 723 (2005) (citing the Congressional Record and Senate Report); *Smith v. City of Jackson*, 544 U.S. 228, 232 n.2 (2005) (citing the Congressional Record); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 469 n.40, 470 (1986) (citing the Congressional Record); *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 239 n.9 (1986) (citing hearings); *Lyng v. Payne*, 476 U.S. 926, 929 (1986) (citing hearings); *U.S. v. Dion*, 476 U.S. 734, 741, 743 (1986) (citing hearings and Senate Report); *Brock v. Pierce Cty.*, 476 U.S. 253, 264–65 (1986) (citing Senate Report); *Sorenson v. Sec. of Treasury*, 475 U.S. 851, 865 (1986) (citing hearings); *U.S. v. Am. Coll. of Physicians*, 475 U.S. 834, 838, 840 n.3, 846 (1986) (citing hearings); *U.S. v. City of Fulton*, 475 U.S. 657, 664 (1986) (citing hearings); *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 216 (1986) (citing hearings). And in *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15, 24 (1982), the Court noted, "While the statutory

favorable to cite. There was, however, something quite unfavorable to the Court's position. Several food industry witnesses urged Congress to strike the private-right-of-action provision.<sup>181</sup> Senator Copeland, a sponsor of the bill and Chairman of the Subcommittee hearing the testimony responded to one witness: "I said several times I cannot, for the life of us, see why this was put in the bill. If the injury is received from some food or drug, there is a method provided for it at the present time."<sup>182</sup> Thus, the only available material on the disappearance of the private-right-of-action provision suggests that Congress eliminated it because it was superfluous, not because Congress thought there should not be private actions for recovery.

In any event, whether a plaintiff could assert federal-question jurisdiction on a negligence-*per-se* theory would have had little effect on the federal courts' workload. Any effect would have come only from actions by state citizens against in-state producers. Such actions would have had to proceed in the state courts in the absence of federal-question jurisdiction. That would have kept purely local cases out of the federal courts.<sup>183</sup> Query, however, whether in a world with well-developed distribution and transportation systems, with many producers distributing their goods across many states and nations, how likely it is that the bulk of such cases would not qualify for diversity jurisdiction.<sup>184</sup> Some of the

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language supplies no definitive answer, the legislative history is conclusive." (citing House Hearings, Senate and House Reports, and the Congressional Record).

181. See *infra* note 182.

182. SSubcommCommerce73FDCA, *supra* note 177, at 205 (statement of Senator Royal S. Copeland, Chairman, Subcommittee of the Senate Committee on Commerce). Producers' organizations inveighed against it. For example, the California Fruit Exchange submitted the following statement to the Subcommittee. See *id.* at 479.

Section 24, Liability for Personal Injury, is very dangerous. It should be eliminated, as it merely places the stamp of approval of the Federal Government on "ambulance chasers" and persons attempting to take unfair advantage. One large food industry organization maintains a large fund for the express purpose of fighting professional damage seekers. There is plenty of law on the statute books at the present time under which a person can sue for damages. This additional language is not needed.

*Id.* See also *id.* at 114 (statement of Dr. James H. Beal, National Drug Trade Conference); *id.* at 145 (statement of Francis L. Whitmarsh, Pure Food and Legislative Committee of the National American Wholesale Grocers' Association); *id.* at 161 (statement of Dr. John F. Anderson, E.R. Squibb & Sons).

183. *Merrell Dow* could have been a diversity case because the plaintiffs in the consolidated cases were from Canada and Scotland, and Ohio was the state of Merrell Dow's incorporation. See 28 U.S.C. § 1332(a)(2) (2012). But the plaintiffs sued in an Ohio state court, and Merrell Dow, an Ohio citizen, could not remove the case on diversity grounds. See 28 U.S.C. § 1441(b)(2) (2012). So Merrell Dow removed both of the original cases on the theory that the negligence-*per-se* count that the plaintiffs asserted qualified for federal-question jurisdiction. Removal occurs automatically upon a timely petition for removal. 28 U.S.C. § 1446(d). The federal court consolidated the cases and denied plaintiffs' motion to remand. *Merrell Dow*, 478 U.S. at 806.

184. Focusing on the largest and best-known pharmaceutical companies illustrates the phenomenon. Pfizer is a Delaware corporation with its headquarters in New York, see Pfizer, Inc., Annual Report (Form 10-K) (Feb. 29, 2016), available at <https://www.sec.gov/Archives/edgar/data/78003/000007800316000077/pfe-12312015x10kshell.htm> (on file with *The University of the Pacific Law Review*), as is Bristol-Myers Squibb. See Bristol-Myers Squibb, Annual Report (Form 10-K) (Feb. 12, 2016), available at <https://www.sec.gov/Archives/edgar/data/14272/000001427216000288/bmy-20151231x10k.htm> (on file with *The University of the Pacific Law Review*). Johnson & Johnson and Merck & Co. are both New Jersey corporations with their headquarters in New Jersey. See Johnson & Johnson, Annual Report (Form 10-K) (Feb. 24, 2016), available at

largest pharmaceutical companies have only one state citizenship; others have two.<sup>185</sup> Any plaintiff not a citizen of one of a defendant corporation's states, assuming she can allege in excess of \$75,000 in damages, can file in a federal court. The Court's concern in *Merrell Dow* with the number of hybrid FDCA cases the federal courts might have to hear as federal-question cases rings hollow.<sup>186</sup>

*Merrell Dow* raised, but never even attempted to answer, another important question about the Court's analysis. It is one thing to attempt to infer congressional intent about jurisdiction from a jurisdictional statute; it is quite another to infer such intent from non-jurisdictional statutes. How are the Justices to know, when construing a statute having nothing to do with subject-matter jurisdiction, that there lurked in the congressional mind<sup>187</sup> some unexpressed intent to direct the Court to construe a jurisdictional statute differently? Unfortunately, the two ensuing cases dealing with federal-question jurisdiction do not assist that inquiry.

### B. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*

*Grable* built on the foundation that *Merrell Dow* failed to supply. Justice Souter's opinion for the unanimous Court<sup>188</sup> noted that the Court had granted

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<https://www.sec.gov/Archives/edgar/data/200406/000020040616000071/form10-k20160103.htm> (on file with *The University of the Pacific Law Review*); Merck & Co., Inc., Annual Report. (Form 10-K) (Feb. 26, 2013), available at <https://www.sec.gov/Archives/edgar/data/310158/000119312513084618/d438975d10k.htm> (on file with *The University of the Pacific Law Review*). Eli Lilly is an Indiana corporation with its headquarters in that state. See Eli Lilly and Co., Annual Report (Form 10-K) (Feb. 19, 2016), available at <https://www.sec.gov/Archives/edgar/data/59478/000005947816000321/lly-20151231x10k.htm> (on file with *The University of the Pacific Law Review*). Abbott Laboratories is entirely from Illinois. See Abbott Labs., Annual Report (Form 10-K) (Feb. 27, 2015), available at <https://www.sec.gov/Archives/edgar/data/1800/000104746915001377/a2222655z10-k.htm> (on file with *The University of the Pacific Law Review*).

185. See *id.*

186. There is yet another problem with the *Merrell Dow* Court's reliance on the FDCA Congress's intent. Assuming *arguendo* (1) that Congress had some jurisdictional intent and (2) the Court's majority correctly divined that intent, why is it even relevant? The FDCA Congress did not amend (or even mention) the federal-question jurisdiction statute. The most recent recodification of federal-question jurisdiction had happened in 1911, see Act of Mar. 3, 1911, ch 231, § 24, 36 Stat. 1087, 1091 ("The district courts shall have original jurisdiction as follows: "First . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. . . .").

The language concerning federal-question jurisdiction was not materially different from what exists today, see 28 U.S.C. § 1331 (2012), or what existed in 1875, when Congress enacted the 1911 statute's predecessor. See *supra* note 10. The *Merrell Dow* Court in effect attributed to the 1938 Congress, without evidence, an amendatory intent with respect to a statute originally enacted sixty-three years earlier and recodified twenty-seven years earlier that Congress never mentioned, and gave that assumed intent the force of law without it having gone through the process that the Constitution prescribes for enacting legislation. That is the very sort of end run that the Court had condemned only three years earlier in *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 952–59 (1983).

187. I recognize that even using this phrase is making a hell of a big assumption. See *supra* note 20.

188. Justice Thomas concurred, agreeing with Justice Souter's analysis under long-established law, but arguing that the Court, for the sake of simplicity and clarity, should return to the law-that-creates-the-cause-of-action test that Justice Holmes articulated in *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (2016). *Grable*, 545 U.S. at 320–21 (Thomas, J., concurring). But see *supra* note 179, suggesting that Holmes's formula did not command a majority even in *American Well Works*.

certiorari “to resolve a split within the Courts of Appeals on whether *Merrell Dow* . . . always requires a federal cause of action as a condition for exercising federal-question jurisdiction,”<sup>189</sup> thus acknowledging the confusion that *Merrell Dow* generated. But the Court was explicit that it had not intended *Merrell Dow* to establish that (or any) bright-line test and denied that one could properly read that case as having done so.<sup>190</sup>

*Merrell Dow* regarded the absence of a private right of action as weighing against federal-question jurisdiction in a hybrid case. *Grable* seemed to back away from that, characterizing the absence of a private right of action as “Congress indicat[ing] ambivalence.”<sup>191</sup> The Court did not cite anything tending to demonstrate that Congress was ambivalent or that Congress had even thought about a private right of action at all. *Grable* and *Merrell Dow* are two instances of the Court “hearing” the sounds of silence.<sup>192</sup>

There is good reason to suspect Congress had never thought about it. *Grable* concerned an Internal Revenue Service seizure and sale of Grable’s property to satisfy a tax delinquency. That occurred under the Internal Revenue Code of 1954, as amended. The federal issue was whether the Code section specifying service of a notice of sale on a delinquent taxpayer required personal service rather than substituted service by certified mail.<sup>193</sup> Consider how likely it is that the 1954 Congress, which enacted the Internal Revenue Code, spent much time (a) mulling over whether service under that provision had to be in-hand,<sup>194</sup> and (b) ever considered whether violation of the service provision should be a predicate for federal-question jurisdiction.

And yet, the Court waxed eloquent about Congress’s intent.

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 governing the application of § 1331.

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The meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court. The Government has a strong interest in the “prompt and certain collection of delinquent taxes,” . . . and

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189. *Grable*, 545 U.S. at 311–12. See *supra* note 179.

190. *Grable*, 545 U.S. at 317.

191. *Id.* at 320.

192. Simon & Garfunkel should be proud. See SIMON & GARFUNKEL, THE SOUNDS OF SILENCE (Columbia Studios 1964).

193. See 26 U.S.C. § 6335 (2012). Grable did receive the mail and thus had actual notice. *Grable*, 545 U.S. at 310.

194. The statutory text appears fairly clearly to support specified forms of substituted service, and Grable had lost on that issue in both the district and the circuit court. See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 207 F. Supp. 2d 694 (W.D. Mich. 2002), *aff’d*, 377 F.3d 592 (6th Cir. 2004) (note that the Sixth Circuit, where *Merrell Dow* originated, obviously did not read that decision as having excluded all hybrid cases).

the ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers like Darue to satisfy themselves that the Service has touched the bases necessary for good title. The Government thus has a direct interest in the availability of a federal forum to vindicate its own administrative action, and buyers (as well as tax delinquents) may find it valuable to come before judges used to federal tax matters. Finally, because it will be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor.<sup>195</sup>

The juxtaposition of two excerpts from the Court's opinion is interesting. The first speaks of "congressional judgment about the sound division of labor between state and federal courts,"<sup>196</sup> but cites nothing except *Franchise Tax Board v. Construction Laborers Vacation Trust*,<sup>197</sup> an ERISA<sup>198</sup> case that decided whether a hybrid claim under a state's declaratory judgment statute qualified for federal-question jurisdiction using the approach of *Skelly Oil*,<sup>199</sup> a case under the federal Declaratory Judgment Act.<sup>200</sup> The *Franchise Tax Board* Court paid lip service to congressional intent, but the only mention of a specific intent was that Congress made clear that it had not intended the federal law involved "to preempt entirely every state cause of action relating to such plans."<sup>201</sup> That is well enough, but the Court did not explain why a decision not to preempt suggested, much less compelled, the conclusion that Congress would *not* have wanted there to be federal-question jurisdiction in cases involving ERISA. The Court cited no legislative history concerning federal-question jurisdiction.<sup>202</sup>

Now consider the second excerpt. The first sentence makes a policy argument; it is not a statement of law.<sup>203</sup> The same is true of the second part of the quotation; there the Court fleshed out its preceding assertion, going into more detail of why

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195. *Grable*, 545 U.S. at 313–15. One might sense a counterintuitive irony in the concluding sentence. The Court appears implicitly to take the position that the more often a particular federal issue will arise in litigation, the less appropriate it is to exercise federal-question jurisdiction.

196. *Id.*

197. 463 U.S. 1 (1983).

198. Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, 89 Stat. 829 (current version at 29 U.S.C. §§ 1001-1461 (2012)).

199. *See supra* text accompanying notes 24–27.

200. *See* 28 U.S.C. §§ 2201–2202 (2012).

201. *Franchise Tax Bd.*, 463 U.S. at 25.

202. The Court did cite one remark from the Congressional Record, but it appears to have nothing to do with federal-question jurisdiction. *See Franchise Tax Bd.*, 463 U.S. 1, 24 n.26 ("ERISA's legislative history indicates that, in light of the act's virtually unique preemption provision, . . . 'a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.'") (quoting 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits)).

203. The Court has often asserted policy judgments are not appropriate judicial territory. *See supra* text accompanying notes 36–38; *infra* text accompanying notes 230–252.

such cases “sensibly belong[ ] in a federal court.”<sup>204</sup> The third sentence adverts to the balance of work between federal and state judiciaries. Note that Congress is entirely absent from the discussion. Surely the arguments the Court found compelling would have found some mention, at some point, in the legislative process. That clearly would have supported the Court’s assertion about congressional intent, but there was no mention. It therefore is appropriate to ask which institution—Congress or the Court—is really making the judgment about the sound division of labor.

Between those two excerpts lies an even more interesting statement. “[A]rising-under jurisdiction to hear a state-law claim always raises the possibility of upsetting the state-federal line drawn (*or at least assumed*) by Congress. . . .”<sup>205</sup> In this context, that is a confession of sorts. Without support in any legislative history, the *Court* is assuming that *Congress* assumed a sophisticated balance of the distribution of work between federal and state judiciaries. This is reminiscent of Judge Friendly’s famous comment: “Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought.”<sup>206</sup> This is the stuff of which crystal balls are made. The Court admits here that it is not deducing what Congress actually intended, nor is it even inferring congressional intent from any congressional materials discussing it. The balance is the Court’s.

To the extent that *Grable* clarified *Merrell Dow* (or did it?), it may represent doctrinal development, though it is difficult to pin down exactly what the doctrine is. Eight years later, *Gunn v. Minton*<sup>207</sup> attempted to be more specific. Chief Justice Roberts wrote for a unanimous Court.

### C. *Gunn v. Minton*

Minton, a client, sued the Gunn attorneys for malpractice in handling a patent infringement suit, arguing that they had failed to raise a winning argument. His case depended on whether that failure caused his defeat; the attorneys argued that it did not. Minton’s malpractice case was in a Texas state court.<sup>208</sup> The trial court ruled for the defendants, and on appeal, Minton argued that the trial court had lacked subject-matter jurisdiction because the malpractice action, depending as it did on patent law, was within the exclusive jurisdiction of the federal courts. Although he lost in an intermediate appellate court, the Texas Supreme Court

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204. *Grable*, 545 U.S. at 315.

205. *Id.* at 314.

206. *Nolan v. Transocean Airlines*, 276 F.2d 280 (2d Cir. 1960), *judgment set aside and remanded for reconsideration*, 365 U.S. 293 (1961). The remand occurred because of a change in California law that the California Supreme Court announced after judgment in the district court. The change occurred shortly before oral argument in the Second Circuit, which had no occasion to consider it. *Nolan*, 365 U.S. at 295. The Supreme Court had no quarrel with Judge Friendly’s statement of the issue. On reconsideration, the Second Circuit again affirmed the district court’s decision. *Nolan v. Transocean Airlines*, 290 F.2d 904 (2d Cir. 1961).

207. 568 U.S. 251 (2013).

208. The patent case had been in federal court, as 28 U.S.C. § 1338 (2012) required.

reversed in a split opinion, apparently leaving Minton free to recommence his malpractice action in a federal court.<sup>209</sup>

The Supreme Court granted certiorari. The Chief Justice wrote:

In an effort to bring some order to this unruly doctrine several Terms ago, we condensed our prior cases into the following inquiry: Does the “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”? That is, federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.<sup>210</sup>

That was nothing new. The first point is a restatement of the well-pleaded-complaint rule.<sup>211</sup> The second comes from *Gully v. First National Bank*,<sup>212</sup> an opinion by Justice Cardozo upon which the Court often relies in federal-question cases. The Court announced the last two criteria in *Merrell Dow*,<sup>213</sup> and *Grable* simply adverted to them. The four-prong test merely consolidates previously announced factors for determining federal-question jurisdiction. It offers little, if any, clarification of the unruly doctrine.

The doctrine today is no less unruly than it was ten, twenty, thirty, or forty years ago—or indeed, back to the beginning of federal-question jurisdiction well over a century ago. The question is who is responsible, and Congress and the Court must share the credit. Congress did its part by using as open-ended a term as “arising under,” clearly copying the Constitution’s language,<sup>214</sup> and perhaps expecting that the language would have the same broad meaning that Chief Justice Marshall had announced in *Osborn v. Bank of the United States*.<sup>215</sup> Senator Carpenter’s lonely statement in support of the 1875 rebirth of federal-question suggested as much.<sup>216</sup>

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209. Whether it made sense to do so is another matter. The Texas trial court had ruled that Minton “had put forward ‘less than a scintilla of proof’” and granted summary judgment to the attorneys. *Gunn*, 568 U.S. at 255 (quoting the trial court).

210. *Id.* at 258 (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005)).

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

212. 299 U.S. 109 (1936).

213. 478 U.S. 804 (1986).

214. *See* U.S. CONST. art. III, § 2, cl. 1.

215. 22 U.S. (9 Wheat.) 738 (1824). Marshall seems to have thought that if either party could spell “federal,” that was close enough for constitutional federal-question jurisdiction.

216. *See supra* note 15. One should note that the Senator’s remarks came in the context of a spirited debate concerning provisions of the bill that had implications for personal jurisdiction and venue. No part of the debate suggested any dissatisfaction with the bill’s provisions for subject-matter jurisdiction. However, Senator Carpenter’s remark addressed itself to the entire bill, including its provisions for service of process. Although it encompassed the entire bill, including the provision for federal-question jurisdiction, Senator Carpenter did not specifically address that more limited matter. *See* 2 CONG. REC. 4978–4988 (1874).

Placing the entire weight on Congress, however, overlooks the Court's significant contributions to the confusion. That, of course, has not stopped the Court from blaming the confusion on Congress.<sup>217</sup> It is time to pierce the cloak and pull aside the curtain.<sup>218</sup>

D. *Behind the Screens (and Scenes)*

1. *Whose Balance Is It?*

The Court is correct about one thing concerning federal-question jurisdiction: there is a carefully calibrated balancing that has been going on over a long period of time. However, the Court is wrong—perhaps disingenuous—about the branch of the government doing the balancing. The record shows that almost all congressional balancing involving subject-matter jurisdiction occurred with respect to diversity, not federal-question, jurisdiction, with two exceptions.<sup>219</sup> With respect to diversity, Congress clearly was most concerned with the federal courts' docket load,<sup>220</sup> but the only time Congress even mentioned federal court congestion with respect to federal-question jurisdiction was in 1979–1980 when it considered and re-enacted the general federal-question statute without its previous jurisdictional-amount floor.<sup>221</sup>

The Court used to be more straightforward. In a famous passage in *Gully v. First National Bank*,<sup>222</sup> Justice Cardozo made no bones about the Court's process:

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

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217. See *supra* text accompanying notes 167–170, 199–203.

218. See *supra* text accompanying notes 3–8.

219. One is Congress's decision to codify a law of pendent and ancillary jurisdiction (now "supplemental jurisdiction") doctrines the Court had developed. See *supra* text accompanying notes 145–150. The other is the elimination of the amount-in-controversy requirement. See *supra* text accompanying notes 103–105.

220. See Appendix, Part B.

221. See *supra* text accompanying notes 101–106.

222. 299 U.S. 109 (1936).

we put that compass by.<sup>223</sup>

He admitted forthrightly that the courts made the decisions about which cases were worth federal-question jurisdiction and which were not. He did not attempt to shift responsibility to Congress.

Justice Frankfurter followed Justice Cardozo's lead. In *Romero v. International Terminal Operating Co.*,<sup>224</sup> his opinion for the Court characterized statutory federal-question jurisdiction as having

been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the [statute's] function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding.

Here, too, there is no pretense that the Court walked a line Congress drew. Construing laws is the province of the courts. Justice Frankfurter noted the things the Court had considered in making its jurisdictional decisions: history and sound judicial policy. And in 1983, a unanimous Court, speaking through Chief Justice Burger, quoted that language from *Romero* with obvious approval.<sup>225</sup>

Only in 1986 did the Court begin to attribute its federal-question decisions to congressional jurisdictional balancing that appears nowhere in any records.<sup>226</sup> “[D]eterminations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.”<sup>227</sup> The Court's exercise of its sensitive judgment apparently was unable to identify any actual manifestations of congressional intent. The Court's repeated cite-less vision of congressional intent raises an important question. Why does the Court think it is necessary to employ this cloaking device?

## 2. *Judicial Policy-Making and Federal Common Law*

The cloak attempts to shield the Court from self-condemnation, a classic example of the psychological phenomenon of projection:<sup>228</sup>

the process by which one attributes one's own individual positive or negative characteristics, affects, and impulses to another person or group.

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223. *Id.* at 117 (emphasis added).

224. 358 U.S. 354, 379 (1959).

225. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494–95 (1983).

226. See *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986). In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), Justice Frankfurter spoke (incorrectly) of Congress's intent with respect to the Declaratory Judgment Act, see *supra* text accompanying notes 24–27, but at least there the Court focused on that specific statute rather than adverting to some hypothetical congressional architecture for federal and state judicial jurisdiction more generally.

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

228. See *supra* note 8.

This is often a defense mechanism in which unpleasant or unacceptable impulses, stressors, ideas, affects, or responsibilities are attributed to others . . . Such defensive patterns are often used to justify prejudice or *evade responsibility*.<sup>229</sup>

The Court talks about congressional balancing but proves none and attributes its own conduct to Congress. The Court does not want the weight of the balancing, as it were, to be on its shoulders. Why is that?

The Court has often instructed that it cannot properly inquire into the wisdom underlying constitutional statutes and will not do so.<sup>230</sup> Yet in this area, it clearly has. The carefully articulated approach that Chief Justice Roberts outlined in *Gunn v. Minton*,<sup>231</sup> insofar as it purports to rest on congressional intent, is a structure with no foundation. Justice Scalia once noted that Judge Harold Leventhal, a former colleague of Justice Scalia's on the United States Circuit Court for the District of Columbia, "used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."<sup>232</sup> The complete absence of references to anything even tending to demonstrate the kind of intent the Court routinely attributes to Congress suggests that the Court has no friends at this particular congressional cocktail party.

The truth is that the Court—perhaps with the best of intentions—has fashioned an amorphous body of federal common law. There is nothing inherently wrong with federal common law,<sup>233</sup> but Justices across the judicial spectrum have always

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229. AM. PSYCHOL. ASS'N, APA DICTIONARY OF PSYCHOLOGY 843 (2d ed. 2015) (emphasis added).

230. See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194–95 (1978).

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal."

Our Constitution vests such responsibilities in the political branches.

*Id.* See also *Griswold v. Conn.*, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."); *Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963) ("We refuse to sit as a 'superlegislature to weigh the wisdom of legislation. . . .'); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919) (citations omitted) ("No principle of our constitutional law is more firmly established than that this court [*sic*] may not, in passing on the validity of a statute, inquire into the motives of Congress. . . . Nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of a power is not an argument against its existence."); *U.S. v. Union Pac. R.R. Co.*, 91 U.S. 72, 91 (1875) ("We cannot sit in judgment upon [a statute's] wisdom or policy. When we have interpreted its provisions, if Congress has power to enact it, our duty in connection with it is ended."); see also *supra* text accompanying notes 36–38.

231. 458 U.S. 251, 258 (2013). See *supra* text accompanying note 210.

232. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). Then-Judge Patricia Wald, also a member of that court, recalls Judge Leventhal saying the same thing in a conversation with her. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 & n.143 (1983).

233. Contrary to the recollections of many lawyers (and students at examination time), *Erie v. Tompkins*, 304 U.S. 64 (1938), did not say there is no federal common law. It made the quite distinct statement that "there is no federal *general* common law," *id.* at 78 (emphasis added), by which Justice Brandeis meant that there could

cautioned that it needs to be in furtherance of some federal law<sup>234</sup> or in an area of “uniquely federal interest.”<sup>235</sup> They have cautioned repeatedly against the federal courts making policy judgments.

For example, in *Boyle v. United Technologies, Inc.*,<sup>236</sup> a product-liability case, the majority recognized a federal-contractors’-immunity defense that the Fourth Circuit had created as federal common law.<sup>237</sup> The defense prevented recovery that state law would have allowed. Justice Scalia’s majority opinion noted that the government’s ability to purchase military equipment to its specifications without exposing contractors to potential liability for product defects (which presumably would have tended to increase product cost) was a uniquely federal interest. But the majority imposed another requirement for creating federal common law, at least when the federal common law would displace state law.

That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end the inquiry. That merely establishes a necessary, not a sufficient, condition for the displacement of state law. Displacement will occur only where, as we have variously described, a “significant conflict” exists between an identifiable “federal policy or interest and the [operation] of state law,” . . . or the application of state law would “frustrate specific objectives” of federal legislation . . . The conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates “in a field which

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be no federal common law (as there had been under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)) in areas that the Constitution had not assigned to the federal government. His statement was a repudiation of natural-law theory in favor of legal positivism. See Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis*, 109 W. VA. L. REV. 611, 621, 623–25 (2007).

234. See, e.g., *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (applying four previously identified criteria to the question of whether the Court should imply a private right of action in Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (current version at 20 U.S.C. § 1981 (2012))). See also *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469–70 (1942) (Jackson, J., concurring) (quoting *Erie*, 304 U.S. at 78) (quoting the Rules of Decision Act, Federal Judiciary Act of 1789, ch. 20, 1 Stat. 73 (current version at 28 U.S.C. § 1652 (2012))).

I do not understand Justice Brandeis’s statement . . . that “There is no federal general common law,” to deny that the common law may in proper cases be an aid to or the basis of decision of federal questions. In its context it means to me only that federal courts may not apply their own notions of the common law at variance with applicable state decisions except “where the Constitution, treaties, or statutes of the United States [so] require or provide.”

*Id.* (citation and footnote omitted).

235. See, e.g., *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

[T]he Court has recognized the need and authority in some limited areas to formulate what has come to be known as “federal common law,” . . . These instances are “few and restricted,” . . . and fall into essentially two categories: those in which a federal rule of decision is “necessary to protect uniquely federal interests,” . . . and those in which Congress has given the courts the power to develop substantive law.

*Id.* (citations omitted).

236. 487 U.S. 500 (1988).

237. See *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986).

the States have traditionally occupied” . . . Or to put the point differently, the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can. But conflict there must be.<sup>238</sup>

There was no mention of congressional intent.

Ironically, there was a legislative record available from which the Court might have made at least a weak inference of congressional intent, but it cut the wrong way. As Justice Brennan’s dissent pointed out, Congress previously had considered six bills that would either have established the immunity or provided indemnification for the contractors. None survived the legislative process.<sup>239</sup> Justice Brennan even quoted a colleague’s protest against a federal-common-law extension of a doctrine insulating the government from tort liability arising from injuries to servicemen incident to military service<sup>240</sup> to cover “negligence on the part of civilian employees of the Federal Government.”<sup>241</sup> The author of that protest was none other than Justice Scalia (whom Justice Brennan had joined) just a year before *Boyle*:

As it did almost four decades ago in *Feres* . . . , the Court today provides several reasons why Congress might have been wise to exempt from the Federal Tort Claims Act (FTCA) . . . certain claims brought by servicemen. The problem now, as then, is that *Congress not only failed to provide such an exemption, but quite plainly excluded it*. We have not been asked by respondent here to overrule *Feres*; but I can perceive no reason to accept petitioner’s invitation to extend it as the Court does today.

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If our [extension of *Feres*] bore the legitimacy of having been prescribed by the people’s elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and it is not.<sup>242</sup>

But Justice Scalia’s *Boyle* opinion did not even mention his *Johnson* dissent and ignored Justice Brennan’s mention of the failed efforts in Congress. Said Justice Brennan,

Were I a legislator, I would probably vote against any law absolving multibillion dollar private enterprises from answering for their tragic mistakes, at least if that law were justified by no more than the

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238. *Boyle*, 487 U.S. at 507–08 (footnotes and citations omitted).

239. *See id.* at 515 & n.1 (Brennan, J., dissenting).

240. *See Feres v. U.S.*, 340 U.S. 135 (1950).

241. *U.S. v. Johnson*, 481 U.S. 681, 682 (1987).

242. *Id.* at 692, 703 (Scalia, J., dissenting) (emphasis added and citations omitted).

unsupported speculation that their liability might ultimately burden the United States Treasury. Some of my colleagues here would evidently vote otherwise (as they have here), but that should not matter here. We are judges not legislators, and the vote is not ours to cast.<sup>243</sup>

He clearly regarded what the majority had done as a usurpation.

A few years earlier, another Justice had decried a majority's creation of federal common law, even though it furthered a congressional policy that a recent statute clearly expressed. *Cannon v. University of Chicago*<sup>244</sup> involved a claim under Title IX of the Educational Amendments of 1972<sup>245</sup> that the University had refused to admit the plaintiff to its medical school because of her sex. The statute contained no private right of action. Nonetheless, Justice Stevens's opinion for the Court implied a private right of action in the statute based on criteria for implying such a right in a statute that the Court had announced four years earlier in *Cort v. Ash*.<sup>246</sup> The majority found that Congress (1) had enacted Title IX for the benefit of a special class of which Cannon was a member and (2) had not indicated any intention to deny such an action.<sup>247</sup> The Court also considered (3) whether implying a right of action "would frustrate the underlying purpose of the legislative scheme,"<sup>248</sup> and (4) whether it should forgo implication because "the subject matter involves an area basically of concern to the States."<sup>249</sup> Finding that all four criteria pointed in the direction of implying a private right of action, the Court did so. Two years after *Cannon*, the Court ruled that the four criteria went to "the ultimate issue [of] whether Congress intended to create a private right of action."<sup>250</sup>

Justice Powell dissented vigorously, asking why, if it was so clear that

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243. *Id.* at 531 (Brennan, J., dissenting). Justice Stevens's dissent also highlighted his disagreement with *Boyle*'s creation of common law:

When judges are asked to embark on a lawmaking venture, I believe they should carefully consider whether they, or a legislative body, are better equipped to perform the task at hand. There are instances of so-called interstitial lawmaking that inevitably become part of the judicial process. But when we are asked to create an entirely new doctrine—to answer "questions of policy on which Congress has not spoken," . . . we have a special duty to identify the proper decisionmaker before trying to make the proper decision. When the novel question of policy involves a balancing of the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual—whether in the social welfare context, the civil service context, or the military procurement context—I feel very deeply that we should defer to the expertise of the Congress.

*Boyle v. United Tech., Inc.*, 487 U.S. 500, 531–32 (1988) (Stevens, J., dissenting).

244. 441 U.S. 667 (1979).

245. Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (current version at 20 U.S.C. § 1981 (2012)).

246. 422 U.S. 66 (1975).

247. *Cannon*, 441 U.S. at 689–703. Four years after enacting Title IX and three years before *Cannon*, Congress made the Court's subsequent inference more supportable by amending 42 U.S.C. § 1988 (1970) specifically to allow attorney's fees in Title IX actions. See Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641 (current version at 42 U.S.C. § 1988 (2012)). It would be difficult to find a clearer, albeit implicit, manifestation of congressional intent.

248. *Cannon*, 441 U.S. at 703.

249. *Id.* at 706.

250. *Cal. v. Sierra Club*, 451 U.S. 287 (1981).

Congress wanted a private of action in Title IX, none appeared there.<sup>251</sup> Citing seventeen statutes in which federal courts had implied private rights of action, he stated, “It defies reason to believe that in each of these statutes Congress absentmindedly forgot to mention an intended private action.”<sup>252</sup> He condemned the Court’s creation of common law and regarded the three of the four criteria as “invi[ing] independent judicial lawmaking.”<sup>253</sup>

With all respect to the Court,<sup>254</sup> that is precisely what it has been doing concerning the scope of federal-question jurisdiction under 28 U.S.C. § 1331. To borrow from Justice Powell, if congressional policy with respect to the meaning of § 1331 and its relationship to state judicial jurisdiction is so clear, why is there absolutely no indication of it in any legislative materials? At least in *Cannon*, the majority could point to a policy clearly embodied in a statute: discrimination in education on the basis of sex was unacceptable to Congress and the President, the majoritarian branches.

The interpretation of the federal-jurisdiction statute was stable as of 1936.<sup>255</sup> Only three years after *Louisville & Nashville R. Co. v. Mottley*,<sup>256</sup> the best known articulation of the well-pleaded-complaint rule, Congress recodified the statute without altering its scope, although the wording changed slightly.<sup>257</sup> In 1916, Justice Holmes announced his law-that-creates-the-cause-of-action test,<sup>258</sup> but the well-pleaded-complaint rule explains the decision equally well.<sup>259</sup> Three of the Justices who joined that Holmes opinion also joined a six-to-two majority only five years later, holding there was federal-question jurisdiction in a hybrid case<sup>260</sup> because the well-pleaded federal issue was outcome determinative.<sup>261</sup> The Court ignored Justice Holmes’s anguished dissent in support of his previously expressed view.<sup>262</sup> That circumstance strongly suggests that those three Justices regarded the Holmes test as *dictum*, basing their votes instead on the well-pleaded-complaint

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251. *Cannon*, 441 U.S. at 742 (Powell, J., dissenting).

252. *Id.*

253. *Id.*

254. Well, at least as much respect as I can muster at this point.

255. *See supra* text accompanying note 223.

256. 211 U.S. 149 (1908).

257. *See* Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091. Succeeding recodifications occurred in 1948, 1958, 1976, and 1980. *See* Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (removing jurisdictional-amount requirement); Act of Oct. 21, 1976, Pub. L. No. 94-574, § 733(2), 90 Stat. 2721; Act of July 25, 1958, Pub. L. No. 85-554, § 1331(a), 72 Stat. 415; Act of June 25, 1948, ch. 646, § 1331, 62 Stat. 869, 930. With the exception of dropping the jurisdictional-amount requirement, none change the scope of federal-question jurisdiction, currently codified at 28 U.S.C. § 1331 (2012).

258. *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). *See supra* note 179.

259. *See supra* note 179. Justice Holmes was part of the unanimous Court that decided *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908).

260. *See Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180 (1921).

261. *Id.* at 199, 201. This added nothing to the test for federal-question jurisdiction. The test of whether an allegation in a complaint is well pleaded is whether, were that allegation removed, the complaint would succumb to a motion to dismiss for “failure to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). *See Trojan Horse*, *supra* note 27, at 541.

262. *Id.* at 213–14 (Holmes, J., dissenting).

rule. Justice Cardozo later mentioned the necessity of the federal issue being in dispute,<sup>263</sup> but the Court had articulated that years before,<sup>264</sup> and it is implicit in the *Mottley* test.

There the situation rested until *Franchise Tax Board v. Construction Laborers Vacation Trust*<sup>265</sup> introduced “substantiality.”<sup>266</sup> That statement was also *dictum*; the Court had already applied the declaratory-judgment-jurisdiction test of *Skelly Oil Co. v. Phillips Petroleum Co.* and decided that the allegation of federal law was not well pleaded. *Merrell Dow Pharmaceuticals Co. v. Thompson*<sup>267</sup> was the first actual application of the new criterion, and Justice Stevens’s majority opinion acknowledged that the plaintiffs had properly pleaded the federal issue in the negligence-*per-se* counts of their complaints. However, the majority ruled that the issue they raised was insufficiently substantial.<sup>268</sup> *Merrell Dow* marks the Court’s embarkation on its current voyage of construction (or, more appropriately, reconstruction) of federal-question jurisdiction, wholly divorced from any demonstrable congressional intent.

## V. CONCLUSION

*Merrell Dow*, with its amorphous “substantiality” criterion, began the Court’s current effort to restrict federal-question jurisdiction. The Court has never announced any real test for substantiality, apparently content to make such determinations *ad hoc*. There is little doubt that the Court’s reformation of federal-question jurisdiction excludes cases that, prior to *Merrell Dow*, would have been in federal courts. *Merrell Dow* itself is an example; it is clear that jurisdictional law before that decision supported federal-question jurisdiction, and the federal court would have heard plaintiffs’ remaining claims under the doctrine of pendent (now supplemental) jurisdiction. Now such cases are out.

They are not out because of anything Congress did or said. In this millennium, Congress has expanded the federal courts’ docket load, largely through enacting CAFA. Whatever Congress’s rationale, CAFA is not the work of a Congress so concerned about federal docket pressure that it wanted the Supreme Court to commence or continue a judicial project to cut back on federal-question jurisdiction.

And yet, the Court’s common-law work in this area appears to be part of a larger effort by the Justices to reduce the federal courts’ caseload. Parallel to the most recent developments that this Article has discussed, the Court has also sharply

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263. See *Gully v. First Nat’l Bank*, 290 U.S. 109, 113 (1936).

264. See *City of New Orleans v. Benjamin*, 153 U.S. 411 (1894).

265. 463 U.S. 1, 28 (1983).

266. “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.” *Id.* at 13 (emphasis added).

267. 478 U.S. 804 (1986).

268. *Id.* at 814. See *supra* text accompanying notes 172–187.

raised the threshold for pleading federal-question cases by reconstruing what constitutes “a claim upon which relief can be granted.”<sup>269</sup> Ironically, if Congress actually did have some carefully calibrated balance in mind, the Court’s recent pleading decisions would have upset it rather dramatically. Congress has participated in none of this, and it is obvious that the Court now is defining its own subject-matter jurisdiction.

Doing so raises serious questions of legitimacy. The Constitution gives Congress the power to create federal courts beneath the Supreme Court,<sup>270</sup> and that power has always included the power of defining their jurisdiction within the bounds of Article III.<sup>271</sup> Now the Supreme Court challenges the exclusivity of that congressional power. There is, however, nothing in the Constitution that gives the federal judiciary the power to define its own jurisdiction, and the Court’s doing so undermines separation of powers. Perhaps that is why the Court attempts to conceal its efforts by claiming, entirely without evidence, that it is all Congress’s doing.

Eighty years ago, *Erie R. Co. v. Tompkins*<sup>272</sup> noted that for ninety-six years, the Court had set itself and the rest of the federal courts above the Constitution by its decision in *Swift v. Tyson*.<sup>273</sup> “If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.”<sup>274</sup> The Court relied in part<sup>275</sup> on Justice Holmes’s far more pointed criticism of *Swift* a decade earlier. Thus, the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, ‘an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.’”<sup>276</sup>

As Yogi Berra apparently never actually said,<sup>277</sup> “It’s like *déjà-vu*, all over

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269. FED. R. CIV. P. 12(b)(6). See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

270. U.S. CONST. art. I, § 8, cl. 9.

271. See U.S. CONST. art. III, § 2; HSCComm3Jud85, *supra* note 121, at 28 (testimony of Hon. Albert B. Maris, Chairman, Committee on Revision of the Laws of the Judicial Conference of the U.S.) (“[T]he Constitution delimits the area in which the Federal jurisdiction may be exercised, but it doesn’t precisely define that area; it leaves that definition to Congress, and that has always been the construction from the foundation of our Government.”). See also WRIGHT & KANE, *supra* note 34, § 10, at 45.

272. 304 U.S. 64 (1938).

273. 41 U.S. (16 Pet.) 1 (1842).

274. *Erie*, 304 U.S. at 77–78. In a classic understatement, the *Erie* Court appeared to try to downplay the matter. *Id.* at 79–80 (“In disapproving that doctrine we do not hold unconstitutional section 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We *merely* declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.”) (emphasis added). With all respect to the Court, a nearly century-long violation of the Constitution by the entire federal judiciary at the direction of the Supreme Court is no “mere” matter.

275. *Id.* at 79.

276. *Id.* (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

277. See Victor Mather & Katie Rogers, *Behind the Yogi-isms: Those Said and Unsaid*, N.Y. TIMES (Sept. 23, 2015), <https://www.nytimes.com/2015/09/24/sports/yogi-berra-yogi-isms-quotes-explored.html> (on file with

again.”

## APPENDIX

### A. Historical Basis of Diversity Jurisdiction

See, e.g., *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 30 (1979) (statement of Hon. Elmo B. Hunter, Judicial Conference of the United States).

To this day there is no consensus as to why diversity jurisdiction was made a permissive basis of Federal court jurisdiction; or why Congress opted for it. It was simply not debated or explained at the time. Scholars, and others, over the years, have endeavored to come up with explanations for the congressional action taken in 1789. The traditional explanation is a fear that State courts in those early days would be prejudiced against those litigants from out of State.

*Id.* at 147 (statement of Daniel J. Meador, Assistant Attorney General). Mr. Meador also pointed out that with the elimination of the in-state requirement, the bias explanation became less compelling since none of the opposing parties need be residents of the forum state. *Id.* See, e.g., *Diversity of Citizenship/Magistrates Reform: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Admin. of Justice of the H. Committee on the Judiciary*, 95th Cong. 144 (1977) (statement of Hon. Edward T. Gignoux). Henry J. Friendly, *The Historic Bases of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484–86 (1928). Professors Wright and Kane cite many of the nearly innumerable scholarly articles urging abolition of diversity jurisdiction, see WRIGHT & KANE, *supra* note 34, § 23, at 146 n.17, and to those opposed. See *id.* at 146 n.18.

### B. Docket Pressure

#### 1. Diversity Cases as a Percentage of Cases in the District Courts

See, e.g., *U.S. District Courts—Judicial Business 2016*, *supra* note 39. That Table notes the total number of civil case filings from 2012 to 2016 and the number of such filings that were diversity cases: 30.7% in 2012, 31.2% in 2013, 34% in 2014, 30.6% in 2015, and 28% in 2016.

#### 2. Congressional References

See, e.g., HSubcommCCLAJud100, *supra* note 77, at 26, 102 (statement of Hon. Elmo B. Hunter, Judicial Conference of the U.S.); COURT REFORM AND

ACCESS TO JUSTICE ACT OF 1988, H.R. REP. NO. 100-899, pt. 1, at 756 (letter from Thomas M. Boyd, Acting Assistant Attorney General, to Sen. Howell Heflin, Chairman, Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary); *Diversity of Citizenship/Magistrates Reform, Hearings Before the Subcommittee on Courts, Civil Liberties, and the Admin. of Justice of the H. Committee on the Judiciary*, 95th Cong. 77–78 (1977) (statement of Rep. Tom Railsback, Member, House Committee on the Judiciary); *id.* at 144 (statement of Hon. Edward T. Gignoux); *id.* at 214 (statement of Rep. Jim Santini, Member, House Committee on the Judiciary); *id.* at 221 (statement of Prof. Charles Alan Wright); *id.* at 231 (statement of John P. Frank); *Jurisdictional Amendments Act of 1979, S. 679: Hearings Before the S. Committee on the Judiciary*, 96th Cong. 92–93 (statement of Prof. Burt Neuborne); SSubcommIJMJud96, *supra* note 112, at 40 (statement of Hon. Jon Newman); *id.* at 167, 172–73 (statement of Hon. Henry J. Friendly).

C. *Concern about Local Prejudice*

*See, e.g., Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 30 (1979) (statement of Hon. Elmo B. Hunter, U.S.D.J., for the Judicial Conference of the U.S.); *id.* at 46 (statement of Senator Alan Simpson, Member, Committee on the Judiciary); *id.* at 47 (statement of Daniel J. Meador, Assistant Attorney General); *id.* at 64 (statement of Rep. Dan Glickman); *id.* at 147–48 (statement of Daniel J. Meador, Assistant Attorney General); *Jurisdictional Amendments Act of 1979, S. 679: Hearings Before the S. Committee on the Judiciary*, 96th Cong. 51 (1979) (statement of Senator Howard F. Metzenbaum, Member, Committee on the Judiciary); *id.* at 55 (statement of Charles Wiggins); *Diversity of Citizenship/Magistrates Reform: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Admin. of Justice of the H. Committee on the Judiciary*, 95th Cong. 80 (1977) (statement of Rep. M. Caldwell Butler, Member, House Committee on the Judiciary); *id.* at 80 (testimony of Robert G. Begam, Association of Trial Lawyers of America); *id.* at 144, 150 (statement of Hon. Edward T. Gignoux); *id.* at 177 (statement of Daniel J. Meador, Assistant Attorney General); *id.* at 207 (statement of Hon. Henry Friendly); *id.* at 220 (statement of Prof. Charles Alan Wright); *id.* at 232–33 (statement of John P. Frank); *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). *But see* SSubcommIJMJud96, *supra* note 112, at 185 (statement of Hon. Henry J. Friendly) (noting diversity supporters' reduced emphasis on this factor); HSubcommCCLAJud100, *supra* note 77, at 155 (prepared statement of Robert MacCrate, ABA); *id.* at 194–95 (colloquy between Rep. Cardin, Member, Comm. on the Jud. and Robert MacCrate, ABA); *id.* at 321 (statement of Hon. Patrick Higginbotham); *id.* at 443 (prepared statement of Alan B. Morrisison, Public Citizen Litigation Group); H.R. REP. NO. 100-899, pt. 1, at 758 (letter from Thomas M. Boyd, Acting Assistant Attorney General, to Sen. Howell Heflin,

Chairman, Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary).

D. *Litigant Choice*

See, e.g., *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 24–25 (1979) (statement of Daniel J. Meador, Assistant Attorney General); *id.* at 32 (statement of Hon. Elmo B. Hunter, U.S.D.J., for the Judicial Conference of the United States); *id.* at 53 (statement of Edward W. Mullinix, American Bar Association); *Jurisdictional Amendments Act of 1979, S. 679: Hearings Before the S. Committee on the Judiciary*, 96th Cong. 61–62 (1979) (statement of Charles Wiggins); *id.* at 81, 85, 86 (statement of John P. Frank); *id.* at 86 (statement of Senator Max Baucus, Member, Committee on the Judiciary); *Diversity of Citizenship/Magistrates Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Committee on the Judiciary*, 95th Cong. 243, 245 (1977) (statement of John P. Frank); *id.* at 206 (statement of Hon. Henry Friendly). *But see* SSubcommIJMJud96, *supra* note 112, at 186 (statement of Hon. Henry J. Friendly) (disputing any inherent right to litigant choice); HSubcommCCLAJud100, *supra* note 77, at 101, 102 (statement of Hon. Elmo B. Hunter, Jud. Conf. of the U.S.); *id.* at 195 (statement of Rep. Benjamin L. Cardin, Member, Committee on the Judiciary); *id.* at 331 (statement of Rep. Robert W. Kastenmeier, Chairman of Subcommittee of Judiciary Committee).

E. “*Social Service*”

See, e.g., HSubcommCCLAJud100, *supra* note 77, at 103 (statement of Rep. Hyde, Member, Committee on the Judiciary); *id.* at 194–95 (statement of Robert MacCrate); *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 34 (1979) (statement of Hon. Elmo B. Hunter, Judicial Conference of the U.S.); *Jurisdictional Amendments Act of 1979, S. 679: Hearings Before the S. Committee on the Judiciary*, 96th Cong. 56 (1979) (statement of Charles Wiggins); *id.* at 71–72, 82, 85 (statement of John P. Frank); *Diversity of Citizenship/Magistrates Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. 76, 107 (statements of Rep. George E. Danielson, Member, H. Committee on the Judiciary); *id.* at 234, 237, 238, 245 (1977) (statement of John P. Frank). *But see* SSubcommIJMJud96, *supra* note 112, at 186 (statement of Hon. Henry J. Friendly) (rebutting “social service” argument); HSubcommCCLAJud100, *supra* note 77, at 109 (statement of Rep. Dan Lundgren, Member, Comm. on the Jud.).

F. *Jury Pool*

*See, e.g., Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 96th Cong. 129 (1979) (statement of Rep. Carlos J. Moorhead, Member, House Committee on the Judiciary); id. at 151–52 (statement of Rep. Harold S. Sawyer, Member, House Committee on the Judiciary); Federal Diversity of Citizenship Jurisdiction: Hearings Before the Subcomm. on Improvements in Jud. Machinery of S. Comm. on the Judiciary, 95th Cong. 170 (1978) (statement of Stephen A. Trimble, National Association of R.R. Counsel); Diversity of Citizenship/Magistrates Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 95th Cong. 75 (1977) (colloquy between George E. Danielson, Member, House Committee on the Judiciary, and Robert G. Begam, Association of Trial Lawyers of America).*

G. *Parity*

*See, e.g., HSubcommCCLAJud100, supra note 77, at 104 (statement of Rep. Hyde, Member, Committee on the Judiciary); id. at 313 (statement of Hon. Abner J. Mikva); id. at 317 (statement of Hon. Abner J. Mikva); Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 96th Cong. 41, 51 (1979) (statement of Hon. Elmo B. Hunter, Judicial Conference of the U.S.); id. at 71 (statement of Rep. Sawyer, Member, House Committee on the Judiciary); id. (statement of Rep. Glickman); Jurisdictional Amendments Act of 1979, S. 679: Hearings Before the S. Committee on the Judiciary, 96th Cong. 85 (1979) (statement John P. Frank); see, e.g., Charles L. Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way but Vote the Other Way with Its Feet?*, 61 N.Y. ST. B.J. 20 (July 1989); Jacob R. Karabell, Note, *The Implementation of “Balanced Diversity” Through the Class Action Fairness Act*, 84 N.Y.U. L. REV. 300, 300–01 (2009); SSubcommIJMJud96, supra note 112, at 166 (statement of Hon. Henry J. Friendly); *Diversity of Citizenship/Magistrates Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 95th Cong. 128 (statement of Pamela S. Horowitz, Legislative Counsel for American Civil Liberties Union); id. at 144 (statement of Hon. Edward T. Gignoux); id. at 233 (statement of John P. Frank); id. at 266, 267 (statement of Prof. Lucas A. Powe, Jr.).**

H. *Mass Tort Cases*

*See, e.g., HSubcommCCLAJud100, supra note 77, at 288–90 (statement of Prof. Thomas D. Rowe, Jr.); COURT REFORM AND ACCESS TO JUSTICE ACT OF 1988, H.R. REP. NO. 100-899, pt. 1, at 37–44; Diversity of Citizenship*

*Jurisdiction/Magistrates Reform—1979: Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 96th Cong.* 148 (1979) (statement of Daniel J. Meador, Assistant Attorney General); *id.* at 154 (colloquy between Rep. Robert T. Matsui, Member, House Committee on the Judiciary, and Daniel J. Meador, Assistant Attorney General); *id.* at 198 (statement of the Defense Research Institute); *id.* at 265 (article by Prof. Thomas D. Rowe, Jr.); HSubcommCCLAJud100, *supra* note 77, at 207–08 (statement of Stephen J. Markman, Assistant Attorney General); *id.* at 224–27 (statement of Stephen J. Markman, Assistant Attorney General); *id.* at 325–26 (statement of Hon. Patrick Higginbotham).

*I. Federal Interpleader Act*

*Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 96th Cong.* 148 (1979) (statement of Daniel J. Meador, Assistant Attorney General); *id.* at 182 (letter from Prof. Paul J. Mishkin to Rep. Robert W. Kastenmeier); *id.* at 205, 211 (statement of Prof. Charles Alan Wright); *id.* at 242, 264 (article by Prof. Thomas D. Rowe, Jr.); *Diversity of Citizenship/Magistrates Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 95th Cong.* 150 (statement of Hon. Edward T. Gignoux); *id.* at 181, 255 (statement of Daniel J. Meador, Assistant Attorney General); *id.* at 221, 228 (statements of Prof. Charles Alan Wright); *id.* at 228 (statement of Rep. Tom Railsback, Member, House Committee on the Judiciary); *id.* at 276–77 (statement of Prof. Thomas D. Rowe, Jr.).

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