

KEEPING *GRABLE SLIM*: FEDERAL QUESTION JURISDICTION AND THE CENTRALITY TEST

INTRODUCTION

“The most difficult single problem in determining whether federal question jurisdiction exists is deciding when the relationship of the federal law to a case is such that the action may be said to be one ‘arising under’ that law.”¹

The jurisdiction of federal courts extends “to all Cases, in Law and Equity, arising under this Constitution, [or] the Laws of the United States”² About 140,000 cases purporting to allow “arising under” jurisdiction are filed every year,³ but when exactly does a case arise under the Constitution or the laws of the United States? It is well-settled that cases in which federal law provides the cause of action are considered to “arise under” the Constitution or laws of the United States.⁴ Unfortunately, the standard over the last ninety years has been much less clear for cases that assert a state cause of action but have an embedded federal element central to the case.⁵ The centrality test is used to address those cases in which a federal law does not create the plaintiff’s cause of action but there is still a significant federal question that

¹ 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3562, at 17–18 (2d ed. 1984).

² U.S. CONST. art. III, § 2, cl. 1.

³ John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247, 293 (2007) (citing Admin. Office of the U.S. Courts, Table 4.8: U.S. District Courts, Civil Cases Filed by Jurisdiction, <http://www.uscourts.gov/judicialfactsfigures/2007/Table408.pdf> (last visited Feb. 19, 2008) (listing the number of cases filed under § 1331 between 2000 and 2007, which ranged from 134,877 to 165,241 per year)).

⁴ *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8–9 (1983) (“The most familiar definition of the statutory ‘arising under’ limitation is Justice Holmes’ statement, ‘A suit arises under the law that creates the cause of action.’” (citing *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916))).

⁵ Determining whether a case that asserts a state law cause of action but has some federal element can invoke federal question jurisdiction will be referred to throughout this Comment as the “centrality test.” *See, e.g.*, RICHARD D. FREER & WENDY C. PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 249–52 (4th ed. 2005) (discussing requirement as one of “centrality”); William Cohen, *The Broken Compass: The Requirement that a Case Arise “Directly” Under Federal Law*, 115 U. PA. L. REV. 890 (1967); Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on “Arising Under” Jurisdiction*, 82 IND. L.J. 309, 310 n.4 (2007) [hereinafter Freer, *Of Rules and Standards*]. Additionally, the Supreme Court has recently referred to this area as the “centrality of a federal issue.” *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 n.5 (2006).

needs to be decided. Historically, the Supreme Court vacillated between two centrality tests: one that completely excludes all cases from a federal forum if state law provides the cause of action⁶ and one that allows any case to invoke federal question jurisdiction where a federal law or the Constitution is to be interpreted or applied and the “federal claim is not merely colorable.”⁷

Three years ago, the Supreme Court redefined and clarified the centrality test in a pivotal decision. The Court granted certiorari in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*⁸ to resolve a split between the circuits and articulate a clear standard for determining when a case asserting a state cause of action still arises under the Constitution or laws of the United States.⁹

This Comment contends that the Supreme Court created a straightforward, commendable test that effectively promotes the purposes of federal question jurisdiction, in contrast to recent critiques of *Grable*.¹⁰ The lower courts generally achieve the correct results when applying the *Grable* test,¹¹ but there have been some problematic applications.¹² If history is any indication, the Supreme Court will not revisit the centrality test anytime soon despite lower courts’ problems with applying *Grable*.¹³ The Court offered enough guidance to the lower courts through its decisions in both *Grable* and *Empire HealthChoice Assurance, Inc. v. McVeigh*,¹⁴ a case decided the year following *Grable*. It should be the prerogative of the lower courts to utilize *Grable* properly, while recalling the Supreme Court’s intent in fashioning the *Grable* test.

⁶ *Am. Well Works*, 241 U.S. at 260.

⁷ *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 199 (1921).

⁸ 545 U.S. 308 (2005).

⁹ See discussion *infra* Part III.

¹⁰ See, e.g., Douglas D. McFarland, *The True Compass: No Federal Question in a State Law Claim*, 55 U. KAN. L. REV. 1, 30 (2006) (“The end result of *Grable & Sons* is that the federal court is now instructed to look for federal issues, not federal ‘cases’ or federal ‘claims.’ This overweening concern for any glimmer of federal interest can only result in more state law cases commenced in, or removed to, federal courts. That is a misallocation of jurisdiction between state and federal courts.”).

¹¹ E.g., *Bennett v. Sw. Airlines, Co.*, 484 F.3d 907 (7th Cir. 2007) (declining federal question jurisdiction); *California v. H & R Block, Inc.*, No. C 06-2058 SC, 2006 WL 2669045 (N.D. Cal. Sept. 18, 2006) (same); *Corre v. Steltenkamp*, No. 06-30-DLB, 2006 WL 2385352 (E.D. Ky. Aug. 16, 2006) (same); *McCormick v. Excel Corp.*, 413 F. Supp. 2d 967 (E.D. Wis. 2006) (same); *Armitage v. Deutsche Bank AG*, No. C 05-3998 PJH, 2005 WL 3095909 (N.D. Cal. Nov. 14, 2005) (same).

¹² See discussion *infra* Part IV.

¹³ *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), was decided in 1986, and the Court did not revisit the subject again until 2005 when it decided *Grable*.

¹⁴ 547 U.S. 677 (2006).

Part I of this Comment briefly examines the history of federal question jurisdiction and the centrality test to show how the test has changed over the last century and how those changes shaped the Court's formulation of the current centrality standard in *Grable*. Part II analyzes the four-factor test laid out by the Court in *Grable* and the Court's application of that test in *Grable* and *Empire HealthChoice*. Part III defends the merits of the *Grable* test, including its alignment with the purposes of federal question jurisdiction: providing litigants with judges who have greater federal law experience than state judges,¹⁵ promoting uniformity of federal law,¹⁶ and providing litigants with courts that are more solicitous to federal issues.¹⁷ Part IV discusses a few of the problems lower federal courts are having in applying *Grable* and the potential ramifications of those misapplications.

I. THE HISTORY OF FEDERAL QUESTION JURISDICTION

This Part offers the background of the centrality test prior to *Grable*. Section A describes the constitutional and congressional grants of federal question jurisdiction and the necessity of limiting the scope of such jurisdiction. Section B discusses the first requirement for federal question jurisdiction: the well-pleaded complaint rule. Section C describes and analyzes the centrality test cases decided prior to *Grable*. The history of federal question jurisdiction has been tumultuous, and each test set out by the Supreme Court during that turbulent history influences the current state of federal question jurisdiction to some extent.

A. *The Constitutional and Statutory Evolution of Federal Question Jurisdiction*

The Constitution of the United States grants judicial power to the federal courts over “all Cases, in Law and Equity, arising under this Constitution, [or]

¹⁵ *E.g.*, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483–84 (1981) (“The factors generally recommending . . . federal-court jurisdiction . . . include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.”).

¹⁶ *E.g.*, *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 811 (1824) (“It is indispensable, that the interpretation and application of the laws and treaties of the Union should be uniform.”); *see also* THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The mere necessity of uniformity in the interpretation of the national laws, decides the question.”).

¹⁷ *E.g.*, *Osborn*, 22 U.S. (9 Wheat.) at 811 (“There is no unreasonable jealousy of State judicatures; but the constitution itself supposes that they may not always be worthy of confidence, where the rights and interests of the national government are drawn in question.”).

the Laws of the United States”¹⁸ The purpose of federal courts, at least in part, is to “expound principles of federal law” and to “protect federal rights and interests.”¹⁹ To fulfill this purpose, the Supreme Court interpreted the constitutional grant of power broadly in *Osborn v. Bank of the United States*.²⁰ The Court held that the Constitution empowered Congress to grant jurisdiction to the federal courts over any case in which an “ingredient” of federal law existed.²¹ This interpretation would have allowed any claim involving a federal element, no matter how slight, to be heard by a federal court. Without further limitations, such a broad interpretation would have inundated federal courts with cases that did not necessarily need a federal forum.

When Congress codified federal question jurisdiction in 28 U.S.C. § 1331,²² it did little to limit the Court’s broad interpretation of the grant of power derived from the Constitution. Instead, Congress mimicked the language in the Constitution: “The district courts shall have original jurisdiction of all civil actions *arising under* the Constitution, laws, or treaties of the United States.”²³ Congress’s use of the same language the Supreme Court interpreted expansively in *Osborn* left the balance between state and federal courts in a precarious position.

Despite the statutory and constitutional language being essentially the same, the Supreme Court and lower federal courts interpreted § 1331 as bestowing a narrower grant of power than the Constitution.²⁴ Realizing the danger of interpreting the congressional language in the same broad fashion as the constitutional language,²⁵ the Supreme Court created the well-pleaded complaint rule²⁶ and the centrality test²⁷ to limit § 1331. Although it is clear that federal question jurisdiction requires litigants to satisfy the well-pleaded

¹⁸ U.S. CONST. art. III, § 2, cl. 1.

¹⁹ MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 96 (2d ed. 1990).

²⁰ 22 U.S. (9 Wheat.) at 823.

²¹ *Id.*

²² 28 U.S.C. § 1331 (2006).

²³ *Id.* (emphasis added).

²⁴ REDISH, *supra* note 19, at 96.

²⁵ *See, e.g.,* Gully v. First Nat’l Bank, 299 U.S. 109, 117–18 (1936) (“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.” (citations omitted)).

²⁶ *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

²⁷ *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 n.5 (2006).

complaint rule²⁸ and allege either a federal cause of action or fulfill the centrality test,²⁹ federal question jurisdiction under § 1331 has “eluded precise definition and consistent application, causing well-documented chagrin to courts and commentators alike.”³⁰ This confusion is due to the Court’s repeatedly unclear decisions regarding the centrality test.³¹

B. The Well-Pleaded Complaint Rule

“The ‘well-pleaded complaint rule’ is the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts”³² and is much less flexible than the current centrality test.³³ The well-pleaded complaint rule requires that the plaintiff plead the issue of federal law in his complaint for the case to arise under the Constitution or laws of the United States.³⁴ Additionally, the plaintiff cannot insert the federal element into his or her claim in anticipation of the defendant raising a federal defense.³⁵ In other words, the possibility of a federal defense or even the defendant’s assertion of a counterclaim actually involving a federal issue is irrelevant.³⁶ It must be the

²⁸ See, e.g., *Mottley*, 211 U.S. at 152 (holding that the plaintiff must plead the federal issue in his complaint).

²⁹ See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005) (“[F]ederal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law There is, however, another longstanding, if less frequently encountered, variety of federal ‘arising under’ jurisdiction, this Court having recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues.”).

³⁰ Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After Merrell Dow*, 52 OHIO ST. L.J. 1477, 1479 (1991); see, e.g., *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8 (1983) (“[T]he statutory phrase ‘arising under the Constitution, laws, or treaties of the United States’ has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts.”); REDISH, *supra* note 19, at 84 (“The similarity in the language of the constitutional and statutory provisions has, on occasion, caused confusion in determining the appropriate scope of each provision.”).

³¹ Compare *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 817 (1986), and *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 259 (1916), with *Grable*, 545 U.S. at 314, and *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 199 (1921).

³² *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

³³ See *infra* Part II. For a discussion of the non-flexibility of the well-pleaded complaint rule, see 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).

³⁴ *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

³⁵ *Id.*

³⁶ *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002) (disagreeing with respondent’s assertion “that the well-pleaded complaint rule, properly understood, allows a counterclaim to serve as the basis for a district court’s ‘arising under’ jurisdiction”).

plaintiff's statement of his or her cause of action that presents the suit as one arising under the Constitution or laws of the United States.³⁷

The well-pleaded complaint rule is the first and most important filter used to determine whether federal question jurisdiction exists.³⁸ If the plaintiff cannot satisfy the well-pleaded complaint rule, the plaintiff's case cannot be adjudicated in federal court,³⁹ and the centrality test should never be applied.⁴⁰ Unlike the centrality test, which has changed multiple times over the past century,⁴¹ the Court remains faithful to the well-pleaded complaint rule.⁴²

C. *Pre-Grable Judicial Interpretations Shaping the "Arising Under" Test*

The centrality test determines whether certain cases belong in federal court. If federal law creates the cause of action, federal question jurisdiction is appropriate.⁴³ The centrality test, however, addresses cases in which there is no federal cause of action but there is some embedded federal element.⁴⁴ Unfortunately, Supreme Court decisions regarding the centrality test have been less than uniform.⁴⁵

In one of the first important "arising under" cases, *American Well Works Co. v. Layne & Bowler Co.*, the plaintiff sued the defendants for libel and slander, alleging that the defendants made statements to others that the plaintiff

³⁷ *Mottley*, 211 U.S. at 152.

³⁸ The well-pleaded complaint rule is "relatively easy to use" and helps determine at the forefront of a case whether the case will invoke federal question jurisdiction, but it is also underinclusive, keeping some important cases out of a federal forum. Freer, *Of Rules and Standards*, *supra* note 5, at 318–19.

³⁹ *Mottley*, 211 U.S. at 152.

⁴⁰ *Contra* Seruntine v. State Farm Fire & Cas. Co., 444 F. Supp. 2d 698, 702 (E.D. La. 2006).

⁴¹ See cases cited *supra* note 31.

⁴² See, e.g., *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002) ("The well-pleaded-complaint rule has long governed whether a case 'arises under' federal law for purposes of § 1331."); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) ("It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law."); *Taylor v. Anderson*, 234 U.S. 74, 75–76 (1914) ("[I]t has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute . . . , must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.").

⁴³ See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) ("[F]ederal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law." (internal citation omitted)). Of course, the well-pleaded complaint rule must be satisfied first. See *supra* Part I.B.

⁴⁴ See *supra* note 5 and accompanying text.

⁴⁵ Compare *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916), with *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180 (1921).

had infringed the defendants' patent.⁴⁶ The defendants removed to federal court under the proposition that the plaintiff's threat to sue for patent infringement, an area governed by federal law, allowed federal question jurisdiction.⁴⁷

In *American Well Works*, Justice Holmes wrote for the majority and established an inflexible rule: "A suit arises under the law that creates the cause of action."⁴⁸ Under the "Holmes rule" if state law provided the cause of action there was no federal question jurisdiction despite the substantiality of the disputed federal issue.⁴⁹ Justice Holmes emphatically stated that a suit for damage caused by a threat to sue under patent law or damage caused by a mere factual statement that a patent had been infringed certainly did not constitute a suit under patent law.⁵⁰

The Court considered *Smith v. Kansas City Title & Trust Co.*⁵¹ only a few years later and failed to follow the Holmes rule from *American Well Works*.⁵² Like *American Well Works*, state law created the cause of action in *Smith*.⁵³ The plaintiff alleged that the defendant's plan to invest in bonds issued under the Federal Farm Loan Act was illegal under Missouri law.⁵⁴ Unlike deciding *American Well Works*, deciding *Smith* required a more serious determination—whether a federal law was constitutional.⁵⁵

Under the Holmes rule, there should have been no federal question jurisdiction in *Smith* because federal law did not create the cause of action,⁵⁶ but the Court strayed from the Holmes rule and upheld jurisdiction.⁵⁷ The majority held that "where it appears . . . 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, . . . the District Court has

⁴⁶ *Am. Well Works*, 241 U.S. at 258.

⁴⁷ *Id.*

⁴⁸ *Id.* at 260.

⁴⁹ *See id.*

⁵⁰ *Id.* at 259–60.

⁵¹ 255 U.S. 180 (1921).

⁵² *Id.*

⁵³ *Id.* at 214 (Holmes, J., dissenting).

⁵⁴ *Id.* at 195 (majority opinion).

⁵⁵ *Id.* at 201 ("It is, therefore, apparent that the controversy concerns the constitutional validity of an act of Congress The decision depends upon the determination of this issue.")

⁵⁶ *See Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 259 (1916).

⁵⁷ *Smith*, 255 U.S. at 201.

jurisdiction under this provision.”⁵⁸ The standard devised in *Smith* was quite generous, similar to the jurisdictional grant given by both the Constitution and Congress. At the opposite end of the spectrum is the Holmes rule, which significantly limits the scope of the federal courts’ jurisdiction.

A little over a decade later, the Court ignored *Smith* and reinstated the Holmes rule in *Moore v. Chesapeake & Ohio Railway Co.*⁵⁹ In *Moore*, the plaintiff sued his employer after he was injured on the job, alleging a violation of Kentucky law.⁶⁰ Kentucky law stated that employees could not be held contributorily negligent or to have assumed any risk where the defendant’s violation of any statute “enacted for the safety of employees contributed to the injury or death of such employee.”⁶¹ The plaintiff alleged that the defendant violated the Federal Safety Appliance Acts, and therefore, the plaintiff could not be held contributorily negligent or to have assumed any risk.⁶² The Court denied jurisdiction, using reasoning identical to that of *American Well Works*: because Kentucky law created the cause of action, the case did not arise under the Constitution or the laws of the United States.⁶³ Ironically, but not surprisingly, the majority failed even to mention *Smith* in deciding *Moore*.⁶⁴

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, the Court vacillated again.⁶⁵ The Court recognized that two types of cases trigger the “arising under” inquiry,⁶⁶ noting that Justice Holmes’s view was “more useful for describing the vast majority of cases that come within the district courts’ original jurisdiction than it [was] for describing which cases are beyond district court jurisdiction.”⁶⁷ In *Franchise Tax Board*, the Court held that if state law created the cause of action, there could be no federal question jurisdiction *unless* “it appear[ed] that some substantial, disputed question of

⁵⁸ *Id.* at 199. Unsurprisingly, Justice Holmes dissented. *Id.* at 213–15 (Holmes, J., dissenting).

⁵⁹ 291 U.S. 205 (1934).

⁶⁰ *Id.* at 208.

⁶¹ *Id.* at 212–13 (citing CARROLL’S KY. STAT. § 820-1 to 3 (1930) (internal quotations omitted)).

⁶² *Id.* at 208.

⁶³ *Id.* at 217.

⁶⁴ *See id.* at 205. This is not surprising because the majority in *Smith* failed to cite *American Well Works*. *See Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180 (1921). In addition, the Court would have had to uphold federal question jurisdiction had it utilized the *Smith* standard. The Court was able to achieve the result it wanted by not applying the *Smith* standard.

⁶⁵ 463 U.S. 1 (1983).

⁶⁶ The first branch consists of cases in which federal law provides the cause of action, while the other branch consists of cases that are the focus of this Comment: cases in which state law creates the cause of action but there is some federal element. *Id.* at 8–9.

⁶⁷ *Id.* at 9.

federal law [was] a necessary element of one of the well-pleaded state claims.”⁶⁸ Although similar to the *Smith* standard, *Franchise Tax Board* also required that the federal issue be substantial.⁶⁹

The fluctuating nature of the Court’s holdings respecting federal question jurisdiction did not end with *Franchise Tax Board*. In *Merrell Dow Pharmaceuticals Inc. v. Thompson*,⁷⁰ the Court issued a decision that commentators have since thoroughly criticized for leaving lower courts with no clear standard for deciding whether a federal issue was central enough to a state law claim to invoke federal question jurisdiction.⁷¹ In *Merrell Dow*, the plaintiffs sued the defendants in state court for negligence, based in part on the allegation that the defendants’ “misbranding” of a certain drug violated the Federal Food, Drug, and Cosmetic Act (FDCA).⁷² Although state law, rather than the FDCA, provided the plaintiffs’ cause of action,⁷³ the defendants asserted federal question jurisdiction and removed the case to federal court.⁷⁴

The Court held that when Congress did not create a federal, private cause of action, a state law claim—even one involving a federal issue—did not arise under the Constitution or laws of the United States.⁷⁵ Although the Court purported to reconcile *Smith* and *Moore*,⁷⁶ it simply reinstated the Holmes rule.⁷⁷ “A refortified *American Well [Works]* emerged from the Court’s” decision in *Merrell Dow*.⁷⁸

⁶⁸ *Id.* at 13. This is the *Grable* test without the disruption factor. See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005).

⁶⁹ *Franchise Tax Bd.*, 463 U.S. at 13.

⁷⁰ 478 U.S. 804 (1986).

⁷¹ *E.g.*, Alleva, *supra* note 30, at 1486, 1546; McFarland, *supra* note 10, at 16–17.

⁷² 478 U.S. at 805–06.

⁷³ *Id.* at 811.

⁷⁴ *Id.* at 806. The defendants likely (and logically) relied on the Court’s most recent centrality ruling in *Franchise Tax Board*. See *Franchise Tax Bd.*, 463 U.S. at 13 (holding that “original federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is ‘really’ one of federal law”).

⁷⁵ *Merrell Dow*, 478 U.S. at 817.

⁷⁶ *Id.* at 814 n.12. The Court justified the inconsistent holdings of *Smith* and *Moore* by indicating that the interests at stake in the two cases differed in nature. *Id.* But the rule the Court then set forth in *Merrell Dow* did not discuss the nature of the interest at stake. See *id.* at 817 (holding that there is no arising under jurisdiction where Congress has not provided a private, federal cause of action). Professor Alleva suggests that the Court might have viewed the absence of a federal cause of action as congressional indication that the federal interest was not substantial enough to warrant federal jurisdiction. Alleva, *supra* note 30, at 1530.

⁷⁷ Compare *Merrell Dow*, 478 U.S. at 817 (holding that Congress must have created a private right of action for a claim to invoke federal question jurisdiction), with *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (holding that a suit “arises under the law that creates the cause of action”).

⁷⁸ Alleva, *supra* note 30, at 1531.

The Court in *Merrell Dow* failed to articulate a usable standard for determining when a federal issue was central enough to a dispute to require federal question jurisdiction.⁷⁹ While reinstating the Holmes rule, the Court favorably mentioned *Smith* and *Franchise Tax Board*.⁸⁰ Those two cases, however, are in direct opposition to the holding in *Merrell Dow*,⁸¹ and this dissonance left the lower courts rightfully unsure of which centrality test was proper. The failure to create an effective centrality standard became abundantly clear through the subsequent inability of lower federal courts to agree on the proper application of the *Merrell Dow* standard.⁸²

II. THE CREATION OF THE *GRABLE* TEST AND ITS APPLICATION IN *GRABLE* AND *EMPIRE HEALTHCHOICE*

This Part discusses and analyzes the Supreme Court's holdings in *Grable* and *Empire HealthChoice*. Section A focuses on the Court's formulation and application of the test in *Grable* and the Court's attempt to reconcile that decision with previous cases, mainly *Smith* and *Merrell Dow*. Section B evaluates the Court's application of the *Grable* test in *Empire HealthChoice* and the insight that application should give lower courts concerning how to apply the *Grable* test correctly.

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

The Court finally addressed the confusion created by *Merrell Dow* when it decided *Grable* in 2005.⁸³ After the plaintiff, *Grable & Sons Metal Products*,

⁷⁹ See *Merrell Dow*, 478 U.S. 804.

⁸⁰ *Id.* at 807–09.

⁸¹ Compare *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 199 (1921) (requiring only a federal issue that is “not merely colorable”), and *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983) (requiring a substantial, necessary, and actually disputed federal issue), with *Merrell Dow*, 478 U.S. at 817 (requiring a federal cause of action).

⁸² *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 311–12 (2005). Compare, e.g., *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 152 (4th Cir. 1994) (“Therefore, under *Merrell Dow*, if a federal law does not provide a private right of action, a state law action based on its violation does not raise a ‘substantial’ federal question.”), with *W. 14th St. Commercial Corp. v. 5 W. 14th Owners Corp.*, 815 F.2d 188, 193 (2d Cir. 1987) (“To determine whether the court has federal question jurisdiction to decide the case, the complaint must contain either a federal cause of action or a state cause of action embodying a substantial federal question.”).

⁸³ *Grable*, 545 U.S. at 311–12 (“We granted 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.”).

Inc., failed to pay its taxes in a timely fashion, the Internal Revenue Service (IRS) seized Grable's property.⁸⁴ Federal law required the IRS to give notice of the seizure, which the IRS did through certified mail prior to selling Grable's property to Darue.⁸⁵ The federal government gave Darue a quitclaim deed after Grable failed to take advantage of its statutorily provided right to redeem the property, despite admittedly having actual notice of the seizure.⁸⁶

Grable contended that Darue's title was invalid because the IRS failed to abide by its statutory duty to provide proper notice when the IRS served Grable by certified mail rather than personally.⁸⁷ Grable brought suit to quiet title, and Darue removed the case to federal court alleging federal question jurisdiction.⁸⁸ The district court denied Grable's request to remand the case, finding that there was a central and substantial federal issue.⁸⁹ The court of appeals then affirmed the district court's grant of summary judgment in favor of Darue after finding that there was both a substantial federal interest in the matter and a federal issue at stake.⁹⁰ The Supreme Court granted certiorari to decide the jurisdictional question only.⁹¹

The Court upheld jurisdiction in a unanimous decision.⁹² It started its opinion by recognizing that most disputes invoking federal question jurisdiction concern causes of action created by federal law but that the Court had also historically permitted jurisdiction in cases in which state law claims "implicate[d] significant federal issues."⁹³ Then, unlike in *Merrell Dow*, in which the Court seemed to invalidate *Smith*,⁹⁴ the Court in *Grable* addressed *Smith* and truly reconciled it with the current state of federal question jurisdiction.⁹⁵

⁸⁴ *Id.* at 310.

⁸⁵ *Id.*

⁸⁶ *Id.* at 310–11.

⁸⁷ *Id.* at 311.

⁸⁸ *Id.*

⁸⁹ *Id.* This occurred despite *Merrell Dow*'s holding that there must be a federal cause of action, evidencing the confusion of the lower courts.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 312. *Merrell Dow* in contrast was only a five-Justice majority with a very strong four-Justice dissent. *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804 (1986).

⁹³ *Grable*, 545 U.S. at 312.

⁹⁴ "After 1986, *Smith* seemed to hang by a proverbial thread, or literal footnote." Lonny S. Hoffman, *Intersections of State and Federal Power: State Judges, Federal Law, and the "Reliance Principle,"* 81 TUL. L. REV. 283, 297 (2006).

⁹⁵ *Grable*, 545 U.S. at 312–13.

The Court readily recognized that the *Smith* doctrine gave a broad jurisdictional grant to the federal courts—too broad, in fact.⁹⁶ Subsequent decisions “trimmed” *Smith* by requiring the federal issue be contested and substantial for a state law claim to invoke federal question jurisdiction.⁹⁷ The *Grable* Court further narrowed *Smith*, holding that “the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”⁹⁸

Therefore, a four-part inquiry is now required to determine whether federal question jurisdiction exists over a claim where there is no federal cause of action alleged. A court must analyze whether the federal issue is (1) necessary, (2) actually disputed, and (3) substantial; and (4) whether accepting jurisdiction would be too disruptive on the balance between state and federal judicial responsibilities.⁹⁹

In applying the test, the Court found that the meaning of the statute was disputed and that whether *Grable* received appropriate notice under the statute was “an essential element of its quiet title claim.”¹⁰⁰ In fact, the only issue at stake was the interpretation of “notice” under the federal statute.¹⁰¹ Therefore, the first two requirements of the test were present: the federal issue was both necessary to resolve the case and disputed by the parties.¹⁰² Under the substantiality prong, the Court found that the interpretation of the tax statute “sensibly belong[ed] in a federal court,” and the federal government’s interest in the “prompt and certain collection of delinquent taxes” indicated that the

⁹⁶ *Id.* at 313. The Court states that “*Smith* . . . held, in a somewhat generous statement of the scope of the doctrine, that a state-law claim could give rise to federal question jurisdiction as long as it ‘appears from the [complaint] that the right to relief depends upon the construction or application of [federal law].’” *Id.* at 312–13 (quoting *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921)).

⁹⁷ *Id.* at 313 (citing *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 164 (1997); *Merrell Dow*, 478 U.S. at 814 n.12 (1986); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 28 (1983)).

⁹⁸ *Id.* at 314. The Court also claimed to reconcile *Merrell Dow* with *Grable*. First, the Court stated that “*Merrell Dow* disclaimed the adoption of any bright-line rule.” *Id.* at 317. The Court held that *Merrell Dow* should not be read as requiring a federal right of action but instead as treating the lack of a federal cause of action as an indication of congressional intent. *Id.* at 318. “The [*Merrell Dow*] Court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction . . . would have attracted a horde of original filings and removal cases” *Id.*

⁹⁹ *Id.* at 314.

¹⁰⁰ *Id.* at 315. The Court noted that the *only* issue at stake was the interpretation of the federal statute. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

federal issue was substantial.¹⁰³ The substantiality inquiry requires consideration of the federal interest in the outcome of the disputed federal issue.¹⁰⁴

Finally, the Court gave a disconcertingly brief discussion of the application of the newly added fourth prong of the centrality test.¹⁰⁵ The Court held that because state title cases will rarely raise federal issues, especially issues concerning federal title provisions, there would be no disruption of the “federal-state division of labor.”¹⁰⁶ The Court offered virtually no guidance about what other factors could lead to a disruption of the “congressionally approved balance of federal and state judicial responsibilities.”¹⁰⁷ However, the Court did indicate that the caseload of the federal courts would be a large part of that examination.¹⁰⁸

It is important to note that the *Grable* test allows the courts to exercise a veto power in certain instances.¹⁰⁹ The process should go as follows: First, the court must determine whether the embedded federal issue is necessary, actually disputed, and substantial.¹¹⁰ If it fails to meet one of these standards, there is no federal question jurisdiction. Then, the court must view the first three factors in light of the disruption that accepting federal question jurisdiction would have on state and federal judicial responsibilities.¹¹¹ If allowing federal question jurisdiction would be too disruptive, the court has a veto power and can, and should, decline jurisdiction.¹¹²

¹⁰³ *Id.* (internal quotation marks omitted). The Court also noted that the Government had a substantial interest in the “availability of a federal forum to vindicate its own administrative action” and that it would benefit the parties to be able to appear in front of a judge who had experience in federal tax issues. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Importantly, the Court noted that a lack of any federal cause of action in *Merrell Dow* is worthy of some consideration in the assessment of substantiality, but its primary importance belongs under the fourth prong. *Id.* at 318. “For if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action.” *Id.*

¹⁰⁷ *Id.* at 314.

¹⁰⁸ *Id.* at 316–18 (reconciling *Merrell Dow*).

¹⁰⁹ *See id.* at 313–14 (discussing the disruption factor as a veto power).

¹¹⁰ *Id.* at 314.

¹¹¹ *Id.*

¹¹² *Id.* at 313–14.

B. Empire HealthChoice Assurance, Inc. v. McVeigh

Only one year after *Grable*, the Court decided *Empire HealthChoice Assurance, Inc. v. McVeigh*.¹¹³ *Empire HealthChoice* concerned the Federal Employees Health Benefits Act of 1959, which established a health insurance program for federal employees.¹¹⁴ The plaintiff, Empire, was a private insurance carrier that negotiated with the Office of Personnel Management to provide benefits for the defendant's deceased husband.¹¹⁵ The defendant originally sued a third party who allegedly caused her husband's death, and that suit ended in a settlement.¹¹⁶ Empire then sued the defendant to regain the money already paid to the widow for her deceased husband's medical care.¹¹⁷ Both the district court and the appellate court dismissed Empire's claim based on a lack of subject matter jurisdiction, holding that there was no federal question.¹¹⁸ The Supreme Court applied *Grable* and affirmed the lower courts' decisions with only a five-Justice majority.¹¹⁹

According to the Court, *Empire HealthChoice* was "poles apart from *Grable*" for three reasons.¹²⁰ First, the actions of a federal agency "triggered" the issue in *Grable*, while the issue in *Empire HealthChoice* involved a personal injury claim initiated in state court.¹²¹ Second, "*Grable* presented a nearly 'pure issue of law,'" the resolution of which would establish a rule applicable to "numerous tax sale cases," while *Empire HealthChoice* was "fact-bound and situation-specific."¹²² It seemed to be relevant to the substantiality of the federal issue both that a federal agency was involved in *Grable* and that resolving the issue in *Grable* would establish a rule, although neither alone was dispositive.¹²³ Finally, the Court recognized that the federal

¹¹³ *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006).

¹¹⁴ *Id.* at 682 (citing the Federal Employees Health Benefits Act (FEHBA) of 1959, 5 U.S.C. § 8901 (2000)).

¹¹⁵ *Id.* at 683–84, 687.

¹¹⁶ *Id.* at 683.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 688 (referring to the District Court's dismissal "for want of subject-matter jurisdiction" and the Court of Appeals's holding that the claim "'arise[s] under state law'").

¹¹⁹ *Id.* at 683. The Court also disconcertingly failed to quote any of the pertinent parts of *Grable* even though it briefly applied the *Grable* test. *Id.* at 699–701.

¹²⁰ *Id.* at 700–01.

¹²¹ *Id.* at 700.

¹²² *Id.* at 700–01 (quoting RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 65 (5th ed. Supp. 2005)). In addition, the issue in *Grable*, once settled, would not have to be decided again. Hoffman, *supra* note 94, at 307.

¹²³ See *Empire HealthChoice*, 547 U.S. at 701 (holding that the government's important interests in attracting able workers and assuring their health and welfare "do not warrant turning into a discrete and costly

government had important interests in “attracting able workers” and assuring their “health and welfare,” but those interests were not strong enough to require federal question jurisdiction.¹²⁴ Accepting jurisdiction in *Empire HealthChoice* would have turned simple contract-derived state law cases into “discrete and costly” federal cases.¹²⁵ Through its analysis, the Court signaled that both state interests in interpreting their own laws and federal interests in maintaining manageable caseloads should be considered under the disruption factor.¹²⁶

While applying the *Grable* test to *Empire HealthChoice*, the Court reiterated that though a federal cause of action is not a prerequisite for federal question jurisdiction, the intent of the *Grable* test was not to let just any case with a federal element into federal court.¹²⁷ On the contrary, the test was meant to be narrow, allowing into federal court only those cases in which the federal issue was central to the dispute.¹²⁸

III. THE GREAT COMPROMISE: THE GRABLE TEST

The centrality test has varied greatly over the past century, often leaving lower courts unsure of what the correct standard entails.¹²⁹ After nearly a century of indecision, the Supreme Court made great strides in *Grable* by creating a clear centrality test.¹³⁰ Additionally, as this Part demonstrates, the *Grable* test is aligned with the purposes of federal question jurisdiction. The *Grable* test is usable and grants an appropriate amount of flexibility and judicial discretion to determine the centrality of an embedded federal issue. Furthermore, *Grable* strikes an appropriate balance between the narrowness of the Holmes rule and the expansiveness of the standard expressed in *Smith*, addressing and resolving many of the deficiencies of the two prior tests.

‘federal case’ an insurer’s contract-derived claim to be reimbursed from the proceeds of a federal worker’s state-court-initiated tort litigation.”).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See id.* (referring to the state court’s competency to apply federal law in the personal injury suit at issue and the goal of not turning the case “into a discrete and costly ‘federal case’”). As in *Grable*, however, the Court again failed to precisely define the application of the newly added fourth factor. *Empire HealthChoice*, 547 U.S. 677.

¹²⁷ *See id.* at 701 (“This case cannot be squeezed into the slim category *Grable* exemplifies.”).

¹²⁸ *See id.* (“*Grable* emphasized that it takes more than a federal element ‘to open the “arising under” door.’” (citation omitted)).

¹²⁹ *See discussion supra* Part I.

¹³⁰ *See supra* text accompanying notes 98–99.

A. *The Merits of the Grable Test and Its Alignment with the Purposes of Federal Question Jurisdiction*

The Supreme Court has articulated three primary purposes for federal question jurisdiction: providing litigants with judges who have greater federal law experience than state judges,¹³¹ promoting uniformity of federal law,¹³² and providing litigants with courts that are more solicitous to federal issues.¹³³ The use of the *Grable* test promotes all three of those interests by requiring courts to consider whether the federal issue in a state law claim is substantial.¹³⁴

Cases that do not meet the requirements of *Grable* and cases that fail to allege a federal cause of action cannot proceed in federal court.¹³⁵ However, cases decided under *Grable* require the court to determine whether a substantial federal issue exists.¹³⁶ This is the principal purpose behind the creation of the centrality test—to allow disputes into federal courts that do not allege a federal cause of action but contain a federal element that is so central to the dispute that it “sensibly belongs in a federal court.”¹³⁷ Because their claim necessarily implicates a substantial federal issue, litigants successfully relying on *Grable* to gain access to federal court would be best served by having their cases adjudicated by judges more experienced in federal law, in courts that are more solicitous of their claims.¹³⁸ In addition, if a court finds that a litigant has surmounted the *Grable* test because there is a substantial federal interest implicated in the dispute, which is not outweighed by the

¹³¹ *E.g.*, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483–84 (1981) (“The factors generally recommending . . . federal-court jurisdiction . . . include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.”).

¹³² *E.g.*, *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 811 (1824) (“It is indispensable, that the interpretation and application of the laws and treaties of the Union should be uniform.”); *see also* THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 16, at 535 (“The mere necessity of uniformity in the interpretation of the national laws, decides the question.”).

¹³³ *E.g.*, *Osborn*, 22 U.S. (9 Wheat.) at 811 (“There is no unreasonable jealousy of State judicatures; but the constitution itself supposes that they may not always be worthy of confidence, where the rights and interests of the national government are drawn in question.”).

¹³⁴ *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005).

¹³⁵ The exception to this claim is when diversity jurisdiction provides the method to access a federal forum. 28 U.S.C. § 1332 (2006).

¹³⁶ *See Grable*, 545 U.S. at 314 (requiring the federal issue to be substantial to invoke federal question jurisdiction).

¹³⁷ *Id.* at 315.

¹³⁸ *See id.* at 314 (holding that meeting the *Grable* test requires a substantial federal issue).

disruption factor,¹³⁹ it then logically follows that the federal interest in maintaining uniformity in that decision is also important. Consequently, the *Grable* test furthers the purposes of the federal court system.

B. Comparing the *Grable* Test to the *Smith and Holmes* Tests

Beyond furthering the purposes of federal question jurisdiction, the *Grable* test also presents a useful compromise between a centrality test that is too limited and one that is sweepingly broad. Because the well-pleaded complaint rule is so rigid—the plaintiff either injected the federal element into his claim or he did not—the centrality test must be less rigid.¹⁴⁰ Courts determine whether the federal element in the plaintiff’s claim is “federal enough,” so a flexible test is necessary to permit courts the discretion needed to make that determination as well as the ability to weigh all relevant factors. While a bright-line rule tends to be both overinclusive and underinclusive,¹⁴¹ a rule that is too malleable can have the same result. Under-inclusiveness is especially problematic in deciding federal question cases because it “prevents equal treatment, if equal treatment means treating like cases alike.”¹⁴² If courts can only consider whether the cause of action stems from a federal or state law, this will cause state law claims involving substantial federal issues to end up in state courts, possibly leading to a lack of uniformity in federal law.

The Holmes rule ignores “litigation reality”¹⁴³ by denying cases a federal forum if no federal cause of action was alleged, even if the issue implicates a substantial federal interest.¹⁴⁴ That Congress did not create any private right of action under a federal statute does not automatically indicate that it thought there should be no federal question jurisdiction.¹⁴⁵ A bright-line rule like the

¹³⁹ Of course, the other elements of *Grable* must also be satisfied. See *supra* text accompanying note 99.

¹⁴⁰ Freer, *Of Rules and Standards*, *supra* note 5, at 320–21.

¹⁴¹ Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2257 (1998) (“Although bright-line rules may offer comparative advantages in reducing risks of error or bias by other decisionmakers . . . they do so only at the inevitable cost of being either overinclusive or underinclusive in serving their substantive purposes.”).

¹⁴² Elaine A. Welle, *Freedom of Contract and the Securities Laws: Opting out of Securities Regulation by Private Agreement*, 56 WASH. & LEE L. REV. 519, 560 (1999).

¹⁴³ Freer, *Of Rules and Standards*, *supra* note 5, at 318 (“One of the things the court ignores in applying the well-pleaded complaint rule is litigation reality—that is, an assessment of the issues that actually must be addressed when the court adjudicates the merits of the dispute.”).

¹⁴⁴ See *supra* text accompanying notes 48–50.

¹⁴⁵ See *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 825 (1986) (Brennan, J., dissenting) (“Why should the fact that Congress chose not to create a private federal *remedy* mean that Congress would not want there to be federal *jurisdiction* to adjudicate a state claim that imposes liability for violating the federal law?”).

Holmes rule also fails to further the purposes of federal question jurisdiction by denying courts essential discretion.¹⁴⁶ By only granting a federal forum to those cases in which there is a mandated private, federal right of action, the Holmes rule would keep important federal issues from being decided in a federal court. It denies the judiciary the ability to examine the substantiality of the federal issue. The result is a likely decrease in the uniformity of the interpretation of federal law because disputes implicating substantial federal issues would be decided in state courts merely because there was no private, federal cause of action. The Holmes rule also effectively denies litigants an experienced federal judge or a solicitous court to hear their federal issue if the claim does not allege a federal cause of action, despite the substantiality of the federal issue.

The *Smith* standard is also inappropriate for determining whether federal question jurisdiction exists when a federal right of action is lacking. The overly broad *Smith* standard encourages federal question jurisdiction whenever a federal law or statute is to be applied or interpreted.¹⁴⁷ This expansive view would inundate federal courts with cases involving insubstantial federal issues and take away the states' power to interpret their own laws. *Smith* fails to recognize that state courts are competent to adjudicate cases that require applications of federal law¹⁴⁸ because it does not enable federal courts to consider any factors other than whether a federal law is to be applied or interpreted and whether the federal claim is more than "merely colorable."¹⁴⁹

Providing conciliation between the Holmes rule and *Smith* test, *Grable* resolves some of the inadequacies from which the two older standards suffer. The *Grable* test is superior to Holmes's view in part because it allows flexibility and judicial discretion in determining whether a federal issue is substantial.¹⁵⁰ The bright-line Holmes rule only allows federal question jurisdiction if there is a federal right of action.¹⁵¹ *Grable*, however, lets into

¹⁴⁶ The *Grable* test, however, does promote the purposes of federal question jurisdiction. See discussion *supra* Part III.A.

¹⁴⁷ 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.")

¹⁴⁸ See, e.g., *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006) ("The state court in which the personal-injury suit was lodged is competent to apply federal law . . .").

¹⁴⁹ *Smith*, 255 U.S. at 199.

¹⁵⁰ See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) (arguing for use of discretionary rules to determine when a case should be allowed to invoke federal jurisdiction).

¹⁵¹ *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

federal courts those same cases that would pass the Holmes rule, while also enabling courts to consider disputes that do not allege a federal cause of action but do have a necessary, actually disputed, and substantial embedded federal issue, making the *Grable* test a more comprehensive measure.¹⁵²

The *Grable* test is also more useful than the Holmes rule¹⁵³ because it allows courts to consider congressional intent concerning the balance between state and federal judicial responsibilities beyond the plain language of a statute.¹⁵⁴ That Congress even fashioned a law concerning a certain subject indicates that it considered there to be some federal interest in the topic.¹⁵⁵ Under *Grable*, the courts must ascertain how substantial the interest in that issue is—despite the absence of a congressionally provided cause of action.¹⁵⁶

In addition, while broader than the Holmes rule, *Grable* is still more limiting than *Smith*.¹⁵⁷ *Grable* restricts *Smith*'s broad allowance of cases into federal courts by not only requiring courts to consider the impact of accepting federal question jurisdiction on state and federal judicial responsibilities but also by giving the court a veto power if the disruption would be too great, even where there is a substantial federal issue.¹⁵⁸ The *Grable* test thus gives courts the discretion to decide if an issue is substantial enough to invoke federal question jurisdiction, while at the same time forcing courts to consider the effect of their decision, making it preferable to the *Smith* standard.

Grable cures many of the ills of the Holmes rule and *Smith* test. The Supreme Court's decision in *Grable* encourages judicial discretion and

¹⁵² *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005); see also John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145, 148 (2006) (“*Grable & Sons* stands for the proposition that discretion within the lower courts is preferable to a bright-line rule for determining jurisdiction over hybrid law cases.”).

¹⁵³ *Contra Hoffman*, *supra* note 94 (arguing for a reinstatement of the Holmes rule).

¹⁵⁴ *Grable*, 545 U.S. at 313–14.

¹⁵⁵ *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 828 (1986) (Brennan, J., dissenting) (“Congress passes laws in order to shape behavior; a federal law expresses Congress’ determination that there is a federal interest in having individuals or other entities conform their actions to a particular norm established by that law. Because all laws are imprecise to some degree, disputes inevitably arise over what specifically Congress intended to require or permit. It is the duty of courts to interpret these laws and apply them in such a way that the congressional purpose is realized.”).

¹⁵⁶ *Grable*, 545 U.S. at 318 (holding that congressional intent is relevant to the substantiality of the federal issue and to the disruptiveness of federal and state judicial responsibilities).

¹⁵⁷ Compare *Grable*, 545 U.S. 308 (requiring the claim to meet four factors to invoke federal question jurisdiction), with *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180 (1921) (requiring only that there be a federal issue and that it be more than merely colorable).

¹⁵⁸ *Grable*, 545 U.S. at 313–14.

promotes flexibility, while taking into consideration the purposes of federal courts, the substantiality of the federal issue, state and federal caseloads, and states' interests in interpreting their own laws.

IV. PROBLEMATIC LOWER COURT APPLICATIONS OF *GRABLE*

Although the lower courts generally come to the correct conclusion as to whether federal question jurisdiction is present in a case involving a state law cause of action,¹⁵⁹ some fail to appreciate the nuances of the test. In a few instances, this result is in direct opposition to the intent of *Grable*, which was to allow a slim category of cases to invoke federal question jurisdiction even though they only assert state law causes of action, if, and only if, there is a federal issue that is so central to the dispute that it “sensibly belongs in a federal court.”¹⁶⁰ These lower court misapplications are problematic because the Supreme Court is unlikely to make another decision involving the centrality test in the near future.¹⁶¹ The lower courts must cautiously and thoroughly apply the *Grable* test while being sure to utilize the guidance already given by the Supreme Court in *Grable* and *Empire HealthChoice*.

This Part addresses a few of the more significant problems with lower federal court applications of the *Grable* test. Some courts have difficulties with the fourth factor of the *Grable* test, the inquiry into whether accepting federal question jurisdiction would disrupt congressionally approved divisions of state and federal labor. Section A discusses these misguided applications of the disruption factor. Section B addresses the tendency of some courts to consider the impact of a missing federal cause of action incorrectly. Section C analyzes the placing of undue weight on the presence or lack of agency action under *Grable*'s substantiality factor. Section D evaluates the problematic overemphasis on the federal issue in *Grable* being the only disputed issue. Finally, Section E addresses a curious and alarmingly incorrect reading of *Grable* as an exception to the well-pleaded complaint rule.

¹⁵⁹ See cases cited *supra* note 11.

¹⁶⁰ See *Grable*, 545 U.S. at 315 (holding that because the issue of whether there was notice within the meaning of a federal statute was “an essential element” of the claim, the claim belonged in federal court).

¹⁶¹ As seen by a discussion of centrality cases, the Supreme Court only decides these cases occasionally. See *supra* note 13 and accompanying text.

A. *Incorrect Applications of the Disruption Factor (Congressionally Approved Divisions of Labor)*

The Supreme Court added a new factor to the centrality test in *Grable*, the disruption factor,¹⁶² although this new factor received little discussion in both *Grable*¹⁶³ and *Empire HealthChoice*.¹⁶⁴ The Court's analysis of those cases, however, clearly indicated that applying the disruption factor requires consideration of the congressional intent evidenced by the lack of a federal cause of action,¹⁶⁵ the states' interest in interpreting their own laws,¹⁶⁶ and keeping the federal courts' caseloads manageable.¹⁶⁷

The possible disruptive impact that accepting federal question jurisdiction might have on the balance between state and federal judicial responsibilities is of great importance to the Court, evidenced by its addition of this factor to the centrality test in *Grable* and its reference to the disruption factor as a complete veto power.¹⁶⁸ A few courts have had trouble applying the disruption factor,¹⁶⁹ which is problematic because this was *Grable*'s most significant change to the centrality test. Incorrect applications of the disruption factor could potentially destroy the slimness of the *Grable* test.¹⁷⁰

In *Broder v. Cablevision Systems Corp.*,¹⁷¹ the Second Circuit did not appropriately consider all aspects of the disruption factor, and therefore, wrongly accepted federal question jurisdiction. In *Broder*, the defendant provided cable television services that gave certain customers who owned summer homes a discount for the winter season.¹⁷² However, the defendant

¹⁶² Compare *Grable*, 545 U.S. at 314 (requiring the federal issue to be substantial, necessary, and actually disputed and requiring the court to consider the disruptive factor on state and federal judicial responsibilities), with *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983) (holding only that the federal issue be substantial, necessary, and actually disputed).

¹⁶³ *Grable*, 545 U.S. 308.

¹⁶⁴ *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006).

¹⁶⁵ See *Grable*, 545 U.S. at 318 (“[T]he absence of a federal private right of action [is] evidence relevant to, but not dispositive of, the ‘sensitive judgments about congressional intent’ that § 1331 requires.”)

¹⁶⁶ Cf. *Empire HealthChoice*, 547 U.S. at 700 (noting that, unlike *Grable*, the issue in *Empire HealthChoice* was prompted “by the settlement of a personal-injury action launched in state court, and the bottom-line practical issue is the share of that settlement properly payable to Empire” (internal citations omitted)).

¹⁶⁷ See *id.* at 701 (holding that the federal interest was not enough to overcome the disruptiveness of accepting federal question jurisdiction).

¹⁶⁸ *Grable*, 545 U.S. at 313.

¹⁶⁹ See discussion *infra* notes 171–90 and accompanying text.

¹⁷⁰ See discussion *infra* notes 185–90 and accompanying text.

¹⁷¹ 418 F.3d 187 (2d Cir. 2005).

¹⁷² *Id.* at 191.

only offered the rate to customers who specifically requested to have their cable cut off entirely during the winter.¹⁷³ The plaintiffs sued under four state law causes of action, two of which implicated federal law: breach of contract and violation of the New York General Business Law (GBL).¹⁷⁴ The plaintiffs claimed that the defendant breached its customer agreement by failing to provide uniform service, a violation of 47 U.S.C. § 543(d), while the defendant argued that § 543(d) did not apply to the plaintiffs.¹⁷⁵ The Second Circuit Court of Appeals affirmed the lower court's holding that there was federal question jurisdiction.¹⁷⁶

As state law provided both causes of action,¹⁷⁷ the court was correct to apply the *Grable* test but not correct in the final result. Regarding the disruption factor, the *Broder* court decided that there would be no disruptive effect because, like *Grable*, it would be rare for a New York state law breach-of-contract claim or a suit under New York's GBL to be based on the violation of a federal law.¹⁷⁸ The problem with this analysis is twofold.

First, the *Broder* court failed to mention the importance of Congress's choice not to provide a private right of action under § 543(d),¹⁷⁹ which is certainly meaningful to an analysis of both the substantiality factor and the disruption factor.¹⁸⁰ While reconciling *Merrell Dow* with *Grable*, the Court stated, "the absence of a federal private right of action [is] evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent.'"¹⁸¹ The *Broder* court failed to discuss that Congress did not create a private right of action,¹⁸² even though the Supreme Court specifically emphasized its relevance.¹⁸³ This sends the wrong message to lower courts—that the lack of a

¹⁷³ *Id.* at 192.

¹⁷⁴ *Id.* (alleging that the defendant violated its customer agreement in part by failing to provide the plaintiffs with uniform rates under § 543(d)).

¹⁷⁵ *Id.* at 192, 195.

¹⁷⁶ *Id.* at 193, 196.

¹⁷⁷ *Id.* at 192.

¹⁷⁸ *Id.* at 196.

¹⁷⁹ *Id.* at 187.

¹⁸⁰ See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318 (2005) (noting that the lack of a federal cause of action is important to the substantiality factor but more important to the disruption factor).

¹⁸¹ *Id.* (quoting *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 810 (1986)).

¹⁸² *Broder*, 418 F.3d 187.

¹⁸³ *Grable*, 545 U.S. at 318.

federal cause of action is unimportant.¹⁸⁴ This is too broad a reading of *Grable*.

Second, the *Broder* court incorrectly held that “it is likely to be the rare New York breach-of-contract action or suit under GBL § 349 that seeks to assert a private right of action for violation of a federal law otherwise lacking one.”¹⁸⁵ By allowing a breach-of-contract claim derived from state law to invoke federal question jurisdiction, the *Broder* court opened a gate to federal courts. While a contract claim may not involve the federal cable regulatory scheme, courts within the Second Circuit will certainly encounter other contract claims that have some federal element. This decision gives litigants in such cases the ability to argue for a federal forum successfully.¹⁸⁶ *Broder* is more comparable to *Empire HealthChoice* than *Grable* in this respect,¹⁸⁷ and a breach-of-contract claim sensibly belongs in state court so that state courts may enforce and interpret their own laws.¹⁸⁸

The *Broder* court should have exercised its veto power and declined federal question jurisdiction in part because of the disruptive effect on the congressionally approved division of labor between state and federal courts. The court’s main failure stemmed from reading *Grable* too broadly, as if *Grable* had reinstated the *Smith* standard and cases requiring any construction or application of a federal law require federal question jurisdiction.¹⁸⁹ The Supreme Court expressly stated that *Smith* had been narrowed and then narrowed it further by adding the disruption factor to the “arising under” inquiry in *Grable*,¹⁹⁰ but the *Broder* court failed to consider this narrowness correctly. As the Supreme Court is unlikely to revisit the centrality test again, it is important for lower courts, especially appellate courts, to apply the test correctly and keep its narrowness in mind.

¹⁸⁴ For a discussion of the importance of giving correct weight to the lack of a federal cause of action, see *infra* Part IV.C.

¹⁸⁵ *Broder*, 418 F.3d at 196.

¹⁸⁶ That is, if the case is not barred by one of the other factors of the *Grable* test. For instance, in *Broder* the embedded federal issue was not substantial. The more substantial the federal issue, the less the emphasis on the disruption factor. See discussion *supra* text accompanying notes 109–13.

¹⁸⁷ *Broder* was decided prior to the Supreme Court’s decision in *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006).

¹⁸⁸ Compare *Empire HealthChoice*, 547 U.S. at 701 (holding that the federal issue was not substantial enough to turn a state breach-of-contract claim into a federal one), with *Broder*, 418 F.3d at 195 (finding the existence of a substantial federal issue regarding a federal regulatory system within a state law contract claim).

¹⁸⁹ *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 199 (1921).

¹⁹⁰ *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312–13 (2005).

B. Failure to Consider the Lack of a Federal Cause of Action Properly

The Supreme Court in *Grable* held that a federal cause of action is not necessary to invoke federal question jurisdiction;¹⁹¹ however, the absence of a federal cause of action is still relevant to the centrality test.¹⁹² A missing cause of action is worth some discussion under the substantiality factor, but more significantly it offers “an important clue to Congress’s conception of the scope of jurisdiction to be exercised under § 1331” and, therefore, is most significant to the newly added disruption factor.¹⁹³ Although a nonexistent federal cause of action is important to the *Grable* analysis, courts must not view it as dispositive or as the only information appropriate to the analysis of the disruption factor,¹⁹⁴ or the result will be a reinstatement of *Merrell Dow*.

In *Eastman v. Marine Mechanical Corp.*, the defendant employed the plaintiff and required him to sign a document stating that he would adhere to the defendant’s “quality assurance program by reporting any contractual violations” to the defendant.¹⁹⁵ During his employment, the plaintiff gave written notice to his supervisors warning them that one of the defendant’s processes might violate the defendant’s contractual obligations.¹⁹⁶ The defendant investigated and determined that the plaintiff’s allegations were unfounded.¹⁹⁷ The defendant eventually fired the plaintiff “for making more unfounded and meritless allegations” after being reprimanded and warned.¹⁹⁸

The plaintiff sued, alleging wrongful firing in violation of public policy, citing several state and federal statutes he believed evidenced that policy.¹⁹⁹ The defendant removed to federal court, and the plaintiff moved to remand, contending that there was no well-pleaded federal question in his complaint.²⁰⁰

¹⁹¹ *Id.* at 318.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* (“[T]he absence of a federal private right of action [is] evidence relevant to, but not dispositive of, the ‘sensitive judgments about congressional intent’ that § 1331 requires.” (quoting *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 810 (1986))).

¹⁹⁵ 438 F.3d 544, 547 (6th Cir. 2006).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 548.

¹⁹⁹ *Id.* One of the defendant’s major clients was the Navy, and the plaintiff alleged that “[t]here is a clear public policy, manifested in federal statutes and regulations, including but not limited to 18 U.S.C. § 287 and 31 U.S.C. § 3729, prohibiting the submission of false or fraudulent claims to the military or federal government.” *Id.*

²⁰⁰ *Id.* at 549.

The district court denied that motion and subsequent motions, eventually granting summary judgment for the defendant.²⁰¹

On appeal, the Sixth Circuit held that there was no federal question jurisdiction.²⁰² In so holding, the Sixth Circuit placed excessive emphasis on the importance of a missing federal cause of action.²⁰³ The court came to the correct result by denying federal question jurisdiction²⁰⁴ but reached the result through flawed analysis. The court appropriately found it significant to the substantiality factor that Congress withheld a private right of action, but failed to point to any other factors that might suggest a lack of substantiality.²⁰⁵ Although the Sixth Circuit purported to recognize that *Grable* did away with *Merrell Dow*'s requirement of a federal cause of action, the court only relied on Congress's withholding of a private right of action while discussing substantiality.²⁰⁶ Not only did the Supreme Court note in *Grable* that the lack of a private, federal cause of action was more pertinent to the disruption factor than to the substantiality factor, but it also stated that it was only indicative, not dispositive of either.²⁰⁷ This statement made it clear that the substantiality analysis requires something more than just examining the lack of a federal cause of action.²⁰⁸

The Sixth Circuit incorrectly based its holding—that there was no substantial federal question—solely on Congress's failure to provide a private right of action.²⁰⁹ Although the court came to the right conclusion by denying federal question jurisdiction,²¹⁰ it is important that appellate courts utilize the *Grable* test correctly so that other lower courts have proper guidance because the Supreme Court likely will not readdress the centrality test in the near

²⁰¹ *Id.*

²⁰² *Id.* at 553–54.

²⁰³ *See id.* at 551–52 (“The absence of a private right of action might seem to be dispositive in light of the Supreme Court’s holding in *Merrell Dow* . . .”).

²⁰⁴ *Id.* at 553. The federal issue—the public policy cited by the plaintiff—was not in dispute, and therefore, the *Grable* test was not met.

²⁰⁵ *Id.* at 552.

²⁰⁶ *Id.* at 551–52.

²⁰⁷ *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 318 (2005).

²⁰⁸ *See id.* (holding that the absence of a federal cause of action is an important, but not determinative, factor a court should consider in the substantiality analysis).

²⁰⁹ The court also discussed a Ninth Circuit case, which held that there was no substantial federal issue “in a state action relying on the FCA [the False Claims Act] as a source of public policy because . . . a contrary finding would open a ‘back door’ into federal court for what essentially was a state tort action.” *Eastman*, 438 F.3d at 553.

²¹⁰ *Eastman* failed to pass the *Grable* test because the federal policy cited by the plaintiff was not in question. *Id.* at 552. The court held that the plaintiff correctly stated the federal policy. *Id.*

future.²¹¹ An overemphasis on the importance of a missing federal cause of action threatens to extinguish the second branch of arising under cases and the very cases *Grable* was meant to address: those cases in which Congress did not provide a private right of action. The purpose of *Grable* was to recognize that in some instances, even where Congress has provided no federal cause of action, an embedded federal element in a state law claim can be so important that federal question jurisdiction is justified.²¹²

In *Pennsylvania v. Eli Lilly & Co. (Eli Lilly I)*,²¹³ the court also overemphasized the lack of a federal cause of action. Though the Commonwealth did not allege a single cause of action created by federal law, the defendants filed for removal, arguing that the Commonwealth's claims had an embedded federal issue.²¹⁴ To prevail, the Commonwealth needed to prove that the defendants fraudulently promoted their drugs, which in turn led to false claim submissions to Medicaid.²¹⁵ The complaint alleged that the defendants created "false" claims because "Medicaid reimbursement is not available for non-medically accepted indications or non-medically necessary uses" of certain drugs.²¹⁶ According to the defendants, this allegation necessarily depended on the definition of "non-medically accepted indication" and "non-medically necessary"—terms defined by federal law.²¹⁷ Therefore, the plaintiff's claims depended on the construction and application of the FDCA, which is implemented by the Food and Drug Administration (FDA).²¹⁸ Shortly after quoting the portion of *Merrell Dow* stating that the absence of a federal cause of action is "tantamount to a congressional conclusion that [the federal issue] is insufficiently 'substantial' to confer federal-question jurisdiction,"²¹⁹ the *Eli Lilly I* court held, "Due to the absence of any indication of congressional intent to confer federal jurisdiction over claims involving the

²¹¹ See *supra* note 13 and accompanying text.

²¹² See *Grable*, 545 U.S. at 314 (holding that even where there is no federal cause of action a claim can invoke federal question jurisdiction if there is a federal element to the claim that is necessary, actually disputed, substantial, and not be too disruptive of congressionally approved state and federal judicial responsibilities).

²¹³ 511 F. Supp. 2d 576 (E.D. Pa. 2007).

²¹⁴ *Id.* at 578–79, 582.

²¹⁵ *Id.* at 581.

²¹⁶ *Id.* at 581–82 (internal quotations omitted).

²¹⁷ *Id.* at 582.

²¹⁸ *Id.*

²¹⁹ *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 814 (1986).

FDCA or Title XIX, the Defendants also fail to demonstrate the requisite substantiality required by *Grable*.²²⁰

Although the court correctly decided this case, its analysis was flawed in two important respects. First, the court only discussed the absence of a federal cause of action under *Grable*'s substantiality factor.²²¹ The Supreme Court in *Grable* clearly stated that although the lack of a federal cause of action is somewhat relevant to the substantiality factor, it is most significant to and most indicative of the fourth factor, disruption.²²² Second, the *Eli Lilly I* court based its entire decision regarding the substantiality of the federal issue on Congress's failure to provide a private, federal remedy. The Supreme Court also made clear that while the nonexistence of a federal cause of action is certainly significant, even highly relevant,²²³ the *Grable* test requires consideration of all four factors and too great an emphasis should not be placed on the absence of a federal cause of action.²²⁴

The *Eli Lilly I* court's analysis is problematic because the intent of the substantiality factor of *Grable* is to encourage consideration of the strength of the federal interest in a disputed issue.²²⁵ By only discussing the omission of a federal cause of action, the court overlooked other issues that might indicate substantiality, including the federal government's interest in the regulations promulgated by its agencies, in this case the FDA, and the interest of plaintiffs in having a federal court interpret the federal statute. While the federal issue in *Eli Lilly I* was insubstantial, if the court utilizes this same pattern of analysis in another decision where the substantiality issue is less clear, the results could be to ignore the Supreme Court's overruling of *Merrell Dow*. Courts must remember that the *Grable* test requires careful consideration of all the relevant issues, and the nonexistence of a federal cause of action is not dispositive.²²⁶

C. Overemphasis on the Existence or Lack of Federal Agency Action

In *Empire HealthChoice*, the Supreme Court distinguished *Grable* in a few respects, one of which focused on the presence of federal agency action in

²²⁰ *Eli Lilly I*, 511 F. Supp. 2d at 586.

²²¹ *Id.*

²²² *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318 (2005).

²²³ *See id.* (noting that the lack of a federal cause of action is important to the substantiality factor but most important to the disruption factor).

²²⁴ *See supra* text accompanying notes 109–12.

²²⁵ *See Grable*, 545 U.S. at 315.

²²⁶ *Id.* at 313–14.

Grable.²²⁷ In *Empire HealthChoice*, the underlying cause of action was the result of a state law based personal injury claim.²²⁸ No federal agency action was involved.²²⁹ Although the presence of a federal agency's action in a case does weigh toward finding a substantial federal issue, some courts overemphasize the existence or lack of federal agency action when determining the existence of federal question jurisdiction. Overemphasis on the *presence of* agency action could diminish the narrowness of the *Grable* test, while the overemphasis on the *lack of* agency action could have the opposite effect by keeping cases out of federal courts when there is a substantial federal interest despite no federal agency involvement.

In *Mikulski v. Centerior Energy Corp.*, the Sixth Circuit found that there was no federal question jurisdiction.²³⁰ The plaintiffs owned shares of stock in Centerior Energy Corporation (the defendant) and filed a class action suit against the defendant for fraudulent misrepresentation and breach of contract.²³¹ Relying on their interpretation of 26 U.S.C. § 312(n)(1), the plaintiffs alleged that the defendant did not “deduct certain interest expenses from its calculation of taxable earnings,” thereby making the defendant seem more profitable and increasing its tax liability, the cost of which was then passed onto the plaintiffs and the other class members.²³² The defendant characterized § 312(n)(1) differently, contending that it did not apply to the plaintiffs at all.²³³

The federal issue in *Mikulski* was the interpretation of § 312(n)(1), which was certainly disputed and necessary to the case.²³⁴ In fact, the plaintiffs acknowledged that if their construction of the statute was incorrect, it was fatal to their case because that interpretation was the basis for all of their claims.²³⁵ The problem with the *Mikulski* court's *Grable* analysis appears in its consideration of the third factor, substantiality. The court took an interesting and somewhat dangerous approach by utilizing the Supreme Court's

²²⁷ *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700 (2006).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ 501 F.3d 555, 557 (6th Cir. 2007).

²³¹ *Id.* at 557–58.

²³² *Id.* at 558.

²³³ *Id.* at 558–59.

²³⁴ *Id.* at 569–70.

²³⁵ *Id.* The plaintiffs claimed that the defendants should have only capitalized interest expenses incurred after the effective date of the statute, rather than including interest expenses on projects that were ongoing at the time of the effective date of the statute. *Id.* at 569.

considerations in *Empire HealthChoice* and *Grable* to create a four-factor substest for the substantiality factor:

The Supreme Court has identified four aspects of a case or an issue that affect the substantiality of the federal interest in that case or issue: (1) whether the case includes a federal agency, and particularly, whether that agency's compliance with the federal statute is in dispute; (2) whether the federal question is important (i.e., not trivial); (3) whether a decision on the federal question will resolve the case (i.e., the federal question is not merely incidental to the outcome); and (4) whether a decision as to the federal question will control numerous other cases (i.e., the issue is not anomalous or isolated).²³⁶

Although the court stated, "no single factor is dispositive and these factors must be considered collectively, along with any other factors that may be applicable in a given case,"²³⁷ this four-factor test is somewhat disconcerting. At the very least, the court problematically overemphasized the importance of federal agency action.

The *Mikulski* court held that the absence of federal agency involvement weighed against finding federal question jurisdiction.²³⁸ The court also reasoned that because the IRS had never interpreted the provision at hand or initiated any litigation involving this provision, the issue must not be "particularly important to the federal government."²³⁹ The dissent in *Mikulski* put it best: "Clearly, such a lack of litigation bears no necessary correlation to the importance of the subject matter."²⁴⁰

The *Mikulski* court's creation of a substantiality test involving federal agency action is misguided. The Supreme Court in *Grable* logically considered it pertinent to the substantiality inquiry that the outcome would govern a federal agency's actions.²⁴¹ However, it in no way suggested that this should be a consideration in every subsequent analysis of federal question

²³⁶ *Id.* at 570.

²³⁷ *Id.*

²³⁸ *Id.* ("The first factor is both objective and apparent, and in this case it weighs against characterizing the federal interest as substantial because there is no federal agency in this dispute."). The *Mikulski* court also considered it relevant to the first factor of its substantiality test that the resolution of this case would not affect the IRS's ability to collect taxes. *Id.*

²³⁹ *Id.* at 571.

²⁴⁰ *Id.* at 576 (Daughtrey, J., concurring in part and dissenting in part).

²⁴¹ See *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700 (2006) (only briefly mentioning the importance of the agency action in *Grable*).

jurisdiction. Instead, the Court merely indicated that actions stemming from state law and launched in state court likely implicate a substantial federal interest if they arise from the action of a federal department or agency.²⁴² The Court did not intend that agency involvement should be a consideration in every application of the *Grable* test.

The *Mikulski* court sends the wrong signal to other lower courts by creating a test that always examines agency involvement. While the presence of federal agency action might indicate that there is some federal issue, it is certainly possible that a dispute involving the action of a federal agency could have an insubstantial federal issue and that one involving no agency action could implicate a substantial federal issue. Though the *Mikulski* court makes relevant considerations under its substantiality analysis, the problem lies in that the court seems to have fashioned a subtest to use in all applications of the centrality test. Its subtest suggests that federal question jurisdiction, where there is no private cause of action, is always allowable if a federal agency is involved and the agency has litigated or interpreted the statute at hand.²⁴³ This fails to recognize the flexibility of the test the Supreme Court attempted to fashion in *Grable*.²⁴⁴ Once again, the lower courts cannot assume the Supreme Court will revisit the centrality test to clarify it further; therefore, the lower courts must correctly apply the *Grable* test using the guidance the Supreme Court provided in *Grable* and *Empire HealthChoice*.

D. Overemphasis on the Federal Issue as the Only Disputed Issue in *Grable*

In *Empire HealthChoice*, the Supreme Court distinguished *Grable* in part because the question whether *Grable* received adequate notice was “‘the only . . . issue contested in the case.’”²⁴⁵ However, the Supreme Court did not hold that only cases in which the federal issue is the single disputed issue could invoke federal question jurisdiction using the *Grable* test. Instead, the Court was merely noting that accepting jurisdiction in *Grable* was proper because the federal issue was certainly disputed, the sole disputed issue, and

²⁴² See *id.* (“This case is poles apart from *Grable*. . . . Here, the reimbursement claim was triggered, not by the action of any federal department, agency, or service, but by the settlement of a personal-injury action launched in state court, and the bottom-line practical issue is the share of that settlement properly payable to Empire.” (internal citations omitted)). The Court then states other reasons why the federal issue is not substantial enough to outweigh the disruptiveness of allowing federal question jurisdiction. *Id.* at 700–01.

²⁴³ See *Mikulski*, 501 F.3d at 571.

²⁴⁴ See discussion *supra* Part III.

²⁴⁵ *Empire HealthChoice*, 547 U.S. at 700 (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 315 (2005)).

[g]iven the absence of threatening structural consequences and the clear interest the Government, its buyers, and its delinquents have in the availability of a federal forum, there is no good reason to shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of the state-law title claim.²⁴⁶

It was merely a part of the Supreme Court's analysis that the federal issue was the only matter disputed, but some courts have placed undue weight on whether both state and federal questions are in dispute.²⁴⁷

In *Utah v. Eli Lilly & Co. (Eli Lilly II)*, the State of Utah sued the defendant alleging that the defendant's actions led to the improper disbursement of Medicaid funds to drug users.²⁴⁸ One of the plaintiff's claims rested on the defendant's "facilitation of Medicaid claims . . . for non-'medically accepted indications,'" a term defined in a regulation promulgated by the FDA.²⁴⁹ All of the plaintiff's claims were based in state law,²⁵⁰ and the court denied federal question jurisdiction.²⁵¹

The federal element in *Eli Lilly II* was only a single part of one of the plaintiff's claims, and in denying federal question jurisdiction the court held that "[g]iven these multiple bases, resolution of this claim does not hinge *solely* on a federal question."²⁵² In *Empire HealthChoice*, the Supreme Court did note that the federal issue in *Grable* was the only issue disputed,²⁵³ but the *Eli Lilly II* court relied too heavily on that statement. It interpreted the Supreme Court's statement to mean that the federal issue must always be the only disputed issue.²⁵⁴

This is certainly problematic. Rather than stating that *Grable* only applies to cases in which the federal issue is the only issue in dispute, the Court was merely trying to show the differences between *Grable* and *Empire*

²⁴⁶ *Grable*, 545 U.S. at 319–20 (footnote omitted).

²⁴⁷ According to Professor Hoffman, "most courts have recognized that, to be consistent with *Grable*, the meaning of the federal statute must be the only legal or factual issue in the case." Hoffman, *supra* note 94, at 301 n.97 (citing fifteen cases for this proposition).

²⁴⁸ 509 F. Supp. 2d 1016, 1018 (D. Utah 2007).

²⁴⁹ *Id.* at 1022.

²⁵⁰ *Id.* at 1018.

²⁵¹ *Id.* at 1021.

²⁵² *Id.* at 1022 (emphasis added).

²⁵³ *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700 (2006); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 315 (2005).

²⁵⁴ See *Eli Lilly II*, 509 F. Supp. 2d at 1022.

HealthChoice to emphasize the narrowness of the *Grable* test.²⁵⁵ If courts only accept federal question jurisdiction over cases where the dispute hinges entirely on the resolution of the federal issue, the *Grable* test is being interpreted too narrowly. The test might be boiled down to (1) whether the federal issue is disputed and (2) whether it is the only disputed issue. The consideration of substantiality would not even be reached if there were disputed state issues, eliminating the purpose of *Grable*, which is to examine the substantiality of the issue involved and weigh that against the disruptive effect of accepting jurisdiction.

E. Misreading Grable as an Exception to the Well-Pleaded Complaint Rule

*Seruntine v. State Farm Fire & Casualty Co.*²⁵⁶ evidences one of the gravest misinterpretations of the *Grable* test—considering the test an exception to the well-pleaded complaint rule.²⁵⁷ In *Seruntine*, the plaintiffs alleged that their property was destroyed during Hurricane Katrina and sued their homeowners and flood insurance company and the two agents who sold them their policy.²⁵⁸ The plaintiffs alleged that the two insurance agents advised them to take out the least amount of coverage because there was no chance of flooding in their city and whatever the flood policy did not pay for, the homeowner’s policy would.²⁵⁹ The plaintiffs also alleged that State Farm undervalued their damages and failed to compensate them for the true value of the damage to their home.²⁶⁰

The defendants removed to federal court, arguing that there was federal question jurisdiction for the claim under the National Flood Insurance Act.²⁶¹ According to the defendants, any claims relating to the securing of a Standard Flood Insurance Policy²⁶² required the court to interpret federal law “even though no federal laws were pled in the complaint.”²⁶³

²⁵⁵ *Empire HealthChoice*, 547 U.S. at 701 (“This case cannot be squeezed into the slim category *Grable* exemplifies.”).

²⁵⁶ 444 F. Supp. 2d 698 (E.D. La. 2006).

²⁵⁷ *Id.* at 702.

²⁵⁸ *Id.* at 699–700.

²⁵⁹ *Id.* at 700.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² “Under the [National Flood Insurance Program], the director of the Federal Emergency Management Agency has the authority to use private insurance companies, referred to as Write-Your-Own companies, to help administer the program. The WYO companies directly issue federally underwritten Standard Flood Insurance Policies to the public.” *Id.* at 701.

²⁶³ *Id.* at 702.

The court correctly denied jurisdiction and remanded but made an interesting determination of the relationship between the centrality test and the well-pleaded complaint rule.²⁶⁴ The *Seruntine* court stated that the defendants “appear to be invoking the theory of *Grable* Nevertheless, this is a narrow exception to the well-pleaded complaint rule.”²⁶⁵

The Supreme Court mentioned nothing in *Grable* about modifying or creating an exception to the well-pleaded complaint rule.²⁶⁶ The Supreme Court has repeatedly relied on and upheld the validity of the well-pleaded complaint rule.²⁶⁷ After *Grable*, there are still two requirements for federal question jurisdiction: the case must arise under the Constitution or the laws of the United States,²⁶⁸ and the federal question must be well-pled in the plaintiff’s complaint.²⁶⁹ *Grable* did not create an exception to the well-pleaded complaint rule.

One critical benefit of the well-pleaded complaint rule is that it helps control federal dockets by rejecting certain cases at their outset based merely on the way the plaintiff constructs his or her complaint.²⁷⁰ By reading *Grable* as an exception to the well-pleaded complaint rule, the *Seruntine* court could significantly increase the size of federal dockets because the plaintiff could do exactly what the well-pleaded complaint rule guards against—anticipate a federal defense.²⁷¹ This misreading would increase the scope of federal question jurisdiction and welcome a significant number of inappropriate cases into federal courts. Such an influx of cases is problematic because the *Grable* test was intended to prevent this type of disruption, not encourage it.²⁷²

²⁶⁴ *Id.* at 703.

²⁶⁵ *Id.* at 702 (emphasis added). *Contra* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 13 (1983) (holding that if state law created the cause of action, there could be no federal question jurisdiction “unless it appear[ed] that some substantial, disputed question of federal law [was] a necessary element of one of the *well-pleaded state claims*” (emphasis added)).

²⁶⁶ *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005). For a discussion of the requirements of the well-pleaded complaint rule, see *supra* Part I.B.

²⁶⁷ See *supra* note 42.

²⁶⁸ 28 U.S.C. § 1331 (2006).

²⁶⁹ *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

²⁷⁰ See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950). But see Doernberg, *supra* note 33 (arguing that there is no reason for the well-pleaded complaint rule); Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CAL. L. REV. 1515, 1564 (2007) (arguing that the well-pleaded complaint rule “subverts the proper role of Article III judges” by forcing them to dismiss cases because of “the fortuity that the federal question does not appear in a nicely pleaded complaint”).

²⁷¹ *Mottley*, 211 U.S. at 152 (holding that a plaintiff must do more than just anticipate a federal defense).

²⁷² See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005) (holding that the centrality inquiry must always consider the balance between congressionally approved state and federal

The *Seruntine* court's approach also takes away the plaintiff's power to be the master of his case. Allowing the defendant to remove based only on *Grable*, with no need for compliance with the well-pleaded complaint rule, gives the defendant too much control. The defendant could usurp the plaintiff's power by removing to federal court based on some embedded federal element that does not even have to be mentioned in the plaintiff's claim, perhaps asserted as part of the defendant's defense or a counterclaim. The Supreme Court meant *Grable* to be an additional barrier for removal—a stringent and narrow test that would only permit cases into federal courts that presented a necessary, actually disputed, and substantial federal issue.²⁷³ The *Seruntine* court ruins the narrowness of the *Grable* test by incorrectly reading it as an exception to the well-pleaded complaint rule.

CONCLUSION

The proper determination of whether a case “arises under” the Constitution or the laws of the United States has long plagued the Supreme Court and the lower federal courts. Post-*Grable*, it is settled that there are two lines of cases that can invoke federal question jurisdiction. The first line includes the majority of cases decided in a federal forum, those alleging some federal cause of action. The second line concerns those cases invoking the centrality test because they allege a state cause of action but have a central, embedded federal element.

With more than 140,000 cases relying on federal question jurisdiction to gain access to a federal forum each year, it was imperative for the centrality test to evolve into a workable and solid standard.²⁷⁴ In *Grable*, the Supreme Court finally fashioned a centrality test that is arguably better than any previous test. The *Grable* test is a necessarily flexible counterpart to the less flexible well-pleaded complaint rule. The juxtaposition of these two requirements as limitations on § 1331 encourages federal courts to make all relevant and essential considerations when determining whether a case arises under the Constitution or the laws of the United States. It ought to be the lower federal courts' goal to take those two limitations and apply them properly and consistently. Determining whether a case falls into the “arising

judicial responsibilities); see also *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006) (discussing that the issue at hand did not warrant turning a simple state claim into a costly federal claim).

²⁷³ See *Grable*, 545 U.S. at 314.

²⁷⁴ Preis, *supra* note 3, at 293.

under” category should no longer be considered the “most difficult single problem in determining whether federal question jurisdiction exists.”²⁷⁵

JENNIFER E. FAIRBAIRN*

²⁷⁵ 13B WRIGHT ET AL., *supra* note 1, § 3562, at 17.

* J.D. Candidate, Emory University School of Law (2009).

