It’s Just Not Worth Searching for Welcome Mats with a Kaleidoscope and a Broken Compass.

Rory M Ryan
Abstract

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Justice Holmes construed the words “arising under” to mean something simple and ascertainable – a case arises under the law that creates the cause of action. By rejecting the bright-line Holmes test as the exclusive test, the Supreme Court created a second branch of federal-question jurisdiction, which applies to state-created claims with embedded federal issues, and which is governed by a flexible and elusive standard. While eschewing the bright-line Holmes rule as too rigid, champions of the second branch have both praised its flexibility and predicted that clear-enough boundaries will develop. They have not and will not. Long ago, Justice Cardozo acknowledged that the second branch requires an “accommodation of judgment to ... kaleidoscopic situations.” Then armed with kaleidoscopes, the Court and Academy tried to locate the boundaries. Professor Cohen then informed us, in his landmark article, that the “arising under” compass was still broken. The Court tried to fix the compass in the Merrell-Dow case, but that just created a 3-way circuit split. Finally, in 2005, the Court decided the Grable case and explained that Merrell-Dow caused confusion because we should have had our kaleidoscopes and compasses set on finding welcome mats. 85 years of trying is enough.

I make three assertions in the article: (1) The second branch should be eliminated (2) by Congress (3) by defining “arising under” solely for purposes of 28 U.S.C. § 1331. Simple may not always, or even often, be better. But in this context it is. Viewed in light of the state, federal, and systemic interests, the costs of retaining the second branch outweigh the benefits. A limited sample group of opinion-generating second-branch removal cases indicates that for every removed case that satisfies Grable about eight more are remanded after an average delay of about six months—cases remanded without opinion almost surely skew the numbers more. The class of delay-prone cases will remain large because most colorably removable cases are removed, and the nature of the second-branch casts a wide net of colorability. As for the change coming by amendment, Justice Thomas recently invited original-intent arguments to justify returning to the Holmes test, and I agree with him in part. We should look for the Holmes test, but to today’s Congress, not the Congress of 1875. The article concludes by considering issues surrounding the amendment of a major general grant of jurisdiction and ultimately recommending that Congress should define “arising under” solely for purposes of § 1331. This approach will allow Congress to retain the second branch in areas of exclusive jurisdiction, will eliminate Grable’s new disruptiveness prong, and will ultimately facilitate a transition where once again cases construing the jurisdictional statute will resemble statutory-construction cases.
It’s Just Not Worth Searching for Welcome Mats with a Kaleidoscope and a Broken Compass.¹

I. Introduction

Each semester it seems that Justice Holmes’s fan base grows as law students struggle with the elusive meaning of the words “arising under” in 28 U.S.C. § 1331. Justice Holmes construed those words to mean something simple and ascertainable: A case arises under the law that creates the cause of action.² To some, the test is irresistibly appealing for its simplicity—but not to the Supreme Court. It didn’t take the Court long to reject the Holmes test as an exclusive test and to create a second branch of “arising under” jurisdiction.³ For about 85 years, courts and commentators have struggled with defining the boundaries of the second branch,⁴ defending its

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¹ Rory Ryan, Associate Professor of Law, Baylor Law School. (insert acknowledgments).
existence, and occasionally calling for its elimination. I now join the latter group. Justice Holmes and his growing fan club are correct. Simpler may not always (or even often) be better, but it is in this context. My thesis is easy to follow: the second branch should be eliminated and Congress should do the eliminating.

The Article’s title reflects the historical difficulties with defining the second branch. The second branch was born in Smith v. Kansas City Title & Trust Co. There, just a few years after Justice Holmes had announced that a suit only “arises under the law that creates the cause of action,” the Court held that a state-created cause of action might still arise under federal law if its resolution “depended upon the construction or application” of a federal law. Despite Smith’s broad “depended upon” formulation, it soon became clear that not just any federal issue would suffice; the federal issues had to be “substantial” or “important”. The debate about the second branch has long centered on what types of federal issues, present in a state-created cause of action, create “arising under” jurisdiction. Early on, Justice Cardozo noted the difference

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between the bright-line Holmes rule and the flexible second-branch standard, writing that the second branch requires a “common-sense accommodation of judgment to the kaleidoscopic situations” that present a federal issue, in “a selective process which picks the substantial causes out of the web and lays the other ones aside.” Then, intellectually armed with kaleidoscopes, the legal academy and the Court sought to determine these elusive boundaries. Unsurprisingly, the boundaries became anything but clear, and we learned from Professor Cohen’s landmark article that the “arising under” compass was broken. About 25 more years passed before the Court decided *Merrell Dow Pharmaceuticals Inc. v. Thompson*, which many thought nearly eliminated the second branch. But all *Merrell-Dow* did was create a 3-way circuit split, as proponents of the second branch refused to read the case so restrictively. Then came the Supreme Court’s latest word in *Grable & Sons v. Darue Engineering*, where the Court again reformulated the test and taught that *Merrell-Dow* was actually decided under a never-before-articulated prong, which required finding “welcome mats” when exercising jurisdiction would be disruptive.

Ultimately I conclude that the second branch is not worth it. While throughout the second-branch evolution we’ve been assured that sufficiently clear boundaries would develop, they have not and will not. The nature of the second-branch inquiry prevents that from happening. I find particularly unpersuasive the criticism that the Holmes test is too rigid in the face of assurances that the more flexible Second Branch is acceptable because it will eventually

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6. Infra, Part III
develop sufficient rigidity. The costs associated with such a fuzzy jurisdictional inquiry simply outweigh the benefits. A modest sample of post-Grable opinion-generating second-branch removal cases shows, conservatively, that 8 cases are delayed and remanded for an average of six months each for every case that satisfies Grable. The class of delay-prone cases will remain large because most colorably removable cases are removed, and the nature of the second-branch test casts a wide net of colorability.

First, though, before arguing that the second branch should be eliminated, I start by explaining why Congress should effect the change by statutory amendment. In Grable, Justice Thomas expressed his displeasure with the current construction of 28 U.S.C. § 1331 and invited original-intent arguments to return to the Holmes test. I agree with Justice Thomas that we should look for the Holmes test – but from today’s Congress, not the Congress of 1875 when the relevant “arising under” words appeared. Ultimately, I will propose that Congress should amend 28 U.S.C. § 1331 to define “arising under” consistent with the Holmes test.

Finally, I will discuss issues surrounding implementation. As to implementation, the presence of other statutes using the phrase “arising under” makes it preferable for Congress to define “arising under” for purpose of § 1331 rather than either (1) removing the phrase from § 1331 or (2) defining the phrase for all of the Judicial Code. Because “arising under” would be narrowly defined only for § 1331, the words would retain most of their current post-Grable meaning for the rest of the Judicial Code. Congress could therefore retain the current definition in areas of exclusive federal jurisdiction and in other selected areas where Congress decides to

17 Infra Part III-B
18 Infra Part II
20 Infra Part IV
21 28 U.S.C. § 1 et seq.
use more of its Article III jurisdiction-conferring power. Because the allocation would now be congressionally dependent, the *Grable* welcome-mat/disruptiveness inquiry would disappear. No longer would a federal cause of action be a welcome mat; rather, the welcome mat would be a subject-matter-specific grant of jurisdiction that Congress has excluded from 28 U.S.C. § 1331’s newly imposed limitation.

As to the counterarguments, which are addressed throughout, the normative questions here are not easy. The Holmes test is narrow and contains bright lines. No doubt, at the fringes it will exclude some cases that seem to be proper candidates for initial resolution in federal court. Bright-line rules will do that. In this context, it’s worth it.

II. Looking for Holmes today, not from 1875.

Understanding why the solution should come from Congress requires a comparison of the words and functions of both Article III, § 2 and 28 U.S.C. § 1331. Both use the same “arising under” language but serve very different roles. Article III § 2 does not confer jurisdiction on the lower federal courts—it is not self executing. Instead, the lower federal courts need statutory authorization. Article III § 2 merely defines the limits on Congress’s power to give its courts jurisdiction. So, the jurisdictional inquiry contains a question of statutory construction

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22 Compare U.S. Const. art. III, § 2 (“The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws . . . and Treaties . . .” (emphasis added)); 28 U.S.C. § 1331 (1980) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” (emphasis added)).

23 Although Article III-2’s “shall extend” language is susceptible to different interpretation, it is now well-established that statutory authorization is needed. See Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) (“Federal Courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.”); Cary v. Curtis, 44 U.S. 236, 245 (1845) (“the judicial power of the United States, although it has its origin in the Constitution, is . . . dependent for its distribution and organization . . . entirely upon the action of Congress . . .”).

(Did Congress confer jurisdiction?) and one of constitutional power (Does Article III § 2 authorize Congress to confer the jurisdiction?).

Initially, the Court construed the words “arising under” in Article III, § 2 very broadly. In Osborn, Congress had authorized federal jurisdiction over all suits by or against the Bank of the United States. The Court held that Congress had the authority, using its “arising under” power, to confer federal jurisdiction in even an ordinary breach-of-contract suit against the Bank. This was because federal law created the Bank and its right to contract, and because any suit against the Bank could potentially raise a question about that authority. The Supreme Court has never defined the precise boundaries of this so-called “potential ingredient” test, but the 1824 Osborn decision and its progeny hint at a vast universe of constitutional power.

The words “arising under” did not survive in a general grant of jurisdiction until the Judiciary Act of 1875. Before that, some statutes (like the one in Osborn) conferred jurisdiction over particular matters or litigants, but there was no general federal-question statute. Obviously, since the statute did not exist in 1824, the Osborn Court did not compare the statutory and constitutional language.

What did Congress intend in 1875? It granted original federal question jurisdiction for the first time during reconstruction “to prevent states from thwarting its Reconstruction-era

   v. Sill, 49 U.S. 441, 449 (1850) (“The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised [by the lower federal courts].”).
27 Osborn v. Bank of the United States, 22 U.S. 738, 824 (1824)
28 The same “arising under” language also briefly appeared in the Judiciary Act of 1801, known as the Midnight Judges Act: “[The] circuit courts respectively shall have cognizance of . . . all cases in law or equity, arising under the constitution and the laws of the United States and treaties made, or which shall be made, under the authority.” Act of Feb. 13, 1801, ch. 4 § 11, 2 Stat. 89, 92 repealed by Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132. That statute was quickly repealed, and the predecessor to the modern statute first appeared in 1875, 18 Stat. 470, 472.
amendments and legislation.”29 It chose the exact same phrase from Article III-2—the words the Court had construed so broadly in Osborn. If one were to construe the statutory meaning in 1876, most would agree: Congress tried to extend jurisdiction to the constitutional limits defined in Osborn. That seemed to be a sensible purpose at the time, and choosing already-construed words seemed a sensible way of doing so. Even if our construer is a textualist, giving the words their most reasonable meaning, it’s hard to overlook the relevant context: Congress was trying to expand federal power and it chose, of all available words, the two-word phrase that had already been interpreted in Osborn—an unlikely coincidence.30 In addition to this common-sense contextual approach, the meager legislative history31 and the 1875 Act’s sparse contemporary commentary32 support the notion that Congress used the phrase “arising under” to mean Osborn—that is, to extend jurisdiction to the maximum limits of Article III-2.33

29 Pushaw, 95 CAL. L. REV. 1515, 1551 n.229 (and authorities cited).
31 While there was very little debate on this bill, there was a series of statements by Senator Matthew H. Carpenter, who was the author of the bill and was the spokesman for the judiciary committee when it was debated on the Senate floor:

The act of 1789 did not confer the whole power which the Constitution conferred; it did do what the Supreme Court said Congress ought to do; it did not perform what the Supreme Court has declared to be the duty of Congress. This bill does . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less. The Senator from California proposes to limit constitutional jurisdiction and restrict it because it was restricted in 1789 . . . The whole circumstances of the case are different, and the time has now arrived it seems to me when Congress ought to do what the Supreme Court said more than forty years ago it was its duty to do, vest the power which the Constitution confers in some courts of original jurisdiction.

32 “Thus we see, that commencing in 1864, before the close of rebellion, and culminating in March 1875, at the very close of the last session, Congress has exhausted its power; and has conferred upon the federal courts all the jurisdiction authorized by the [C]onstitution.” Forrester, 16 Tul L.Rev. at 376 (quoting Our Federal Judiciary, 2 CENT. L. JOUR. 551, 553 (1875)); Pushaw, 95 CALIF. L. REV. 1515, 1551 n. 229 (“The sole extant article on this
The Supreme Court quickly realized that it would not be feasible to apply the Osborn test to the statutory text. If the federal courts had original jurisdiction over all suits involving a potential federal ingredient, almost nothing would be outside federal reach. For example, as Professor Freer has commented, practically every suit involving real property would invoke federal jurisdiction because one might question whether title was validly derived from the United States. Redefining the words was a matter of the Court’s self-preservation. And so began the divergence of the meaning of the same phrase in the two different provisions.

Once the divergence began, a tension arose. Congress is charged with defining federal jurisdiction. Yet, cases construing 28 U.S.C. § 1331 had little to do with statutory interpretation. Congress seemed to mean Osborn, yet when the Supreme Court began to fight
about the meaning of Congress’s Act, Osborn wasn’t one of the choices. Of course, when I speak of divergences and departures, I do not mean to imply that the Court should have read the statutory phrase to mean Osborn. Doing otherwise was indeed a matter of self-preservation.\textsuperscript{38} In his classic 1953 article, Professor Mishkin forcefully argued for acceptance of this self-preservation.\textsuperscript{39} Recently, while examining Mishkin’s article from a neo-federalist perspective, Professor Pushaw aptly observed that: “Mishkin apparently argued that Congress implicitly had given discretion to the judiciary to make determinations about federal question jurisdiction in light of practical consequences. He cited nothing in the statute’s language or legislative history to support that contention, and indeed acknowledged that this evidence suggested Congress’s intent to confer the full cope of Article III power over such cases.”\textsuperscript{40} The point is that, from that moment of divergence, § 1331 questions have been far more normative than interpretive.

The first major departure was the well-pleaded-complaint rule. While the Osborn rule extended constitutional power to potential ingredients, the well-pleaded complaint rule narrowed the statutory meaning considerably. In Mottley, the Court clarified that the statute requires—not just a potential federal ingredient—but a federal issue present on the face of the plaintiffs’ well-pleaded complaint.\textsuperscript{41} Even though the only disputed issue in Mottley was a federal one, jurisdiction failed.\textsuperscript{42} Basically, Congress wrote “potential ingredient,” and the Court read something far narrower.\textsuperscript{43}

\textsuperscript{38} Supra note 35 (Freer).
\textsuperscript{39} Paul J. Mishkin, The Federal Question in the District Courts, 53 Colum. L. Rev. 157, 166 (1953).
\textsuperscript{40} Robert J. Pushaw, Jr., A Neo-Federalist Analysis of Federal Question Jurisdiction, 95 Calif. L. Rev. 1515, 1539 (2007).
\textsuperscript{41} Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (“[A] suit arises under the Constitution and laws of the United States only when the plaintiff’s statement of his own cause of action shows that it is based upon those laws or that Constitution.” (emphasis added . . . I think)).
\textsuperscript{42} Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908)
Then in *American Well Works* Justice Holmes attempted to narrow the rule again.\(^4^4\) One might call the well-pleaded-complaint rule a where-to-look rule. Justice Holmes took the next step by narrowing what courts should look for in the well-pleaded complaint. According to Justice Holmes, when evaluating the well-pleaded complaint, courts must find, not just a federal issue, but rather that the plaintiff asserted a federally created cause of action.\(^4^5\) Once again, note the departure from *Osborn*. The plain breach-of-contract suit against the National Bank in *Osborn* would have surely failed the Holmes test, yet Justice Holmes, based on the same words that had been construed in *Osborn*, was advocating an exclusive test that required a federal cause of action.

After *American Well Works*, congressional intent was no longer relevant. The search was for the best rule, not the enacted one. And in the *Smith* case, the Court rejected Justice Holmes’s rule, thus creating the second branch.\(^4^6\) In *Smith*, Missouri law created a derivative cause of action that allowed shareholders to enjoin corporations from purchasing unlawful bonds.\(^4^7\) Smith sought to enjoin the corporation from purchasing bonds authorized by the Federal Farm Loan Act of 1916 (the Act).\(^4^8\) He alleged that the bonds were unlawful because the Act was unconstitutional.\(^4^9\) So, while Missouri state law created Smith’s cause of action, his well-pleaded complaint necessarily raised a question of federal law as an element of his state-law claim. The

\(^{4^4}\) History has credited Justice Holmes for this rule, but as Professor McFarland pointed out, “[t]he rule of American Well Works had been emerging for at least three decades. Even to say the rule was emerging understates its clarity and force, for it sprang full-grown twenty-three years earlier . . . .” Douglas D. McFarland, The True Compass: No Federal Question in a State Law Claim, 55 U. KS. L. REV. 1, 6 (2006).

\(^{4^5}\) Put another way, “plaintiff must contend that a federally ordained rule specifically creates her cause of action and establishes her substantive right to a remedy for a violation of that rule.” Howard Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 695-96 (citing Paul J. Mishkin, The Federal Question in the District Courts, 53 COLUM. L. REV. 157, 166 (1953)).

\(^{4^6}\) *Smith v. Kansas City Title & Tr. Co.*, 255 U.S. 180, 195 (1921).

\(^{4^7}\) *Smith v. Kansas City Title & Tr. Co.*, 255 U.S. 180, 195 (1921).

\(^{4^8}\) *Smith v. Kansas City Title & Tr. Co.*, 255 U.S. 180, 195 (1921).

\(^{4^9}\) *Smith v. Kansas City Title & Tr. Co.*, 255 U.S. 180, 198 (1921).
Court rejected Justice Holmes’s Test as a test of *exclusion*, holding jurisdiction proper even though Smith asserted no federally created cause of action.\(^{50}\)

Justice Holmes dissented from *Smith*,\(^{51}\) and the debate has not ended since. From a purely best-policy standpoint, should the Court have created the second branch? That is, should the arising-under inquiry stop with the conclusion that the plaintiff has asserted no federal cause of action? Or, should Holmes’s test be treated (as it currently is) as a test for inclusion but not exclusion?\(^{52}\) The next section focuses on this debate, but as a preliminary matter this background has, I hope, shed some light on Justice Thomas’s suggestion in *Grable*:

> In this case, no one has asked us to overrule [our] precedents and adopt the rule Justice Holmes set forth . . . limiting § 1331 jurisdiction to cases in which federal law creates the cause of action pleaded on the face of the plaintiff’s complaint. In an appropriate case, and perhaps with the benefit as to the original meaning of § 1331’s text, I would be willing to consider that course.\(^{53}\)

The academic and intracourt debate about whether to embrace (and how to define) the second branch, has not focused on an intent-based search. And for good reason. If we evaluate those “arising under” words with our congressional-intent goggles, it seems that we’ll find *Osborn*, not Holmes.\(^{54}\) Everyone agrees that *Osborn* cannot be the test. Sure, there has been an

\(^{50}\) Smith v. Kansas City Title & Tr. Co., 255 U.S. 180, 201-02 (1921). The *Smith* Court framed the test very broadly, stating that jurisdiction exists if “the right to relief depends upon the construction or application” of federal law. *Id.* at 199.

\(^{51}\) See Smith v. Kansas City Title & Tr. Co., 255 U.S. 180, 213-14 (1921) (“[T]he single ground upon which the jurisdiction of the District Court can be maintained is that the suit ‘arises under the Constitution or laws of the United States’ . . . . I am of opinion that this case does not arise in that way and therefore that the bill should have been dismissed. . . . [T]he cause of action arises not under any law of the United States but wholly under Missouri law.”) (Holmes, J., dissenting).

\(^{52}\) Merrell-Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 809, n.5 (“It has come to be realized that Mr. Justice Holmes’ formula is more useful for inclusion than for the exclusion for which it was intended.”) (quoting T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964)).

\(^{53}\) Grable & Sons Metal Products, Inc., 545 U.S. at 320.

\(^{54}\) As Justice Gray observed, “The intention of Congress is manifest, at least as to cases of which the courts of the several States have concurrent jurisdiction, and which involve a certain amount or value, to vest in the Circuit
occasional suggestion that maybe (just maybe) Congress meant something different in 1875 when it chose the same words. But such suggestions seem reminiscent of those advanced in the debates about jurisdiction stripping—really smart and creative people, faced with an unwelcome result, propose solutions that barely pass the straight-face test in the hope of giving the Court a way to reach the desired result.

The answer will not, and should not, come from the Court. After *Merrell-Dow*, the Court was squarely presented with the opportunity to reject the second branch in favor of the Holmes test. It declined and affirmed the second branch in *Grable*. There is no realistic hope that the Court will revisit that choice, except for Justice Thomas’s invitation to examine original intent. Any inquiry into congressional “intent” or the most reasonable meaning of the words in context will not justify deleting the second branch. Of course, none of those sources justify the current definition either, but *stare decisis* does. It would surely strain the Court’s credibility if it overruled its interpretation of “arising under” to mean Holmes under the guise of purpose or intent. As Ray Forrester noted long ago, the solution is not to be found in “misreading the law, Courts of the United States full and effectual jurisdiction, as contemplated by the constitution, over each of the class of controversies above mentioned.” Forrester, 16 TULL. REV. at 377 (quoting *In re Hohost*, 150 U.S. 653,659 (1893)); see also *Our Federal Judiciary*, 2 CENT. L. JOUR. 551, 553 (1875) (“In the Act of March 3, 1875 Congress gave the federal courts the whole sweep of power which had lain dormant in the Constitution since 1789.”). See supra notes ____.

55 For instance, Justice Frankfurter commented that such a dramatic change in federal jurisdiction would not have occurred with so little debate. Romero v. International Terminal Operating Co., 358 U.S. 354, 367 (1959). And some believe the statements made by Senator Carpenter, see supra____, were made regarding § 11, rather than § 1, of the bill. See Patti Alleva, Prerogative Lost, 52 OHIO ST. L.J. 1477, 1491 n.46 (1991).

56 Indeed, as I have suggested elsewhere, except as to a sliver of second-branch cases involving federal laws that themselves create a cause of action, *Merrell-Dow* is best read as returning to the Holmes test. Rory Ryan, No Welcome Mat, No Problem? Federal-Question Jurisdiction After Grable, 80 ST. JOHN’S L. REV. 621, 633-634 (2006).


58 See Merrell-Dow, 478 U.S. 804, 820 (Brennan, J, dissenting) (“The continuing vitality of Smith is beyond challenge.”).
but in passing a new statute with words that actually do limit the amount of federal question jurisdiction granted to the trial courts.”

III. Why Congress should eliminate the Second Branch.

Debate about the second branch has a long and rich history. It’s a familiar debate about rules versus standards, power allocation, and parity. Justice Holmes’s test is a rigid rule, finding jurisdiction only when federal law creates the plaintiff’s cause of action. In contrast, starting with Smith, many courts and commentators have decided that some lawsuits involving certain federal issues based on state-created causes of action deserve trial-level resolution in the federal courts. The second branch exists because some believe that identifying which lawsuits and which issues deserve this treatment is a process not susceptible of a rule, but instead requires resort to a more flexible standard. But generally speaking, fuzzy, case-specific standards are

59 See Ray Forrester, Federal Question Jurisdiction and Section 5, 18 Tul. L. Rev. 263, 288 (1943–44). Professor Forrester also insisted “the solution is not to be found . . . in arguing about the meaning of [the jurisdictional statute].” Id. at 287.
60 Supra notes _____ (4-6 currently)
61 Professor Alexander has articulated the distinction between rules and standards as follows: A “rule” is a norm whose application turns on the presence of relatively noncontentious facts, and turns on the presence of those facts regardless whether the values that the rule is designed to serve are actually served or disserved by the particular application. Rules are often described as “bright-line” (clear and easy to follow), “formal” (to be applied without regard to substance of the results but only with regard to the rule's terms), and “opaque” (to the rules' background justifications).

. . . Standards are norms that have the opposite characteristics. A standard can be applied only by engaging in evaluation. Therefore, to the extent that evaluation is contentious and uncertain, standards will be as well. Standards are thus vague, substantive (as opposed to formal), and transparent (to background values).

64 Smith v. Kansas City Title & Tr. Co., 255 U.S. 180 (1921).
65 See generally, John F. Preis, Article: Jurisdiction and Discretion in Hybrid Law Cases, 75 Cin. L. Rev. 145, 159 (2006) (discussing the context in which federal issues are embedded and the types of federal laws commonly embedded).
poorly suited for jurisdictional inquiries. They create too much threshold litigation about where to litigate and provide excessive opportunities for delay. The question is whether, in the “arising under” arena, the benefits outweigh the costs imposed by the flexible standard. I think not.

As a preliminary matter, I think it important to address a familiar refrain by proponents of the second branch: that the standard will, through judicial construction, develop boundaries that eliminate (or substantially mitigate) the costs traditionally associated with unclear jurisdictional rules. In other words, the standard will become clear enough through precedent. In his 1967 Broken Compass article, Professor Cohen predicted, after the second branch had been baffling courts and commentators for 40 years following Smith, that “recognition of pragmatic factors and decisions based on them will lead to predictable jurisdictional standards.”

This prediction

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66 Infra, Part III-B, page ___.

It may be objected that recognition of the pragmatic nature of the decision whether a claim arises directly under federal law will lead to an ad hoc, unpredictable, case-by-case decision of jurisdictional questions. It goes without saying that it is undesirable for jurisdictional rules to be uncertain. Particularly since objections to jurisdiction of the district court cannot be waived, and since in many cases the lack of jurisdiction can even be asserted by the party who invoked federal jurisdiction, there should not be doubt about the threshold question of jurisdiction.

More important, recognition of pragmatic factors and decisions based on them will lead to predictable jurisdictional standards. Thus, no matter how close the pragmatic judgment in a particular case, once made it is bound to decide more than just the case before the court. In other words, the process is not simply case-by-case decision making, with each case standing on its own bottom, but rather a process of clarifying jurisdictional uncertainty in classes of cases before the court. It is, of course, true that a case may be so unique that a jurisdictional decision has no impact on other cases. Very often, however, an authoritative decision of a novel problem of federal question jurisdiction settles the issue for a class of cases. Shoshone Mining Co. v. Rutter relegated a large group of miners' claims to the state courts. Until the Declaratory Judgment Act, American Well Works placed suits by alleged patent infringers in the state courts. Smith v. Kansas City Title & Trust Co. established a general jurisdictional rule for constitutional challenges through the mechanism of the stockholder's derivative suit. And so on.

Id. at 908-09 (internal citations omitted).
proved wrong. Then in 1986 the Court revisited the test in Merrell-Dow.\textsuperscript{68} More predictions of clarity came, and the result was a three-way circuit split.\textsuperscript{69} Realizing the “arising under” compass was still broken, the Court decided Grable, and again there was\textsuperscript{70} and is\textsuperscript{71} optimism that clear boundaries will develop.

85 years of assurances is enough; we should learn our lesson. The nature of the second branch prevents those predictions from coming true. The Holmes rule is criticized as being too rigid in an area that requires flexibility. I do not find persuasive that the flexible standard, which is needed because a rigid rule will not work, will develop sufficient rigidity through litigation. Standards tend to “collapse decision-making back into the direct application of the background principle or policy to a fact situation.”\textsuperscript{72} As Professor Freer has suggested, we should not be surprised or disappointed when a standard does not yield bright-line answers.\textsuperscript{73} Maybe the inevitable uncertainty is worth the cost, but we should candidly acknowledge another inevitability of the second branch’s continued reign: in 20 years, the next wave of articles will be promising that the then-new clarification will establish clear boundaries where today’s test has failed.\textsuperscript{74}

\textsuperscript{68} Merrell-Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986).
\textsuperscript{69} See Douglas D. McFarland, The True Compass: No Federal Question in a State Law Claim, 55 U. KS. L. REV. 1, 38 (2006). (“While Merrell Dow did not uphold federal jurisdiction, it did confuse this area of law for twenty years to the extent it produced a three-way circuit conflict.”).
\textsuperscript{70} Indeed, my first impressions of the Grable test were more reserved than they are now. In my previous Grable article, which was entirely doctrinal, I noted that, while Grable does not provide a bright line, it “creates a workable structure” and was a “welcome change.” I have obviously changed course as my focus turned from doctrinal to normative. Ryan, 80 ST. JOHNS L. REV. at 653.
\textsuperscript{71} Richard D. Freer, Article: Of Rules and Standards: Reconciling Statutory Limitations on “Arising Under” Jurisdiction, 82 IND. L.J. 309, 344 (2007) (“At the end of the day, the statutory definition of “arising under’ is in better shape now than it has been in a generation, which should put to rest any latter-day calls for a return to the Holmes test for centrality.”).
\textsuperscript{72} Freer, 82 IND. L. J. 309, 320.
\textsuperscript{73} Id.
\textsuperscript{74} As Professor McFarland has recently written, “[t]his question is relatively narrow in the field of federal jurisdiction, yet the Supreme Court of the United States—not to mention lower federal courts—has returned to this issue again and again, sometimes answering yes and more often answering no. On each return, the Court's analysis
In a perfect world, each year there would be a handful of cases that the federal trial courts would adjudicate despite the lack of a federal cause of action. These cases would come wrapped with an easy-to-identify bow, which the jurisdiction fairy would attach to cases that satisfy the criteria of the second branch. Unfortunately, removal, remand, hearings, and delay replace bows and fairies. The real-world problem is identifying that handful of cases that ultimately satisfies the second branch. Eliminating the second branch may not yield the best result for that handful. Nevertheless, of the following two options, I’ll choose the first: (1) leave that handful and many others for prompt initial resolution in state courts; or (2) retain a flexible test that delays a disproportionate number of cases, for many months, just to find each case worth retaining. And as already described, the nature of the second branch standard forecloses a seemingly attractive third option: to define the test better so that we can pick out the handful without delaying the rest.

In the following subsections, I will begin by briefly identifying the test set forth in Grable. Plenty has been written about the scope of the second branch; there’s no need to linger there because the material characteristics of the test are not in dispute. Second, I will argue, pragmatically, why the Grable test is poorly suited for a jurisdictional inquiry. To
supplement my conceptual critique of the standard, I will examine two modest samples of post-
Grable cases in the removal context to illustrate the practical, or impractical, effects.

(a) The boundaries of the second branch.

The second branch is amorphous by nature. Justice Holmes thought there was only one branch of arising-under jurisdiction—when the plaintiff asserted a cause of action created by federal law.\(^79\) The Court rejected,\(^80\) and continues to reject,\(^81\) this test as one of inclusion. Sometimes resolving federal issues is necessary to adjudicate a state-created cause of action, and in Smith, the Court determined that the presence of certain types of federal issues justified “arising under” jurisdiction.\(^82\) It is determining which types, and in which cases, that has proven troublesome. In Smith, for example, the Court defined the test too broadly, writing that jurisdiction would be appropriate if “the right to relief depends upon the construction or application” of federal law.\(^83\) Soon, other buzz words appeared, clarifying that the federal issue must be “important” and “substantial.”\(^84\) And of course, this type of qualitative assessment continues today.\(^85\) It is no surprise then that the Grable Court, like those before it, crafted a flexible, fuzzy test to determine whether a case satisfied this type of qualitative assessment. So

\(^80\) Smith v. Kansas City Title & Tr. Co., 255 U.S. 180, 199 (1921).
\(^81\) Merrell-Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 809, n.5 (“It has come to be realized that Mr. Justice Holmes’ formula is more useful for inclusion than for the exclusion for which it was intended.”) (quoting T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964)).
\(^82\) Smith v. Kansas City Title & Tr. Co., 255 U.S. 180, 199-200 (1921).
\(^83\) Smith v. Kansas City Title & Tr. Co., 255 U.S. 180, 199 (1921).
long as that is the type of final determination sought, no other option is possible, and the Court has been quite forthcoming in so admitting. 86

*Grable* was a second-branch case involving an embedded federal tax issue within a state quiet-title claim. 87 To satisfy a tax delinquency, the IRS seized some of Grable’s real property. 88 The IRS then sold the property to Darue and gave Darue a quitclaim deed. 89 Five years later, Grable brought a quiet-title action against Darue in state court. 90 While Grable conceded that it had received actual notice of the seizure, Grable claimed that Darue’s record title was invalid because the IRS had not strictly complied with the applicable notice provisions, which Grable contended required personal service. 91 Darue removed the case to federal court, arguing that Grable’s claim, while created by state law, contained an embedded federal issue, namely the interpretation of the federal tax statute’s notice provision. 92

Although the Court’s 1986 Merrell-Dow opinion had cast doubts upon the vitality of the second branch, 93 *Grable* reaffirmed it, and redefined it. 94 After *Grable*, the second branch question is whether a “state-law claim necessarily raises 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.” 95 The new definition can be

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86 E.g., *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 317 (2005); cf *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 470 (“The litigation provoking problem has been the degree to which federal law must be in the forefront of the case and not collateral, peripheral, or remote.”).
92 *Erwin Chemerinsky, Federal Jurisdiction, § 5.2, 293 (Aspen, 5th Ed.).
93 An extended discussion of the second branch’s evolution is not needed for this article. For a more complete evolutionary analysis, see Rory Ryan, *No Welcome Mat, No Problem? Federal-Question Jurisdiction After Grable*, 80 St. John’s L. Rev. 621, 637-38 (2006).
helpfully broken into 4 prongs: (1) necessity; (2) actually disputed; (3) substantiality; and (4) disruptiveness. My focus is on the last two prongs.

Substantiality has long been a buzzword in the arising-under realm. Justice Cardozo directed us to evaluate the kaleidoscopic situations to find the substantial issues.\(^{96}\) Sometimes factors are articulated for analyzing the substantiality inquiry, but the factors are as amorphous as the overall test.\(^{97}\) Again, that’s the nature of a standard instead of a rule.\(^{98}\) For example, the Court has often evaluated whether the federal issue is “important” and the “nature” of the federal issue.\(^{99}\) Similarly, the Court has asked whether this federal issue requires special resort to federal expertise or uniformity of construction.\(^{100}\) The standard and its factors can be tweaked indefinitely, and no more clarity will arise. As Justice Brennan noted long ago, the test seems designed to be broad enough to allow a court to simply step back and make the ultimate determination whether a federal court should hear the case: The test is “sufficiently vague and general [such that] any set of results can be ‘reconciled’ with a post hoc analysis.”\(^{101}\)

\(^{97}\) See, e.g., Mikulski v. Centerior Energy Corp. 501 F.3d 555, 570 (6th Cir. 2007) (“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 . . . (3) whether a decision on the federal question will resolve the case . . . and (4) whether a decision as to the federal question will control numerous other cases”) (citing Empire Healthchoice Assur. v. McVeigh 126 S. Ct. 2121, 2137 (2006)).
\(^{98}\) Cite supra ______ (FN regarding standards vs. rules)
\(^{99}\) See Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 545 U.S. 308, 315 (2005) (“The meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court” (emphasis added)); Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 814 n.12 (1986) (“In Smith, as the Court emphasized, the issue was the constitutionality of an important federal statute.” (emphasis added)) (citing Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 201 (1921))
\(^{100}\) See Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 545 U.S. 308, 312 (2005) (“. . . a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues”).
The Court’s disruptiveness prong also deserves mention. In *Merrell-Dow*, the Court wrote an opinion that suggested that a federal cause of action was needed, nearly eliminating the second branch.\(^\text{102}\) But in *Grable*, the Court told us what *Merrell-Dow* really meant – that a federal cause of action was not required in every case, but was merely a “welcome mat” that was needed when exercising jurisdiction would disrupt Congress’s approved balance of federal-state jurisdiction.\(^\text{103}\) Exercising jurisdiction is disruptive (and thus a welcome mat is needed) when it “herald[s] a potentially enormous shift of traditionally state cases into federal court”\(^\text{104}\)

This disruptiveness prong is as elusive as the substantiality prong.\(^\text{105}\) For example, in *Grable*, the Court concluded that no welcome mat was needed because only the rare state quiet-title claim would involve a federal tax issue.\(^\text{106}\) The Court distinguished *Merrell-Dow* because allowing a garden-variety tort claim to incorporate federal law would authorize a “horde of original filings.”\(^\text{107}\) Aside from the introduction of another vague standard, an additional problem involves levels of generality.\(^\text{108}\) In *Grable*, the Court exercised jurisdiction because it viewed the “class of cases” narrowly, quiet title claims with embedded federal tax issues, not just any federal issues. Of course *Merrell-Dow* would be more disruptive when we generalize negligence per se as a garden-variety tort claims and cast the embedded federal drug-labeling issue as “federal law.” Choosing the level of generality affects the label. What if *Grable* had been framed as a quiet-title claim with an embedded question of federal law, rather than tax law? On

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\(^\text{102}\) Erwin Chemerinsky, Federal Jurisdiction, § 5.2, 293 (Aspen, 5th Ed.).


the other hand, what if *Merrell-Dow* had been framed as negligence per se with embedded drug-labeling provisions, rather than state tort laws with embedded federal issues? And what about the vast levels of generality in between? Additionally, as Professor Hoffman has noted, the substantiality prongs and disruptiveness prongs will often “pull in opposite directions.”

That is, if it has been determined that a question of federal law is substantial because its resolution will impact a wide range of persons and behavior, the consequence of shifting so much of the state caseload into federal court will often be that such a profound federalism impact will not be understood to be in accordance with the legislative judgment.

The *Grable* test is narrow, and ultimately the lower courts have rejected far more *Grable* cases than they have accepted. Despite meager success among those invoking jurisdiction under the second branch, the attempts continue. There is enough flexibility in the test to provide nonsanctionable arguments for jurisdiction, which has unsurprisingly resulted in many *Grable* removals. The test is amorphous—it must be to meet its end—but I don’t think the end is important enough to justify the delay.

(b) Flexibility and Inefficiency

Jurisdictional rules should be clear. As Judge Posner eloquently summarized:

Functional approaches to legal questions are often, perhaps generally preferable to mechanical rules; but the preference is reversed when it

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110 Id.
111 See infra Part III-B.
112 Mr. Smith Goes to Federal Court: Federal Question Jurisdiction Over State Law Claims Post-Merrell Dow, 115 Harv. L. Rev. 2272, 2277-87 (2002) (suggesting that a clear rule is desirable to promote judicial economy and predictability); Douglas D. McFarland, Article: The True Compass: No Federal Question in State Law Claim, 55 U. KAN. L. REV. 1, 46 (2006); see *Grable* concurrence.
comes to jurisdiction. When it is uncertain whether a case is within the jurisdiction of a particular court system, not only are the cost and complexity of litigation increased by the necessity of conducting an inquiry that will dispel the uncertainty, but the parties will often find themselves having to start their litigation over from the beginning, perhaps after it has gone all the way through to judgment. Jurisdictional rules ought to be simple and precise so that judges and lawyers are spared having to litigate over not the merits of a legal dispute but where and when those merits shall be litigated. The more mechanical the application of a jurisdiction rule, the better. The chief and often the only virtue of a jurisdictional rule is clarity.113

Jurisdictional rules should be clear. It’s easy to write that sentence, gloss over it, and then migrate towards functional standards whenever we encounter a situation that, when viewed in isolation, seems to warrant a different result. For example, the question arises, why, in *Grable*, should not a federal trial court be available to resolve the tax issue? The proper perspective does not consider *Grable* in isolation. Nor does it stop when it uncovers a handful of Supreme Court cases where initial federal jurisdiction seems warranted. Rather, the proper perspective requires us to look systemically at the cost of allowing a jurisdictional inquiry capable of sorting out the cases.

The flexible nature of the second-branch standard facilitates excessive delay in the modern litigation environment. Typically, second-branch cases involve a plaintiff suing in state court, trying to keep the case there by asserting only state-created causes of action. Defendants typically prefer a federal forum (or, cynically, desire the opportunity for delay) and remove the case, arguing that the presence of a federal issue satisfies the second branch. There is no judge or professor acting as a gatekeeper—rather, the defendant creates delay by simply noticing removal. Then there’s a motion to remand, a hearing, and substantial delay.

113 Hoagland v. Sandberg, 385 F.3d 737, 740-41 (7th Cir. 2004).
Whether or not delay is the end sought, it is the result. The flexibility of the test does facilitate intentional delay, if that is the goal. Considerations such as substantiality, importance, and disruptiveness create a significant area of nonsanctionable argument, and nonsanctionable arguments for removal are an invitation for delay. Courts may not even grant attorneys’ fees to the plaintiff after remand unless the removing party “lacks any objectively reasonable basis for seeking removal,”114 and the boundaries of substantiality have eluded the Court and Academy for 85 years.115 But even if the goal is not delay in itself, delay is rarely the enemy of the defendant, so even a slight chance of success in obtaining the federal forum comes with a delay-bonus. Importantly then, the delay-prone class of cases is broader than the class of cases that ultimately qualify for second-branch jurisdiction. The modest samples that appear on the following pages reveal that few cases will ultimately satisfy the second-branch inquiry. But the systemic efficiency concern is not limited to those few – rather, it is the delay of the larger number of colorably removable cases that are delayed in order to find the few.

To evaluate the success rate and delay of second-branch cases after Grable, we116 considered two modest samples of post-Grable cases, focusing on the removal-remand scenario. The two samples comprise the opinion-generating second-branch removal cases. The first sample comprises those cases decided during the seven months preceding this article,117 and the second sample comprises those cases decided in the seven months immediately following Grable.118 Our focus was merely on the success rate and delay in the common removal-remand context; it was not to quantify how many second-branch cases exist. The most important

115 Cite, supra, ____ (long collection of authorities, currently FN 4)
116 Rather than being buried in an asterisked footnote, my research assistant, Jeff Fisher, deserves credit for his work on compiling and evaluating the sample. Therefore, in this portion of the article, “we” is the appropriate pronoun.
117 Appendix 1.
118 Appendix 2.
limitation of our sample is that it only includes opinion-generating cases.\textsuperscript{119} This is important because a district court’s remand for want of subject-matter jurisdiction is not reviewable on appeal\textsuperscript{120} and because many district courts do not routinely publish remand orders. So when a court remands for want of subject-matter jurisdiction, there may be no opinion accompanying remand, and there is of course no appellate opinion because the remand is unreviewable.\textsuperscript{121} While it would be exceedingly difficult to quantify the number, it seems entirely safe to say that most cases excluded because they generated no opinion were cases that were removed (delayed) and remanded.\textsuperscript{122}

The first, more recent sample generated 59 opinions in removed second-branch cases. Jurisdiction was sustained in seven (12.7%), and 52 were remanded (87.3%). The average time consumed from removal until remand in our sample, for those cases remanded, was 177 days—almost 6 months.\textsuperscript{123} Roughly, to find each case in which jurisdiction was proper under the second branch, the courts delayed about eight cases for about six months each. Given the recency of the sample and the high rate of reversal in second-branch cases,\textsuperscript{124} more of the cases in the “yes” pile may be remanded after appeal, thus lowering the acceptance percentage and increasing the average delay time. And again, this 8:1 ratio is likely underinclusive of remanded cases because we focused only on opinion-generating cases.

\begin{itemize}
  \item \textsuperscript{119} The less important limitation is that we did not include cases filed in federal court. Primarily, this was because such cases were sparse and because we wanted to evaluate the average delay in the common removal-remand scenario. For example, in our more recent sample, our first count revealed only 6 cases filed in federal court. The court remanded five of those cases.
  \item \textsuperscript{121} See Lonny S. Hoffman, Intersections of State and Federal Power: State Judges, Federal Law, and the “Reliance Principle,” 81 Tulane L. Rev. 283, 303 (2006) (noting that the “most likely distortion produced by reliance only on reported cases is to be underinclusive of decisions that limit the scope of the federal judicial power.”).
  \item \textsuperscript{122} If jurisdiction was sustained, of course it would be challengeable in the appellate court. And it is difficult to think of many second-branch cases where the issues would be so clear that neither the loser no court would address the second-branch issue on appeal.
  \item \textsuperscript{123} Even ignoring those cases where the case reached the Court of Appeals before remand, the average delay was 133 days (almost 4 ½ months).
  \item \textsuperscript{124} John F. Preis, Article: Jurisdiction and Discretion in Hybrid Law Cases, 75 Cin. L. Rev. 145, 165-66 (2006).
\end{itemize}
Our earlier sample and Professor Preiss’s findings shed further light on the state of the second-branch docket. Our earlier sample showed 47 opinion-generating removal cases of the same type decided in the seven months immediately following *Grable*. Jurisdiction was sustained in seven (14.9%), and 40 were remanded (85.1%). The average delay for removed-then-remanded cases was 150 days. While the more recent sample shows a slightly higher remand rate, it also shows an increase in attempts (59 to 47) and a slightly longer delay (177 days to 150). Professor Preiss’s findings are also helpful in evaluating the workability of the second branch. He recently studied the published second-branch cases that had reached the federal courts of appeals since the *Merrell-Dow* decision. One statistic from his article stands out: of the 67 studied cases, 44 were remanded back to state court from the appellate court.

*Zenergy, Inc. v. Palace Exploration Co.* is a typical case from the remand pile – a pile that makes up about 85% of the larger pile of colorably-second-branch cases. Plaintiff sought a declaration of the rights of various parties regarding 1,554 oil and gas properties. Defendant RoDa removed, claiming that the case necessitated resolving questions of federal tax law. After 209 days, the district court remanded, finding no substantial federal issue in the complaint. The potential delay impact of amorphous jurisdictional standards is even more significant for cases subject to the federal multidistrict-litigation procedures (the MDL) because, when a defendant removes a case subject to MDL, the district court need not resolve the motion.

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126 Id.
127 Id.
129 Zenergy, Inc. v. Palace Exploration Co., 2007 U.S. Dist. LEXIS 57288 at *4
130 Notice of removal was filed 1/10/07, final order was entered 8/6/07.
to remand before transferring the case.  “The fact that there [are] pending jurisdictional objections [does] not deprive the MDL panel of the ability to transfer the case.” For example, consider In re Pharmaceutical Industry Average Wholesale Price Litigation. There, plaintiffs filed in Florida state court on April 5, 2005. Defendants removed on July 20, 2005, alleging jurisdiction under Grable. Plaintiff moved to remand on August 18, 2005, but a week later the case was transferred to the MDL court. Because a similar case from Florida had been removed and transferred, a decision on the motion to remand was postponed. Ultimately, on September 6, 2006, almost 1½ years after the state-court filing, the MDL transfee court remanded the case for want of jurisdiction, but refused to impose sanctions because the removal attempt was not unreasonable. While courts could avoid this additional delay by ruling on remand motions before transfer, courts have the discretion to stay the remand ruling pending transfer, and many courts do so.

To what end are so many cases delayed to find the few? In summary, a defendant who thinks a lawsuit contains a Grable-satisfying embedded federal issue is probably wrong. And he will be told so close to nine times out of ten, after an average delay of 177 days. As discussed in the next subsection, eliminating the second branch does not impose ominous consequences, either in

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135 Id. at 70.
136 Id.
137 Id.
138 Id. at 70 n.3.
139 Id. at 76.
140 Franklin v. Merck & Co., Inc., 2007 WL 188264, at *2; Hatch v. Merck & Co., 2005 WL 2436716 (W.D. Tenn. 2005) (“Although some courts have opted to rule on pending motions to remand prior to the MDL Panel’s decision on transfer, there are many more that have chosen to grant a stay, even if a motion to remand has been filed.”).
principle or implementation, and it yields considerable benefits, both in terms of systemic
efficiency and state interests in the federal-state balance.

(c) Federal, State, and Systemic Interests

The most persuasive criticism of abandoning the second branch undoubtedly will be an
emphasis on the merits of its existence. Some cases involving important federal issues will not
receive a trial in a federal forum first, and this is undesirable because: federal judges are more
experienced and therefore better at applying federal law; the state judges’ inexperience will
result in disuniformity; and because state courts may be hostile to federal rights. 141 Further,
because of the current volume of litigation, many litigants will be denied any federal forum
because the Supreme Court cannot be expected to entirely police the state docket for important
federal issues. The following three paragraphs contain my response.

My first response is a point made earlier but directly relevant here. Of course it would be
desirable if we could identify the “right cases” for the second branch and bring them to federal
court without disrupting the entire class of colorably right cases.142 But that has never been
possible and promises of a clear-enough second branch have never been fulfilled: “[t]he phrase
‘arising under’ has stymied jurists at all levels of the federal judiciary, from district courts to
several generations of Supreme Court Justices. As Charles Alan Wright and Arthur Miller noted,
‘[t]he meaning of the phrase has attracted the interests of such giants of the bench as Marshall,
Waite, Bradley, the first Harlan, Holmes, Cardozo, and Frankfurter, to name only the dead.”143
As new federal rights have been created and new litigation trends have emerged, it has never

142 Supra, Part ___
143 Donna C. Peavler, Removing the Removal Mystery: When Work-Related Claims Are Removable Under 28
Practice and Procedure § 3562 (2d ed. 1987)).
been possible for precedent to draw reliable lines as to which issues are “substantial.” And the nature of the second branch standard prohibits those lines from developing.\footnote{Supra, Part __}

Next, the arguments for the second branch often overlook, or at least understate, the countervailing state interest when balancing the federalism concerns underlying the second branch. Second-branch cases necessarily involve a state-created cause of action. Taking the case from state to federal court allows the federal forum to adjudicate the federal issue but removes a trial from the courts of the sovereign that made the issue actionable.\footnote{See Martin H. Redish, Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicals,” 78 Va. L. Rev. 1769, 1773-75 (stating that it is the primary duty of a sovereign to determine that sovereigns law, that a sovereign is an expert in that sovereign’s laws because the sovereign spends time interpreting the laws of that sovereign, and that a sovereign is more sensitive and sympathetic to that sovereigns own issues and courts.); see also Barry Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1237 (2004); Ronald J. Greene, Hybrid State Law in the Federal Courts, 83 Harv. L. Rev. 289, 293 (1969) (stating that the federal government has little interest in having its courts adjudicate second-branch cases).} While this jurisdictional allocation provides federal expertise for the disputed federal issues, federal courts assume the role of \textit{Erie} guessers for the rest of a case—a case involving state substantive issues and not made actionable until the state created the cause of action. And unlike the Supreme Court’s ability to review the state court’s determination of federal law,\footnote{There is, of course, the rare occasion in which the Court of Appeals may certify a question of state law to the State’s high court.} the State’s high court is unavailable to hear an appeal after federal proceedings end.\footnote{See Linda R. Hirshman, Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction Over Cases of Mixed State and Federal Law, 60 Ind. L. J. 17, 41-42, 64 (1984-85); see also John F. Preis, Article: Jurisdiction and Discretion in Hybrid Law Cases, 75 CIN. L. REV. 145, 199 (2006) (Put simply, hybrid law cases almost always involve more state law than federal law.”).}

The proper allocation must consider federal, state, and systemic interests. Given that the federal court will make an essentially final \textit{Erie} guess if the case is allocated to federal court, and given at least the potential for Supreme Court review if the case is allocated to state court, even if the second-branch inquiry did not result in the delay of so many cases that failed it, the proper
allocation of authority between the state and federal courts would be questionable. Surely it will be rare that state courts create havoc by resolving federal issues. While states outnumber circuits 50 to 13, most disputed legal questions have only a few possible answers, and difficult issues often result in splits among the circuits. It seems unlikely that state courts will often diverge from either (1) following a uniform, though disputed, federal interpretation or (2) choosing among already-existing disputes among the federal courts. Supreme Court review seems an appropriate safeguard against the truly rare cases that involve a state court diverging in a case that would have actually qualified for second-branch jurisdiction. Ultimately, while the current test results in more frequent jurisdictional litigation, it results in very few cases actually satisfying the test and therefore yielding any benefit of enhanced uniformity. And as explained later, under my proposal Congress will have defined those areas in which initial resolution should be more broadly allowed in the federal forum.

Finally, the evolution of the law governing implied causes of action impacts the efficiency gained by adopting the Holmes rule. Not too many years ago, reverting to the Holmes test would have increased efficiency less because of the Supreme Court’s treatment of implied causes of action. Then, the test governing implied causes of action was amorphous, barely connected to statutory construction, and frequently satisfied. Eliminating the second branch then would merely have moved jurisdictional litigation from arguing about the second branch to

148 See Preiss (noting that of the 44 remanded second-branch cases, not one resulted in a published state-court opinion resolving the federal issue).
150 Supreme Court review of course does not depend upon 28 U.S.C. § 1331, which is a grant of original jurisdiction. Because the Supreme Court’s jurisdiction to review state-court decisions comes from 28 U.S.C. § 1257, eliminating the second branch will not impact the issues available for its review.
151 Infra, Part IV.
152 Supra _____
153 See Cort v. Ash, 422 U.S. 66, 78 (1975) (rejecting the approach of cases such as J.J. Case Co. v. Borak, 377 U.S. 426, 433 (1964)); see also Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (“Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago . . . .”).
arguing that the Holmes test is satisfied because federal law (impliedly) creates the cause of action. The Court has since reigned in its implied-cause-of-action jurisprudence and clarified that, “like federal substantive law itself, private rights of action to enforce federal law must be created by Congress. . . . Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.”

The Holmes test today thus provides a much brighter line than it did during the heyday of implied causes of action.

IV. Implementation

For reasons discussed below, Congress should effect this change by adding a definition to 28 U.S.C. § 1331: “for purposes of § 1331, a civil action arises under federal law when the plaintiff asserts a federal cause of action.”

Even assuming one agrees with my conclusions that (1) the Holmes test should govern § 1331 and (2) the change must come from Congress, implementation concerns still exist because the words “arising under” appear frequently in the Judicial Code, not just in § 1331. To be clear, my proposal is not to remove the words “arising under” from 28 U.S.C. § 1331 and not to redefine the phrase for purposes of the entire Judicial Code. It is to redefine the term solely for

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155 Redefining the words “arising under” for purposes of the Judicial Code would impact many untargeted provisions in many different contexts.” E.g., 28 U.S.C. §§ 1445 (“A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States”), 1658 (“a civil action arising under . . . may not be commenced later than 4 years after the cause of action accrues.”), 1339 (“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.”), 1441(b) (“Any civil action . . . arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties”), 1338(a) (“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks.”), 1295 (“. . . except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks . . .”) (emphases added).
purposes of 28 U.S.C. § 1331. Ultimately, this will facilitate a transition with minimal problems and a return to congressional intent.

Several currently superfluous jurisdictional grants appear in the Judicial Code and use the same “arising under” phrase. They are superfluous because they are now consumed by 28 U.S.C. § 1331. Section 1331 provides that “the district courts shall have original jurisdiction of all civil actions arising under the … laws … of the United States.” If a civil action arises under the Postal Laws of the United States, then 28 U.S.C. § 1331 provides jurisdiction; yet, § 1339 provides that the “district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the Postal Service.” The statutes have not always been superfluous. Section 1331, the general federal question statute, used to contain an amount-in-controversy requirement. At one time then, the significance of a separate “arising under” grant was to allow courts to exercise original jurisdiction in civil actions “arising under” particular laws without regard to the amount in controversy. In other words, jurisdiction existed for cases arising under the postal laws even if they did not satisfy the amount-in-controversy, which was present in the general grant but not in the postal-laws grant.

Redefining “arising under” only for purposes of 28 U.S.C. § 1331 would render those other provisions no longer superfluous. The current two-branch inquiry—with an important

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156 Id.
157 E.g., 28 U.S.C. §§1337, 1339, 1340
qualification discussed next paragraph—would apply to the other arising under grants if they were left in place. With respect to each of the now-superfluous grants, Congress would make a simple choice: either delete the provisions and therefore extend the Holmes limitation to those areas or deliberately retain those other provisions to use more of its Osborn power over particular matters Congress deems important. Federal question jurisdiction would thus again begin to resemble a congressionally controlled area. The Holmes branch would govern federal-question jurisdiction unless Congress retained or created another “arising under” statute. Because “arising under” is only narrowly defined for § 1331, the words would retain their current Grable meaning for the rest of the Judicial Code. Congress could therefore retain the current definition in areas of exclusive federal jurisdiction and in other selected matters where Congress decides to use its Osborn power to extend jurisdiction. For example, Congress could retain the second branch for patent cases, trademark cases, and certain “Indian claims,” where it determines that the cost is justified.

Because the allocation would now be congressionally dependent, the Grable disruptiveness inquiry would disappear. Obviously the disruptiveness inquiry would no longer have a role in the § 1331 inquiry. But more importantly, even in the retained second-branch

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163 E.g., (recent case from Federal Circuit).
164 Indeed, Congress is free to extend jurisdiction even further in selected areas, for example using its Article III jurisdiction-conferring power to override the well-pleaded-complaint rule. See Mesa v. California, 489 U.S. 121, 136 (1989).
168 Although the amendment would remove the second branch, it would not impact the complete-preemption doctrine. A different article might take on the Court’s modern complete-preemption approach, See Beneficial Nat’l Bank v. Anderson, 539 U.S. 1, 11 (2003) (Scalia, J., dissenting) (finding that the Court’s “view finds scant support in our precedents and no support whatever in . . . any . . . Act of Congress.”), but it is easy enough to incorporate it into the Holmes test. When a state-created cause of action is completely preempted because it falls within the scope of an exclusively federal cause of action, the effect is that the plaintiff actually has asserted the federal cause of action, for no state cause of action exists. See Richard E. Levy, Federal Preemption, Removal Jurisdiction, and the
areas, there would be no need for a disruptiveness inquiry because Congress has delineated in which areas it wants the courts to hear state-created claims raising substantial federal issues. The federal cause of action would no longer be the welcome mat – the welcome mat would be a subject-matter-specific grant of jurisdiction that exists without § 1331’s newly imposed limitation.169

Nor would this amendment affect the current removal or supplemental-jurisdiction inquiries. By leaving the terms “civil action” and “arising under” in place, and by referencing “a federal cause of action,” the search for a jurisdictional hook under Exxon v. Allapattah,170 is unchanged, except to the extent that a second-branch claim no longer qualifies for original jurisdiction under § 1331 and therefore cannot be a jurisdictional hook. Nor would amending § 1331 would disturb the general removal statute, which requires the remover to find a grant of original jurisdiction, and does not use the words “arising under.”171 Amending 28 U.S.C. § 1331 would simply alter one of the original grants and would not alter the inquiry. Nor would any problems arise under 1441(b) because the only sensible reading would be to construe “arising under” for purposes of that subsection to incorporate the meaning of the grant of jurisdiction that satisfied subsection (a).

Well-Pleased Complaint Rule, 51 U. Chi. L. Rev. 634, 655-57 (1984); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 24 (1983) (“if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily “arises under” federal law”). It is, as Judge Easterbrook asserted, the federal court correcting the plaintiff’s “spelling error” in order to assert the only available cause of action for the complained-of conduct. Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073, 1075 (7th Cir. 1992).

169 While not solving all problems in the declaratory judgment context, See, e.g., Federal Jurisdiction and the Problem of the Litigative Unit: When Does What “Arise Under” Federal Law?, 76 Tex. L. Rev. 1829, 1835-36 (1998) and Donald L. Doernberg and Michael B. Mushlin, The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expaded Federal Jurisdiction While the Supreme Court Wasn’t Looking, 36 UCLA L. Rev. 529, 544 (1989), reverting to the Holmes test should simplify the inquiry slightly in cases in which the hypothetical coercive complaint would contain a second-branch claim.

170 See Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 593 (2005)

One likely objection to my suggested implementation is that the words “arising under” would mean different things in different parts of the Judicial Code. This is true and perhaps a bit odd, but it is probably better than the alternatives. First, I have already discussed, in Part II, why the solution should not come from the Court. Second, although a case could be made either way, redefining “arising under” for purposes of § 1331 is probably superior to removing the words “arising under” from § 1331. Removing the words “arising under” would create no problems within § 1331 where the same meaning could be enacted without definition. The complications with this second solution arise because of the interaction with other statutes that use the words “arising under” in the Judicial Code. For example, the removal statute references cases “arising under” federal law, and therefore would need to be amended if those words were removed from, rather than defined within, § 1331. Also, because Congress would likely (and should) leave in place some of the now-broader “arising under” grants, future statutes could conveniently reference “arising under” jurisdiction and therefore incorporate both the broader grants and the narrower “arising under” from § 1331. An undesirable third alternative would be to redefine the words for purposes of the entire Judicial Code, rather than just for § 1331. Pursing this third alternative would reach untargeted areas and cause unnecessary confusion. Under my proposal, no difficult interpretative issues should arise, as congressional intent to restrict “arising under” only for purposes of § 1331 would be made clear by a definition

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172 For example by merely rewriting § 1331 to read “the district courts shall have original jurisdiction over civil actions in which federal law creates a cause of action asserted by the Plaintiff.”

173 Id.

174 See supra (currently 124).

175 Also, § 1331’s interaction with the supplemental jurisdiction statute supports leaving the words “arising under” and “civil action” alone. Changing civil action to claim, or otherwise incorporating the Holmes test by removing the words “arising under” would create difficult interpretative problems, given the claim-specific approach the Court has taken to the supplemental-jurisdiction statute in the face of § 1367’s ambiguous language. See Exxon Mobile Corp. v. Allapattah Services, Inc. 545 U.S. 546 (2005).

176 For example, the phrase is used in the habeas statute, the description of the Federal Circuit’s appellate jurisdiction (1295), government disbursements (613).
that is limited to only § 1331. Such an approach is not novel, for legislatures often define terms for purposes of one statutory section only.\textsuperscript{177} And in any event, it’s not as though this definition confuses a clear area—we already have redundant jurisdictional grants, the same words meaning different things in different contexts, all of which are inconsistent with what the words “mean,” under just about any approach to statutory construction. While for now I prefer the redefining approach, I would not-so-grudgingly accept Congress’s decision to rewrite § 1331 to remove the “arising under” words, so long as proper study is given to the impact on other statutes that mean to reference § 1331 with the phrase “arising under.”

\textbf{V. Conclusion}

The Second Branch should be eliminated for purposes of the general federal-question statute. Often, the clamor for bright-line rules is misplaced. In many contexts, legal rules ought to be fluid, flexible, and adaptable. Such flexible standards, though, generally are poorly suited for jurisdictional inquiries, where flexible standards create too much litigation about where to litigate. Justice Holmes adopted a bright-line rule governing when a case “arises under” federal law. Unsurprisingly, cases arose that seemed to fall on the wrong side of the bright-line. Bright-line rules will do that, but before abandoning the bright line, consideration must be given to the benefits of its existence and, relatedly, the costs of its removal. By eliminating that bright line in favor of standards such as substantiality, importance, and now disruptiveness, the Court has created a class of delay-prone cases that is much broader than the class of cases that ultimately benefit from the standards. Colorably removable cases will be removed, and the second-branch, though difficult to satisfy, creates a broader category of colorably removable

cases. Even without the considerations of delay, policy considerations do not overwhelmingly favor federal adjudication of cases that satisfy the current second-branch test. Second-branch cases are necessarily hybrid cases, containing issues of both state and federal law, and made actionable only by the state’s creation of a cause of action. If the case proceeds in state court, review (though limited) is available in the Supreme Court. Conversely, when the case is removed, federal courts decide the federal issue and become essentially final *Erie* guessers as to the state issues. The limited benefits for the few do not justify the costs on the many—neither the systemic costs nor the costs on litigants whose cases are one of the 8 removal cases that are delayed for an average of 6 months just to find each true second-branch case.

Congress can effect this change with minimal impact on the rest of the Judicial Code, and the 28 U.S.C. § 1331 inquiry will begin to resemble an exercise in statutory construction. The best approach is probably to add a definition of “arising under” that applies solely to § 1331, the general federal-question statute. The Holmes test would therefore govern only § 1331 and not the other “arising under” grants. As to the other “arising under” grants existing now, Congress would choose whether to remove them in order to bring those matters within the Holmes test or to keep them, therefore keeping those matters within the current “arising under” realm (including the Second Branch). Future statutes could conveniently reference “arising under” and incorporate both types. Because the allocation would now be congressionally dependent, the *Grable* disruptiveness inquiry would no longer be needed. Obviously it would not govern cases under the amended § 1331. In the broader “arising under” areas, there would be no need to search for a federal-cause-of-action welcome mat—the welcome mat would be a subject-matter-specific grant of jurisdiction that exists without § 1331’s limitation.
We’ve tried looking through kaleidoscopes, and we’ve tried fixing our compass. At each step, assurances are given that this time the boundaries will be acceptably clear (though not too clear, after all, that’s why the Holmes test is bad). 85 years is enough.