

JURISDICTION AND DISCRETION IN HYBRID LAW CASES

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An everlasting debate in the federal courts field is which branch of the federal government has the power to control federal jurisdiction. While some commentators and judges assert that the judiciary has the implicit authority to refine the boundaries of its jurisdiction, others argue that Article III vests that authority with Congress only and judicial modification of jurisdiction is illegitimate. In focusing almost entirely on the constitutional legitimacy of the question, this debate has overlooked an important consideration: Even if the judiciary may legitimately wield discretion in setting its jurisdiction, is such discretion functionally appropriate?

This Article argues that such discretion is not always appropriate. Relying on an empirical analysis of two decades of cases in one area of federal jurisdiction—hybrid law jurisdiction—the Article demonstrates that some jurisdictional questions are better resolved by simple, bright-line rules. Drawing on extensive scholarship studying rules and standards—which until now has not yet been applied in this field—the Article concludes that the particular (and often misunderstood) nature of hybrid law cases calls for a rule rather than a standard. This conclusion, while limited to the field of hybrid law jurisdiction, nonetheless suggests that the debate over judicial discretion in jurisdictional questions is too narrow. Only by considering functionality as well as legitimacy can the proper jurisdictional directives be formulated.

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I. INTRODUCTION

One of the most engrossing debates in the field of federal courts concerns congressional control of federal jurisdiction. One aspect of this debate is role of the judiciary in defining its own jurisdiction. On one side of the debate are those who argue that Article III bestows Congress with plenary power to control federal jurisdiction and that the judiciary therefore has no role in its determination.¹ On the other side are those who contend that the federal judiciary—with its comparative expertise in jurisdictional considerations—should have leeway to refine its jurisdiction as needed.² Along the continuum between these two positions are numerous other views.³

While this argument has both descriptive and normative elements, the chief normative concern has always been legitimacy.⁴ That is, in light of Article III and other relevant sources of law, is it *legitimate* for the judiciary to exert any control over its jurisdiction? While the legitimacy question is an essential inquiry, it is not the sole question that should be explored. Even if one believes that the judiciary *may* define the contours of its jurisdiction, that does not *per force require* the judiciary to exercise its discretion in that field. Many commentators have observed that broad discretion in the hands of judges often leads to complex and often conflicting doctrine—typically an undesirable result.⁵

1. See, e.g., MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 3–7, 47–139 (1991) (arguing that “underlying normative principles of American political theory”—the representational and counter-majoritarian principles—suggest that the judiciary should closely follow congressional dictates in asserting or declining jurisdiction); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); Phillip B. Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 489 (1959); Gene R. Shreve, *Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law*, 1991 B.Y.U. L. REV. 767 (1991).

2. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 574–88 (1985); Michael Wells, *Why Professor Redish is Wrong about Abstention*, 19 GA. L. REV. 1097 (1985); Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891 (2004).

3. See, e.g., Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 2 (1990) (arguing that “the boundaries of federal jurisdiction—and the authority to define that jurisdiction—evolve through a dialogic process of congressional enactment and judicial response”); Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court’s Theory That Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1329 (2005) (arguing that “Article III requires federal courts to decide ‘all cases’ but not all ‘Controversies’” and that federal judges may decide to “punt” certain “Controversies”).

4. The leading article describing the discretion employed by federal courts in defining their jurisdiction is Shapiro, *supra* note 2, at 548–59 (noting the myriad ways in which federal courts exert control over their jurisdiction, such as the doctrines of abstention, justiciability, and exhaustion, as well as the interpretation of the jurisdictional statutes).

5. See, e.g., Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42

Therefore, even if scholars could solve the legitimacy problem, they would have to face a secondary problem: the risk of doctrinal instability.

The role of discretion in judicially-created jurisdictional doctrine assumed a central role recently in the Supreme Court case *Grable & Sons Metal Prod. Inc. v. Darue Eng'g & Mfg. Co.*⁶ *Grable & Sons* was a “hybrid law” case, meaning that it involved both state and federal law. The question for the Supreme Court was whether this suit—being a traditional state law cause of action—fell within the district court’s federal question jurisdiction because its disposition turned on the interpretation of a federal statute. The Court held that the suit “arose under” federal law and therefore fell within federal question jurisdiction.⁷ While this holding may not seem particularly remarkable, what is remarkable is the analysis the Court used to determine whether to assert jurisdiction in hybrid law cases. Declining to promulgate a “single, precise, all-embracing” test for jurisdiction,” the Court instead instructed lower courts to inquire whether a “state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”⁸ In other words, the Supreme Court instructed lower courts to use their discretion to determine when to assert federal question jurisdiction. While this discretion is not unlimited, its boundaries are far and wide. A district court will feel little constrained by the Supreme Court’s mandate to consider the “congressionally approved balance of federal and state judicial responsibilities.”⁹ Thus, *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.

This Article disagrees with the Supreme Court on this issue and, in doing so, demonstrates that the “legitimacy” debate in the federal courts field is inappropriately narrow. A fuller debate of “jurisdiction and discretion” should take account of functionality as well as legitimacy. To make this case, the Article relies on an analysis of every hybrid law jurisdiction decision published by a circuit court since 1986 (the year the

DUKE L.J. 1, 10–11 (1992) (documenting an increase in legal complexity and attributing it in part to an increase in discretionary, standard-based legal directives). To be sure, the problem of stability is not unrelated to the problem of legitimacy. Inasmuch as discretion and the ensuing doctrinal fuzziness weaken the rule of law, the legitimacy of the institution is weakened. A lawsaying institution with a weak rule of law is typically viewed as less legitimate than institutions with a stronger rule of law. See Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 974–78 (1995).

6. 125 S. Ct. 2363 (2005).

7. *Id.* at 2368.

8. *Id.*

9. *Id.* at 2367.

Court last addressed hybrid law jurisdiction questions).¹⁰ Building on this description of hybrid law doctrine, the Article then turns to a description of rules and standards. After identifying the traits of each legal form, the Article concludes that a rule is preferable to a standard for jurisdictional issues in hybrid law cases. Having established this, the Article relies on the commonly accepted purposes of federal jurisdiction to argue that federal courts should assert jurisdiction over hybrid law cases only when the federal question embedded in the state cause of action is supported by a federal cause of action.

Contrary to this analysis, the Supreme Court has already chosen a discretionary approach and is unlikely to revisit the issue anytime soon (much less, reverse its position). The purpose of this Article, however, is not solely to advocate for a rule-bound approach; rather, it is to show that the debate over discretion in jurisdiction cannot take place solely in the realm of legitimacy. Instead, functionality must be an essential, even if secondary, consideration.

II. FEDERAL QUESTION JURISDICTION IN HYBRID LAW CASES

Federal question jurisdiction has its genesis, of course, in Article III of the U.S. Constitution. Section 2 of that article states that “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”¹¹ The modern scope of federal question jurisdiction, however, is not controlled by Article III but rather by an implementing statute first passed by Congress in 1875. Though the statute, now codified at 28 U.S.C. § 1331, employs the same “arising under” language used in Article III,¹² statutory federal question jurisdiction is in practice much narrower than its constitutional counterpart.¹³

10. Numbering 67 in all, these cases are listed and described in the Appendix at the end of the Article.

11. U.S. CONST. art. III, § 2.

12. Section 1331 provides that “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2006).

13. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 494–95 (1983) (“Although the language of § 1331 parallels that of the ‘arising under’ clause of Article III, this Court never has held that statutory ‘arising under’ jurisdiction is identical to Article III ‘arising under’ jurisdiction.”). See generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION*, § 5.2 at 266–67 (2003) (addressing the distinction between jurisdiction under Article III and under § 1331). For excellent historical accounts of the statutory grant of jurisdiction see James H. Chadbourne & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. & AM. L. REG. L. REV. 639 (1942) and Ray Forrester, *The Nature of a “Federal Question,”* 16 TUL. L. REV. 362, 374–77 (1942).

Determining whether a matter “arises under” federal law for the purposes of § 1331 is usually quite simple. Justice Holmes famously explained in *American Well Works Co. v. Layne & Bowler Co.* that “[a] suit arises under the law that creates the cause of action.”¹⁴ Thus, the existence of a federal cause of action for a given federal law guarantees one access to a federal court. Yet, as has been noted, Justice Holmes’s test for jurisdiction is “more useful for inclusion than for the exclusion for which it was intended.”¹⁵ Put differently, while the existence of a federal cause of action demonstrates that a litigant’s case arises under federal law,¹⁶ the lack of a federal cause has not been considered fatal—in most federal courts at least—to federal question jurisdiction. Cases that generally fall in this latter category, *i.e.*, cases involving federal law but not a federal cause of action, are typically of two types: (1) cases relying wholly on the federal law for relief, and (2) cases relying primarily on state law for relief but involving some aspect of federal law. The first type of case—which this Article does not address—is one where a party seeks to enforce a federal right but cannot point to a congressionally created right of action. While the general rule is that these cases are not cognizable in federal courts,¹⁷ generous debate about the appropriate rule continues.¹⁸ The second type of case, which this

14. 241 U.S. 257, 260 (1916).

15. *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.); *see also* *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9 (1983) (“[I]t is well settled that Justice Holmes’ test is more useful for describing the vast majority of cases that come within the district courts’ original jurisdiction than it is for describing which cases are beyond district court jurisdiction.”).

16. A rare exception to this arises when Congress creates a right of action empowering a litigant to bring suit but also directs that state law govern the disposition of the suit. In such a situation, federal question jurisdiction has been held inappropriate. *See Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 513 (1900).

17. *Alexander v. Sandoval*, 532 U.S. 275 (2001) (refusing to imply a cause of action under Title VI because the statute’s text and legislative history revealed no congressional intent to allow private enforcement); *but see* *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (implying a right of action under Title IX for a wrongful discharge suit by a male basketball coach who complained about discrimination against his female players).

18. For arguments in support of implying a federal right of action, *see, e.g.*, Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 666 (1987) (arguing that the existence of federal right is sufficient to imply a right of action attendant to that right); Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 68 (2001) (criticizing the Supreme Court’s separate inquiries into rights, rights of action and remedies); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 864–65 (1996); Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 322 (1995) (arguing that a right under the constitution should be “self-executing” and that a right of action should not be required to enforce one’s constitutional rights).

For arguments against implying federal rights of action, *see, e.g.*, John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); Thomas W. Merrill, *The Common Law*

Article does address, is one where a party seeks to enforce a state right but, for whatever reason, the resolution of the state law claim will involve the interpretation of federal law. As explained in detail later in this Part, there are three main ways in which a state claim may involve the interpretation of federal law.¹⁹ For the present discussion, however, a simple example will suffice.

Suppose a landowner rents land to a farmer. Because the landowner wishes to preserve the environmental integrity of the land, he insists on the following clause in the contract: "Farmer agrees to comply with all applicable state and federal environmental laws during the term of this contract." One day, the landowner observes the farmer dumping used oil on a portion of the land. The landowner then brings suit in state court against the farmer for breach of contract, citing a federal environmental regulation prohibiting the farmer's conduct. The farmer removes the case to federal court on the ground that the court would have to interpret federal law to determine whether the farmer breached the contract. Thus, on a motion to remand by the landowner, a federal court would be called on to determine if the state-law breach of contract action posed a federal question such that federal jurisdiction would be appropriate.²⁰

Federal courts have employed a variety of doctrines to analyze these types of jurisdictional questions. Although the doctrines have been repeatedly misstated and confused with each other, four distinct doctrines do in fact exist. These doctrines are (1) the well-pleaded complaint rule,²¹ (2) the necessity test,²² (3) complete preemption

Powers of Federal Courts, 52 U. CHI. L. REV. 1 (1985); Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978) (arguing that the Court lacks power to imply causes of action without congressional authority).

19. See discussion *infra* Part II.B.1.

20. This example necessarily assumes, as do all similar examples in this Article, that the parties are non-diverse.

21. A "well-pleaded complaint" is one that, for purposes of federal jurisdiction, invokes federal law. Such complaints merit federal jurisdiction while those without a federal issue do not. Left out of any consideration under the well-pleaded complaint rule is whether the defendant's answer or asserted defenses implicate any federal questions. Nor may federal jurisdiction lie if the plaintiff anticipates a federal defense and preemptively responds to it the complaint. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908). For criticisms of the well-pleaded complaint rule, see, e.g., LARRY W. YACKLE, *RECLAIMING THE FEDERAL COURTS*, 102-05 (1994); Donald 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); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles"*, 78 VA. L. REV. 1769, 1794-97 (1992).

22. Where a complaint involves state and federal issues, federal jurisdiction will obtain only where success on the federal issue is *necessary* to the plaintiff's success in the case. Thus, if a plaintiff advances three separate theories in his complaint, each of which he alleges entitle him to relief, and only one of those theories implicates federal law, then federal jurisdiction will not lie because relief could be

analysis,²³ and (4) substantiality analysis. Substantiality analysis, which is the focus of the Article and the analysis ostensibly used in *Grable & Sons*, differs from the other three methods in that it instructs judges to consider principles of federalism in each and every instance, rather than simply to follow a bright-line rule that follows these same federalism principles.

The remainder of this Part describes substantiality analysis in detail. The relevant Supreme Court cases are first discussed, followed by the lower court cases decided over the past two decades.

A. Substantiality Analysis in the Supreme Court

Substantiality analysis seeks to determine whether the federal question embedded within the state right of action is “substantial” enough to warrant the energies of a federal court—the notion being that insignificant or tangential federal issues do not merit federal jurisdiction. This Section will introduce the general contours of substantiality analysis by discussing several Supreme Court cases dealing with this issue, among them *Smith v. Kansas City Title & Trust Co.*, *Merrell Dow Pharm., Inc. v. Thompson*, and *Grable & Sons Metal Prod. v. Darue Eng’g & Mfg.*

obtained without reference to federal law. Put another way, jurisdiction will not obtain because federal law is not necessary to his case. The relevant Supreme Court case on “necessity analysis” is *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988). For a detailed and incisive analysis of *Christianson*, see John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What “Arise Under” Federal Law?*, 76 TEX. L. REV. 1829 (1998).

23. In hybrid law cases, complete preemption analysis inquires whether the state law implicated in the plaintiff’s suit occupies a field that has been completely preempted by federal law. If the state law is completely preempted, then the state law is “necessarily federal in character” and federal jurisdiction may be invoked. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 56, 63–64 (1987). It is odd that complete preemption should be grounds for federal jurisdiction because preemption claims almost always arise as defenses and, under the well-pleaded complaint rule, a federal defense cannot create federal jurisdiction. As has been noted, this amounts to an exception to the well-pleaded complaint rule. See Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 WAKE FOREST L. REV. 927, 939 (1996) (“[T]he doctrine of complete preemption is an exception, or corollary, to the well-pleaded complaint rule.”).

The seminal case in complete preemption analysis is *Avco Corp. v. Aero Lodge No. 735, Int’l Ass’n of Machinists*, 390 U.S. 557 (1968). For a helpful exegesis of complete preemption analysis in the Supreme Court and lower courts, see Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1793–1800 (1998).

1. *Smith v. Kansas City Title & Trust Company*

Decided in 1921, *Smith* is generally regarded as the start of modern hybrid law jurisdiction.²⁴ The case involved a shareholder's challenge to his company's intention to purchase various federal bonds. The shareholder contended that the bonds, which were issued pursuant to federal legislation, were unlawful because Congress did not have the constitutional authority to authorize the issuance. Given this contention, the shareholder brought suit against the company under a state statute prohibiting investments in illegal securities.

Thus, the suit was primarily a creature of state law: the shareholder alleged that his company violated state law. Yet the case also included an embedded federal question because, in order to ascertain whether the defendant had violated state law, the federal court needed to determine the constitutionality of Congress's issuance of the bonds. Thus, the *Smith* Court faced the question of whether a federal court not sitting in diversity could adjudicate a state-created cause of action if resolving the state claim required resolution of an embedded federal question.

The *Smith* Court held that federal jurisdiction was appropriate. Borrowing from a seminal federal question case, *Osborn v. Bank of United States*, the Court held that federal jurisdiction exists if "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction."²⁵ Because the plaintiff's claim "depend[ed] upon the construction or application of the Constitution or laws of the United States," the Court opined, "the District Court ha[d] jurisdiction under [the federal question statute]."²⁶

After *Smith*, one thing seemed clear: a federal question exists if federal law must be interpreted. This clarity, however, all but disappeared with the Supreme Court's next major statement on the matter in *Merrell Dow Pharm. v. Thompson*.

24. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

25. *Id.* at 199 (quoting *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824)). The Court also relied on a similar but earlier statement by Chief Justice Marshall in *Cohens v. Virginia* that "[a] case . . . may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either." *Smith*, 255 U.S. at 199 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821)).

26. *Id.* While it is true that the Court did rely on case law reported after statutory federal question jurisdiction was created in 1875, it explicitly stated that the *Osborn*'s characterization of a suit arising under the Constitution or laws of the United States has been followed in many decisions of this and other federal courts" and that "[t]he jurisdiction of this court is to be determined upon the principles laid down in the cases referred to." *Id.* at 201.

2. *Merrell Dow Pharm. Inc. v. Thompson*

Merrell Dow involved a state tort claim in which the plaintiff sought to prove the defendant's negligence using a negligence per se theory.²⁷ The federal law in question was a drug-labeling regulation.²⁸ Thus, to determine whether the defendant was negligent, the district judge needed to determine "what a federal law means," namely the labeling regulation. Although this question fell squarely within the rule applied in *Smith*, the Supreme Court declined to find federal question jurisdiction merited. The Court disclaimed any notion that its earlier precedents had created "some kind of automatic test" for finding federal jurisdiction, and instead claimed that analysis of embedded federal question cases required a "principled [and] pragmatic" method that could "accommodate[e] [the] . . . kaleidoscopic situations" in which federal issues arose in state law cases.²⁹

In deciding against federal jurisdiction, the Court relied on the supposed congressional intent underlying the federal regulation at issue. In one portion of the opinion, the Court determined that Congress neither explicitly nor implicitly created a private right of action to allow citizen enforcement of the labeling regulation.³⁰ Although the plaintiff in *Merrell Dow* was relying on a *state* right of action, the Court deemed the lack of a federal right of action to be an indication by Congress that the agency regulation was not to be adjudicated in federal court; otherwise, Congress would have created a private right of action.³¹ Aside from the principle of congressional intent, the Court did little to elucidate other guiding principles. It rejected the uniformity problems potentially caused by allowing state courts to interpret federal law,³² and

27. 478 U.S. 804 (1986). Negligence per se—a doctrine that exists in most states—permits plaintiffs to establish the defendant's breach of a standard of care merely by showing the defendant violated a statute that it had a legal duty to obey. See DAN DOBBS, *THE LAW OF TORTS*, § 134 at 315 (2000).

28. See *Merrell Dow*, 478 U.S. at 805–06 (stating the federal law in question was the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040).

29. *Id.* at 813–14 (partially quoting Justice Cardozo's statement in *Gully v. First National Bank*, 299 U.S. 109, 117–18 (1936)).

30. *Id.* at 810–12.

31. *Id.* at 814. In a sentence that would breed considerable confusion over whether a federal right of action was a *sine qua non* to obtaining federal jurisdiction in embedded federal question cases, the Court stated that "congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute [in a state law action should not confer federal jurisdiction]." *Id.* (emphasis added).

32. *Id.* at 816. The Court explained that, "[t]o the extent that petitioner is arguing that state use and interpretation of the [federal statute at issue in the case] pose a threat to the order and stability of the [statutory] regime, petitioner should be arguing, not that federal courts should be able to review and

dismissed any notion that special circumstances (such as a novel issue of great importance) were compelling enough to warrant jurisdiction.³³

Thus is the majority opinion in *Merrell Dow*. In some respects, its holding is manifestly clear: congressional intent is crucial to determining federal jurisdiction.³⁴ In one important respect, however—namely, whether *Smith* was still good law—the majority opinion was significantly lacking. Yet when the majority opinion is viewed against the forcefully argued dissent of Justice Brennan, its meaning becomes clear.

Justice Brennan's view, which obviously did not prevail, was that federal question jurisdiction should obtain where "federal law [is] an essential element of a state-law claim."³⁵ For Brennan, a federal issue amounts to an "essential element" if the possibility exists "that the federal law will be incorrectly interpreted" by the state court.³⁶ Brennan thus clearly favors the *Smith* analysis whereas the majority does not.³⁷

enforce state [actions involving a federal statute], but that the [federal statute] preempts state-court jurisdiction over the issue in dispute." *Id.* Additionally, the Court noted that any concerns "about the uniformity of interpretation" were "considerably mitigated by the fact that" the Supreme Court "retains power to review the decision of a federal issue in a state cause of action." *Id.*

33. *Id.* at 817 ("[T]he interrelation of federal and state authority and the proper management of the federal judicial system' would be ill served by a rule that made the existence of federal-question jurisdiction depend on the district court's case-by-case appraisal of the novelty of the federal question asserted as an element of the state tort.") (internal citation omitted) (quoting *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8 (1983)).

34. Commentators and courts, however, disputed after *Merrell Dow* whether the absence of a federal cause of action was alone fatal to federal jurisdiction, or merely militated against jurisdiction. Compare ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 273 (2d ed. 1994) ("Therefore, without a federal cause of action, a federal law cannot be the basis for federal question jurisdiction.") and Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1146 n.267 (1992) (claiming that, under *Merrell Dow*, "federal jurisdiction may not exist under that statute") with *City of Huntsville v. City of Madison*, 24 F.3d 169, 174 (11th Cir. 1994) ("We conclude that it will be only the exceptional federal statute that does not provide for a private remedy but still raises a federal question substantial enough to confer federal question jurisdiction when it is an element of a state cause of action.") and *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.").

35. *Merrell Dow*, 478 U.S. at 828.

36. *Id.*

37. The majority's disenchantment with *Smith* is further revealed by its almost total failure to even acknowledge the case. The majority opinion in *Merrell Dow* cites *Smith* three times, two times of which are in footnotes. The first citation (which is in the text) merely refers to *Smith* as the case on which the district court relied in deciding the case. *Id.* at 806. Elsewhere, *Smith* is cited to explain its consonance with a *Smith*-era case that was long thought to contradict it, and to note in passing that *Smith* was the "most frequently cited case for" the notion that federal jurisdiction should exist where a state case "turn[s] on some construction of federal law." *Id.* at 804, 814 nn.5, 12.

On this issue as well, the meaning of the majority's opinion is further revealed by comparison with the dissent. Justice Brennan not only cites the case heavily, but actually begins his analysis with it,

One thing is clear after *Merrell Dow: Smith* is—at least in some important sense—no longer good law. But then came *Grable & Sons*.

3. *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*

Grable & Sons involved a state quiet title action.³⁸ Several years before filing his suit, the plaintiff had defaulted on his federal income taxes. As a consequence, the IRS seized his property and sold it at auction. Before selling the property, the IRS was required under federal law to give notice of the sale to the plaintiff by “giv[ing it] to the owner of the property [or] le[aving it] at his usual place of abode or business.”³⁹ The IRS attempted to fulfill its duty to notify the plaintiff by sending him a certified letter. Though the plaintiff received the letter and had notice of the sale, he did not object to it at that time. Years later, however, he came to believe that the IRS was required to serve him *personally*, rather than through the mail. Accordingly, he filed a quiet title action in state court alleging that the current owner of the property (who purchased the property at the tax sale) did not have clean title because the sale process was flawed. The defendant removed the case to federal court and the plaintiff moved the court to remand the case to state court. The district court denied the plaintiff’s motion and the Sixth Circuit affirmed.

The Supreme Court 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.”⁴⁰ The Court shunned a “‘single, precise, all-embracing’ test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties” and held that *Merrell Dow* does not require a federal cause of action.⁴¹ Rather, the existence of a federal cause of action for the embedded federal law is merely one issue that ought to be considered among a “welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.”⁴² The Court stated the proper inquiry as follows: “does

explaining that “[t]he continuing vitality of *Smith* is beyond challenge,” especially given its affirmance “most recently just three Terms ago by a unanimous Court in *Franchise Tax Board v. Construction Laborers Vacation Trust*.” *Id.* at 820 (Brennan, J., dissenting) (citation omitted). Justice Brennan went on to list numerous other cases in the Supreme and circuit courts applying *Smith*. *Id.* at 820–21.

38. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005).

39. *Id.* at 2366 (quoting 26 U.S.C. § 6335(a)).

40. *Id.* (full case name and citation omitted).

41. *Id.* at 2368 (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 821 (1988) (Stevens, J. concurring)).

42. *Id.* (quoting *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463

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.”⁴³

Applying this test, the Court held that federal jurisdiction was appropriate in this case. The Court found that the issue was “substantial” (though it did not use that word)⁴⁴ because “[t]he Government . . . has a direct interest in the availability of a federal forum to vindicate its own administrative action, and buyers (as well as tax delinquents) may find it valuable to come before judges used to federal tax matters.”⁴⁵ Finally, dealing with the “welter of issues” attendant upon federal-state relations, the Court noted that, “because it will be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor.”⁴⁶

The most notable aspect of *Grable & Sons* is the Court’s strong penchant for a pragmatic test. Over and over again, the Court stressed the need for a “‘common-sense accommodation of judgment to [the] kaleidoscopic situations’ that present a federal issue.”⁴⁷ Thus, the Court dedicated an entire section of its opinion to explaining how *Merrell Dow*—despite the clear import of the opinion’s language in various places⁴⁸—did not contain any bright-line rule. Rather, the Court explained that *Merrell Dow* held that “determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.”⁴⁹ The point here is not whether the Court was disingenuous in its reading of *Merrell Dow*, but rather that *Merrell Dow* lent itself to several varying (and reasonable) interpretations⁵⁰ and that the Court’s reading of the case should be seen

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

43. *Id.*

44. Elsewhere in the opinion, the Court explained that a “substantial” interest is one implicating a “serious federal interest in claiming the advantages thought to be inherent in a federal forum.” *Id.* at 2367.

45. *Id.* at 2368.

46. *Id.*

47. *Id.* at 2367 (quoting *Gully v. Nat’l Bank in Meridian*, 299 U.S. 109, 117–18 (1936)).

48. See *Merrell Dow Pharm. v. Thompson*, 478 U.S. 804, 814 (1986) (“[T]he congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently ‘substantial’ to confer federal question jurisdiction.” (emphasis added)).

49. *Id.* at 810.

50. Courts and commentators have disagreed on the meaning of *Merrell Dow*’s ambiguous

as a choice between such interpretations. Therefore, the Court's selection of a flexible, pragmatic test over a bright-line rule evidences its strong preference for the former over the latter.

Given this strong preference for a flexible test, the Court imbued surprisingly little content in the test. For an analysis the Court describes as "principled [and] pragmatic,"⁵¹ the Court elucidated very few principles and did little to describe its notion of pragmatism. For instance, the only guidance the Court offered for identifying a "substantial" federal question is to inquire whether the resolution of the question would benefit from "the advantages thought to be inherent in a federal forum"⁵² such as, in this case, having the question resolved by "judges used to federal tax matters."⁵³ And with regard to the "welter of issues regarding the interrelation of federal and state authority,"⁵⁴ the Court discussed only a single issue: whether federal jurisdiction will affect the "federal-state division of labor."⁵⁵ Concluding that federal jurisdiction in quiet-title actions "will portend only a microscopic effect" on the division of labor, the Court found jurisdiction appropriate.⁵⁶

Thus, while *Grable & Sons* appears to solve one problem—whether a federal cause of action is required for federal jurisdiction—it has nonetheless created a new problem—how to assess the substantiality of a federal law. The following Section analyzes hybrid law cases in detail to discern whether the cases are amenable to such an open-ended analysis.

B. Substantiality Analysis in the Lower Courts

The conventional wisdom is that embedded federal questions make up a "remarkably tangled corner of the law"⁵⁷ that might well render a judge "lost in a maze."⁵⁸ Yet few jurists or commentators have ventured into the tangled corner to study and explain it in detail.⁵⁹ Such an

holding. See *supra* note 34.

51. *Merrell Dow*, 478 U.S. at 813.

52. *Grable & Sons*, 125 S. Ct. at 2367.

53. *Id.* at 2368.

54. *Id.* at 2367.

55. *Id.* at 2368.

56. *Id.*

57. *Almond v. Capital Props., Inc.*, 212 F.3d 20, 22 (1st Cir. 2000); see also *T.B. Harms v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964) (Friendly, J.) (noting that federal question inquiry is a "treacherous area").

58. *Gully v. First Nat'l Bank*, 299 U.S. 109, 117–18 (1936).

59. The most recent scholarly effort to untangle the law in this area was Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction Over State Law Claims Post-Merrell Dow*, 115 HARV. L. REV. 2272 (2002). While other commentators have addressed the issue over the years, see Oakley,

endeavor is necessary if one expects to untangle the thicket—or assess whether the Supreme Court’s latest effort is likely to do so. Before solving the problem, in other words, one must know its nature. This Section therefore seeks to describe (1) hybrid law cases as they commonly arise, (2) the federal law commonly involved in the cases, (3) the degree of federal law interpretation often required by the cases, (4) the reversal rate of district court jurisdiction decisions, (5) the rate of federal remand to state courts and (6) the rate of post-remand state court opinions on federal questions.

Before presenting this information, a word is in order about the cases selected for this analysis. The universe of cases researched for this Article consists of almost every⁶⁰ circuit court decision dealing with the issue published after July 8, 1986—the date when *Merrell Dow* was issued. I defined the “issue” as whether a federal question in a state right of action was “substantial” such that federal jurisdiction should obtain over the state action. Notably, this definition leaves to the side three common issues that often appear in jurisdictional discussions in hybrid claim cases.⁶¹

1. The Context In Which of the Federal Question Appears

Federal law in hybrid law cases generally appears in one of three contexts. First, in 16% of the hybrid law cases studied, federal law appeared as part of a state statute. For example, in a California case, a plaintiff brought suit for disability discrimination. Under a California statute, the disabled are protected from certain types of discrimination and are guaranteed “full and equal access” to various facilities.⁶² In defining the term “full and equal access,” the statute provides as follows: “‘Full and equal access,’ for purposes of this section in its application to transportation, means access that meets the standards of Titles II and III

supra note 22, at 1839–43; Miller, *supra* note 23, at 1786–93; Linda R. Hirshman, *Whose Law is It, Anyway? A Reconsideration of Federal Question Jurisdiction over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17 (1985), no one has delved deeply into the lower court cases to determine their actual nature. Instead, commentators have generally confined themselves to analyses of Supreme Court precedent and related theoretical considerations

60. I say “almost every” because it is perhaps impossible to locate *every* opinion dealing with the issue. I located these opinions by searching the Westlaw database. More specifically, I shepardized *Smith* and *Merrell Dow* and then read each published circuit court opinion to see if the case was a hybrid law case involving a substantiality determination.

61. These issues are (1) whether the federal question is “necessary” to the plaintiff’s state law case, (2) whether the federal issue arises as a defense rather than in the plaintiff’s complaint, and (3) whether that state cause action is completely preempted by federal law. See *supra* notes 21–23.

62. CAL. CIV. CODE § 54.1 (2006).

of the Americans with Disabilities Act of 1990 (Public Law 101-336).”⁶³ In this case, therefore, a court was called on to determine the meaning of the federal Americans with Disabilities Act.⁶⁴

A second context in which federal law arises—comprising some 45% of the cases studied—is in a private contract. For example, in one case two parties entered into a contract for the use of a rail line. The contract explicitly required one party to satisfy certain operational requirements mandated by federal law. One issue in the case was whether the party had complied with these federal mandates as required by the contract. When called upon to decide this issue, therefore, a court necessarily had to refer to federal law.⁶⁵

In contrast to this type of case, where federal law is *explicitly* made a part of the contract, other cases involve contracts where, because the subject of the contract is regulated by federal law, federal law is *implicitly* a part of the contract. For example, in one case, a company purchased the right to a certain amount of energy output from a power plant. When the power plant sold several million dollars worth of “pollution credits” pursuant to federal regulations, the company that was buying the energy output sought a share of the proceeds from the credit sale. Because federal law assigns pollution credits to the “owner” of a power plant, the court in this case was called upon to determine if the parties’ contract rendered the company a part “owner” of the power plant. Therefore, reference to federal law was required.⁶⁶

Sometimes, however, a federal law is implicated not explicitly (as in the railroad case) or implicitly (as in the power plant case), but only tangentially. For example, in one case a provider of telecommunications services sued a buyer for breach of contract, alleging that the buyer failed to pay for services rendered. Because federal law requires telecommunications providers to file their rates with the Federal Communications Commission, the court in that case had to refer to these rates in determining if the buyer had failed to pay.⁶⁷ Other cases where federal law is only tangentially related to the contract include suits where federal law generally regulates the field to which the contract pertains, but does not specifically address the duties inherent in the

63. *Id.* at § 54.1(a)(3).

64. This example is borrowed from *Wander v. Kaus*, 304 F.3d 856, 858–60 (9th Cir. 2002) (suit under state discrimination statute required reference to Americans with Disabilities Act because state statute adopted certain ADA provisions verbatim).

65. *Mich. S. R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass’n, Inc.*, 287 F.3d 568, 573–74 (6th Cir. 2002).

66. *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806–07 (4th Cir. 1998).

67. *W. Union Intern., Inc. v. Data Dev., Inc.*, 41 F.3d 1494, 1495–96 (11th Cir. 1995).

contract.⁶⁸

The third and final context in which federal questions appear in hybrid law cases is as an element of the action. Comprising about 39% of the hybrid law cases studied, these cases often appear as tort actions where the federal law defines a standard of care to be observed. For example, in a malicious prosecution claim, a plaintiff argued that his prior prosecution under the federal RICO statute was unwarranted because the statute could not be construed as prohibiting his alleged actions. Thus, a court called upon to assess this claim had to determine the meaning of the RICO provision at issue.⁶⁹ Other examples where federal law acted as a standard of care include professional malpractice claims where the defendant failed to follow federal law in discharging his or her duties,⁷⁰ trespass claims where federal law controls the right of access to the land,⁷¹ negligence claims where federal law formed the basis of a negligence per se theory,⁷² and claims against decisionmakers alleging that the decisionmakers incorrectly applied federal law.⁷³ Still other claims implicate federal law in ways difficult to categorize.⁷⁴

Viewing as a whole the contexts in which federal law arises in hybrid law cases, one is struck by the fact that in only 16% of the cases is federal law relied upon to accomplish the same policy goals it was intended to accomplish. In 84% of the cases, on the other hand, federal

68. See, e.g., *Interstate Petrol. Corp. v. Morgan*, 228 F.3d 331, 335 (4th Cir. 2000) (suit alleging breach of gas station franchise agreement required reference to Petroleum Marketing Practices Act because certain franchising agreements are regulated by the Act).

69. *Berg v. Leason*, 32 F.3d 422, 424–26 (9th Cir. 1994).

70. See, e.g., *Custer v. Sweeney*, 89 F.3d 1156, 1168–69 (4th Cir. 1996).

71. See, e.g., *Heydon v. MediaOne of Se. Mich., Inc.*, 327 F.3d 466, 471–72 (6th Cir. 2003) (trespass action against cable company required reference to federal Cable Act in order to determine whether company had authority to trespass); *Nicodemus v. Union Pac. Co.*, 440 F.3d 1227, 1235–37 (10th Cir. 2006) (en banc) (trespass and unjust enrichment action against railroad company required reference to federal land grant laws in order to determine scope of railroad rights under grants).

72. Although *Merrell Dow* focused on this type of case, these cases appear to be rather rare (perhaps because of the *Merrell Dow* holding). Only two such cases have been published by a circuit court since 1987. See *Mulcahey v. Columbia Organic Chem. Co., Inc.*, 29 F.3d 148, 151–54 (4th Cir. 1995) (personal injury suit required reference to federal environmental regulations because plaintiff sought to rely on defendant's violation of regulation as per se evidence of negligence); *Clark v. Velsicol Chem. Corp.*, 944 F.2d 196, 197–199 (4th Cir. 1991) (personal injury suit required reference to federal environmental regulations because plaintiff sought to rely on defendant's violation of regulation as per se evidence of negligence).

73. See, e.g., *Metheny v. Becker*, 352 F.3d 458, 460–61 (1st Cir. 2003) (suit against local zoning board alleging erroneous decision by board required reference to the federal Telecommunications Act because Act allegedly dictated board's decision).

74. See, e.g., *D'Alessio v. N.Y. Stock Exch., Inc.*, 258 F.3d 93, 99–104 (2d Cir. 2001) (injurious falsehood claims against New York Stock Exchange for banning plaintiff from trading on exchange required reference to federal securities laws because laws controlled Exchange's obligations to it members).

law is used as a tool to vindicate policies *different* from the federal law itself. Thus, in the RICO case mentioned above, the RICO statute is not used to fight racketeering and corruption, as Congress originally intended, but to vindicate the policies furthered by malicious prosecution actions. Similarly, in the pollution credit cases discussed above, federal environmental law is not relied on to pursue environmental goals, but rather for the goal of pure financial gain (whether warranted or not).⁷⁵ Thus, notably, in the great majority of hybrid law cases, the vindication of federal law serves very few of the regulatory ends for which the federal law was adopted.

2. The Federal Laws Appearing in Hybrid Law Cases

Although a broad variety of federal laws appears in hybrid law cases, some generalizations are possible. First, only 7% of the cases (5 of 67) sought vindication of the plaintiffs' federal civil rights.⁷⁶ Many cases—approximately 20–30%—involve major federal regulatory statutes, such as the Telecommunications Act, the Cable Act, or intellectual property laws.⁷⁷ At times, the federal law in the hybrid case is a “law” in word

75. It may be argued, perhaps, that one seeking to vindicate a contractual right premised on adherence to federal law may further the policy goals of the federal law. A party found liable for violating federal law—even in a breach of contract context—will be less likely to violate that federal in the future, thus serving the ends of the statute. While this may be true in some cases (such as in the farmer/landowner example presented above, *see supra* text accompanying note 20), it is certainly not true in many other contract cases. For example, in the pollution credit case (*see supra* text accompanying note 66), the dispute involved ownership of pollution credits, which is an issue somewhat attenuated from the goals of the statute itself. Of course, one might argue that ownership issues are core to the operation of the statute (because the statute permits the sale of such credits and ownership rights are a necessity for market forces to work). Yet, even if this argument is correct in theory, the entire endeavor is weakened by the principle of efficient breach. Under this principle, parties often breach contracts regardless of the ensuing damages because the breach will permit greater gains in a separate transaction. Thus, private contracts are a poor vehicle for enforcing federal law. *See* RICHARD A POSNER, *ECONOMIC ANALYSIS OF LAW*, § 4.9 at 120 (6th ed. 2003).

76. *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816–19 (4th Cir. 2004); *Bracey v. Bd. of Educ. of City of Bridgeport*, 368 F.3d 108, 113–16 (2nd Cir. 2004); *Wander v. Kaus*, 304 F.3d 856, 858–60 (9th Cir. 2002); *Jairath v. Dyer*, 154 F.3d 1280, 1282–84 (11th Cir. 1998); *Utley v. Varian Assocs., Inc.*, 811 F.2d 1279, 1282–83 (9th Cir. 1987).

Although four additional cases involved federal civil rights laws, the suits did not seek the vindication of civil rights *per se*, but rather sought the vindication of private law rights, such as contract or tort. *See Morris v. City of Hobart*, 39 F.3d 1105, 1111–12 (10th Cir. 1994); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 550–51 (8th Cir. 1996); *Diaz v. Sheppard*, 85 F.3d 1502, 1505–06 (11th Cir. 1996); *Carpenter v. Wichita Sch. Dist.*, 44 F.3d 362, 366–68 (5th Cir. 1995). For an explanation of why the context in which the federal law arises is important, *see supra* text accompanying note 75.

77. It is difficult to classify the cases according to the nature of the federal regulatory program implicated. Sometimes the cases squarely present important questions of federal regulatory programs. *See, e.g., City of Rome, N.Y. v. Verizon Commc'ns, Inc.*, 362 F.3d 168, 174–76 (2d Cir. 2004) (suit alleging breach of duty to re-negotiate telecommunications contract required reference to federal

only. For example, some suits sought to enforce consent decrees entered pursuant to federal law (whether in a federal court or agency).⁷⁸ Similarly, other cases relied on tariffs that, when filed with the appropriate agency, were imbued with the force of federal law.⁷⁹

3. The Degree of Reference to Federal Law

Regardless of the federal law involved, or the context in which it arises, all hybrid law cases involve at least some interpretation of federal law.⁸⁰ Yet the amount of interpretation involved varies greatly between cases. In approximately 52% of the cases, for example, federal law is not interpreted in any significant or meaningful way. In one such case, a plaintiff brought suit under a state statute prohibiting the dispensation of certain drugs without a prescription. The statute did not list any particular drug for which dispensation was prohibited, but instead incorporated by reference the drugs listed in a federal drug schedule. Thus, to determine whether the state statute was violated, the court in this case had to verify that drug involved in the case was in fact listed in the particular federal drug schedule.⁸¹ Obviously, referring to a drug schedule requires no interpretation and only the barest of application.⁸²

Even less demanding of the court's interpretational skills are cases that simply call for an acknowledgment of federal law. For example, in a suit over a licensing agreement between a Native American tribe and the state of California, federal law was allegedly involved simply because the contract was entered into pursuant to authority conferred by the Indian Gaming Act, but interpreting the federal law was not essential

Telecommunications Act because statute regulated re-negotiation duties). At other times, however, the cases involve federal regulatory programs but do not implicate any core regulatory policies. *See, e.g., W. Union Intern., Inc. v. Data Dev., Inc.*, 41 F.3d 1494, 1495–96 (11th Cir. 1995) (suit alleging failure to pay for services rendered by telecommunications required reference to federal Telecommunications Act because rates charged for services are regulated by tariffs filed pursuant to Act).

78. *See, e.g., Morris v. City of Hobart*, 39 F.3d 1105, 1111–12 (10th Cir. 1994).

79. *See, e.g., W. Union Intern., Inc.*, 41 F.3d at 1495–96.

80. As explained above, if federal law need not be interpreted to resolve the case, dismissal is appropriate under *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988). *See supra* note 22.

81. *Bailey v. Johnson*, 48 F.3d 965, 968 (6th Cir. 1995) (refusing federal jurisdiction).

82. Other examples include *Dunlap v. G&L Holding Group, Inc.*, 381 F.3d 1285, 1291–93 (11th Cir. 2004) (a breach of contract action in which one party sought to establish the validity of a contract; because federal banking regulations required the contract to be in writing, the court had to determine if the contract was indeed in writing) and *Mich. S. R.R. Co. v. Branch & St. Joseph Counties Rail Users Assoc., Inc.*, 287 F.3d 568, 573–74 (6th Cir. 2002) (breach of contract suit for use of railroad where contract required one party to obtain certificates of operation from a federal agency; the court thus had to determine if the certificates had been properly procured).

for determining the outcome of the claim.⁸³ Several other cases involve federal law that plays a similarly thin role.⁸⁴

Contrary to cases requiring insignificant amounts of interpretation, many hybrid law cases do demand courts interpret and apply federal law in significant ways.⁸⁵ For example, in a business disparagement action, a plaintiff alleged that the defendant falsely (and publicly) accused it of selling a product for which it did not own the patent. Thus, the court was called upon to determine the rightful owner of the patent—a question that is controlled by federal law.⁸⁶ While other such cases are not uncommon,⁸⁷ some cases, while involving interpretation of federal law, do not demand an interpretation as rigorous as might be required in a non-hybrid law suit. For example, in a case seeking to reverse an arbitration award, a plaintiff alleged that the arbitrator's interpretation of federal law was grossly negligent. The court presented with this case was thus called upon not to determine exactly what federal law said, but simply whether the arbitrator's interpretation was grossly wrong.⁸⁸ While these cases are not especially numerous, they do comprise

83. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997).

84. *See, e.g., Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 570–71 (2d Cir. 1995) (suit to enforce a collective bargaining agreement involved federal law because collective bargaining agreements are creations of federal law); *Milan Express Co., Inc. v. W. Surety Co.*, 886 F.2d 783, 786–89 (6th Cir. 1989) (a suit by motor carrier alleging breach of shipping contract; although the Interstate Commerce Act regulated many aspects of shipping contracts, the plaintiff did not allege violation of federal law); *Virgin Is. Hous. Auth. v. Am. Arbitration Ass'n*, 27 F.3d 911, 916 (3rd Cir. 1994) (a breach of contract suit related to a contract for the construction of public housing; although HUD regulations addressed many public housing issues, the plaintiff did not allege the violation of any regulation).

Because federal law is simply *present* in these cases, and not requiring of interpretation, these cases should arguably be dismissed under the “necessity analysis” explained in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988). *See supra* note 22. One might argue, therefore, that these cases do not involve a “substantiality analysis” and should therefore be excluded from this study. Notably, however, in each case of this sort, the court *purports* to engage in a substantiality analysis. Thus, these cases—although misguided in their analysis—illustrate the nature of substantiality analysis as it is understood and undertaken by federal courts. As that is the central task of this study, I deem it appropriate to include the cases.

85. The number of cases requiring significant interpretation is 32 of 67, or 48 percent. For a specific listing of these cases, see the Appendix at the end of this Article.

86. *Additive Controls & Measurement Sys., Inc. v. FlowData, Inc.*, 986 F.2d 476, 477–79 (Fed. Cir. 1993) (finding federal jurisdiction warranted).

87. *See, e.g., Clark v. Velsicol Chem. Corp.*, 944 F.2d 196, 197–199 (4th Cir. 1991) (a personal injury action where the plaintiff sought to establish the defendant's negligence under a negligence per se theory; thus the court was called upon to determine whether the defendant violated an EPA regulation); *City of Rome, N.Y. v. Verizon Commc'ns, Inc.*, 362 F.3d 168, 174–76 (2d Cir. 2004) (a breach of contract suit where the plaintiff alleged that the defendant breached its duty to re-negotiate a telecommunications contract; because re-negotiation duties are partially regulated by the federal Telecommunications Act, the court was called upon to interpret federal law).

88. *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 25–27 (2d Cir. 2000) (finding federal jurisdiction warranted).

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approximately 16% of the cases in which significant interpretation is required.⁸⁹

4. The Reversal Rate in Hybrid Law Cases

The reversal rate for hybrid law jurisdiction decisions reflects, to some extent at least, the incoherence of the legal doctrine. An above average reversal rate is generally understood to indicate that the body of law involved is not sufficiently coherent to be consistently applied by the district courts.⁹⁰ For jurisdiction questions in hybrid law cases, the reversal rate is 55%.⁹¹ This is significant because the reversal rate in civil cases (excluding habeas petitions) is 12.4%.⁹² Importantly, however, the overall reversal rate includes many cases that, on appeal, are subject to deferential standards of review.⁹³ Thus, the reversal rate on *de novo* questions alone is likely higher than 12.4%. While I have not discovered any research addressing reversal rates according to

89. These cases total 5 in all. See *Nichols v. Harbor Venture, Inc.*, 284 F.3d 857, 860–61 (8th Cir. 2002). (malicious prosecution action for pursuit of previous declaratory judgment suit required reference to a consent decree entered by a federal court because the consent decree allegedly foreclosed the declaratory judgment suit); *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 388–91 (3d Cir. 2002) (malicious prosecution action required reference to federal maritime law because plaintiff alleged federal law did not support defendant's claims before the court); *Greenberg*, 220 F.3d at 25–27 (suit to reverse allegedly erroneous arbitration award required reference to federal law because arbitrator's decision was predicated in part on federal law); *Diaz v. Sheppard*, 85 F.3d 1502, 1505–06 (11th Cir. 1996) (legal malpractice claim against criminal defense attorney required reference to U.S. Supreme Court opinion on Eighth Amendment to determine if attorney's interpretation of case was grossly negligent); *Berg v. Leason*, 32 F.3d 422, 424–26 (9th Cir. 1994) (malicious prosecution action required reference to federal RICO statute in order to determine if prosecutor had legally tenable ground for prosecution under the law).

90. See, e.g., Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 3 (2001) (explaining that, in a category of intellectual property cases, a reversal rate of 33 percent is indicative of extreme doctrinal ambiguity).

91. Another study found that jurisdictional decisions in hybrid law cases were reversed 65% of the time. See Note, *supra* note 59, at 2280. Because that study did not identify the cases used to calculate the reverse rate, it is impossible to explain the discrepancy.

92. Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics, Mar. 31, 2004, <http://www.uscourts.gov/caseload2004/tables/B05Mar04.pdf>. This reversal rate is consistent with past rates. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 70, tbl. 3.5 (1996).

93. For example, findings of facts are often reviewed under the deferential “abuse of discretion” standard and arguments advanced for the first time on appeal are often reviewed under the similarly deferential “clear error” standard. See, e.g., *Cartier v. Jackson*, 59 F.3d 1046, 1048 (10th Cir.1995) (“In reviewing a court’s determination for abuse of discretion, we will not disturb the determination absent a distinct showing it was based on a clearly erroneous finding of fact.”); *United States v. Mitchell*, 429 F.3d 952, 961 (10th Cir. 2005) (“Because [the defendant] did not raise this objection at the sentencing hearing, we review for plain error.”). See also Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?*, 100 NW. U. L. REV. 517, 519 (2006) (noting in study of legal doctrine that, “when doctrine commanded a higher or lower level of deference to the ruling below, the circuit court’s probability of reversal corresponded with the level of deference it was to give”).

standard of review, the reversal rate on hybrid law jurisdictional decisions is likely much higher than other cases subject to de novo review. That the doctrine in this area is more lacking in coherence than other areas is therefore a fair conclusion.

5. The Rate of Remand

Another interesting trait of hybrid law cases is the rate of remand. Whether a case is first filed in state court and then removed to federal court, or filed initially in federal court, the federal court will consider either party's motion to remand the case to state court. In hybrid law cases, the remand rate appears to be quite high. Specifically, of the 67 circuit court cases studied for this Article, 66% (44 of 67 cases) were remanded to state court.

6. State Decision and Publication Rate

Once a case is remanded to state court, those courts must resolve the federal question in the case. A review of the cases remanded to state courts, however, yields little evidence that state courts are in fact resolving the federal questions remanded to them. Of the 44 remanded cases, not a single one resulted in a published decision interpreting federal law.⁹⁴

* * *

This Part began by summarizing Supreme Court doctrine in the field of hybrid law jurisdiction. That summary concluded with *Grable & Sons*, wherein the Court deliberately adopted a flexible, open-ended approach to deciding jurisdictional questions in hybrid law cases. This Part then turned to a detailed analysis of hybrid law cases as they actually arise in the lower courts. This analysis is now used in the following part to demonstrate that hybrid law jurisdictional cases are best resolved by a bright-line rule rather than the flexible standard that the Supreme Court has adopted.

94. For the purposes of this Article, I define a published decision as one that is available to the public on Westlaw or Lexis/Nexis, regardless of whether the opinion is designated by the state court for publication. My concern here is with the precedential force (or lack thereof) of state court decisions of federal law. Although opinions not designated for publication may not normally be cited as precedent, their availability may nonetheless exert a degree of precedential force inasmuch as the court evinces its reasoning and preferences on the legal questions involved therein.

III. RULES AND STANDARDS IN JURISDICTION OVER HYBRID LAW CASES

Just about nobody, it seems, thinks that jurisdictional rules should be fuzzy. Justice William Brennan—no lightweight in the field of federal jurisdiction—has espoused the near-universal view that uncertain, or as has described them, “infinitely malleable,”⁹⁵ jurisdictional rules have the regrettable effect of allowing “[p]arties [to] . . . spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction.”⁹⁶ In a recent article on the allocation of cases between state and federal courts, Professor Barry Friedman concurred, stating that “[o]ne ought not make a fetish of bright line rules, but they have their place, and one place in particular is the law of jurisdiction.”⁹⁷ Professor Martin Redish, however, has perhaps put it most forcefully. In a paper chastising jurisdictional rules that “resemble[] more the free-standing, subjective, and individualized determinations of Judge Wapner than a coherent, generalizable jurisdictional doctrine,” Professor Redish stated plainly that “jurisdictional uncertainty can surely lead to both a waste of judicial time and added expense to the litigants.”⁹⁸ Nor are Brennan, Friedman and Redish alone in their distaste for jurisdictional discretion; a large number of commentators seem to hold a similar view.⁹⁹

Yet flexibility also has its place, as David Shapiro has forcefully argued in his landmark article, “Jurisdiction and Discretion.” According to Professor Shapiro, “the continued exercise of discretion . . . has much

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

96. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (Brennan, J., dissenting).

97. Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1225 (2004) (arguing that a multijurisdictional approach is preferable to the current approach of having cases litigated in *either* federal *or* state court).

98. Redish, *supra* note 21, at 1794 (criticizing “jurisdictional doctrine” as a “crazyquilt combination of sometimes vague and cryptic statutory directives and judge-made doctrines” and offering a principled approach based on seven normative factors affecting the appropriateness of a particular forum).

99. See, e.g., ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 313–14 (1950) (“the boundary between judicial power and nullity should also, if possible, be a bright line, so that very little thought is required to enable judges to keep inside of it”); RICHARD H. FALLON ET AL., *HART AND WESCHLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 886 (5th ed. 2003) (suggesting that the difficult-to-apply test of *Smith* may be a “game” that is not “worth the candle”); LARRY W. YACKLE, *RECLAIMING THE FEDERAL COURTS* 91 (1994) (lamenting Supreme Court doctrine that “needlessly confuse[s] matters with outdated jargon and misleading generalizations” and advocating “jurisdictional rules that can be easily applied at the outset of litigation”); Meltzer, *supra* note 2, at 1906 (“There is . . . [a] strong tradition . . . urging that jurisdictional rules be clear.”); Note, *supra* note 59, at 2278 (stating that there is a “particularly great need for clarity in articulating jurisdictional principles such as the scope of the *Smith* doctrine.”).

to contribute to the easing of interbranch and intergovernmental tensions.”¹⁰⁰ Yet Professor Shapiro’s penchant for discretion is often overstated. Although he admirably defended the role of discretion in his article, he *did not* argue that free-ranging discretion was the final resting place for jurisdictional norms. Rather, he saw discretion as a means to an end, a tool for incrementally achieving the appropriate rule. As he explained: “Central to [my] thesis is the view that discretion need not mean incoherence, indeterminacy, or caprice; nor is discretion at odds with the recognition of responsibility for the adjudication of disputes. Rather it can lead to the development of effective guidelines and, yes, even rules.”¹⁰¹ Thus, even with Shapiro’s commitment to the values of discretion, a consensus exists that, in the long term, jurisdictional guidelines should be clear.¹⁰²

Yet the underlying preference for clarity in jurisdiction has rarely been fully articulated or analyzed in detail. Thus, the debate over jurisdictional norms stands to benefit greatly from an analysis of the interplay of legal substance and form. The substance of a legal directive—such as the proper jurisdiction of federal courts—may be either fostered or frustrated by its form. Legal forms are generally one of two types: rules or standards, though many legal directives contain aspects of both. Although much has been written on jurisdiction and discretion, and a similarly large amount on rules and standards, the two separate concepts have yet to be applied to each other.

This Part aims to do just that. It begins by defining rules and standards, then proceeds to explain the costs of each, and finally identifies the legal contexts in which each form would be the lowest cost method of resolving a legal issue. The Part then employs these observations to assess of the appropriate legal form for resolving

100. Shapiro, *supra* note 2, at 545.

101. *Id.* Although Shapiro recognized that a certain amount of discretion is likely unavoidable, he nonetheless stressed that discretion “carrie[d] with it an obligation of reasoned and articulated decision . . . that can therefore exist within a regime of law.” *Id.* at 579. Jurisdictional standards, Shapiro explained, must be “capable of being articulated and openly applied by the courts, evaluated by critics of the courts’ work, and reviewed by the legislative branch.” *Id.* at 578. Thus, even at its furthest edges, Shapiro’s position on discretion still retain a significant amount of content that would constrain judges to a certain degree.

For a recent exegesis of Shapiro’s “Jurisdiction and Discretion” article, see Meltzer, *supra* note 2. In regard to discretion serving as a tool for achieving certainty in jurisdictional rules, Professor Meltzer noted that Shapiro’s theory “rests on confidence that judicial elaboration of the reasons for jurisdictional decisions will eventually generate a body of law that is reasonably determinate.” *Id.* at 1907.

102. The most common objection to unclear jurisdictional guidelines is the increased costs of litigation. See, e.g., *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (Brennan, J., dissenting) (“Parties . . . spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction.”). The analysis rarely moves beyond this rather intuitive observation, however.

jurisdictional questions in hybrid law cases. It concludes that a rule is preferable to a standard in such cases.

A. Rules and Standards: Definitions and Costs

“A ‘rule’ is a norm whose application turns on the presence of relatively noncontentious facts, and turns on the presence of those facts regardless [of] whether the values that the rule is designed to serve are actually served or disserved by the particular application.”¹⁰³ A ubiquitously proffered example of a rule is a speed limit: “Drive 65.”¹⁰⁴ The application of this norm turns *only* on the speed at which someone drives; a person who drives in excess of 65 miles per hour violates the rule; a person who drives at 65 miles per hour or less obeys the rule. Notably, adherence to or violation of the rule *does not* turn on the values behind the rule, such as safety, or circumstances not embodied in the content of the rule, such as whether one is rushing to a hospital or driving in poor weather. Thus, rules are often described as “opaque” in the sense that they are applied without regard to the “rule’s background justifications, and “formal” in the sense that they are “applied without regard to [the] substance of the results but only with regard to the rule’s terms.”¹⁰⁵

Standards, on the other hand, “are norms that have the opposite characteristics.”¹⁰⁶ A directive that is standard-like cannot be applied by its words alone, but tends to “collapse decision-making back into the direct application of the background principle or policy to a fact situation.”¹⁰⁷ Thus, while a rule instructs one to “Drive 65,” a standard instructs one to “Drive safely.” The “background principle” underlying a 65 mph speed limit is safety;¹⁰⁸ thus instructing one to “Drive safely” would presumably accomplish the same ends. The difference, however, is that the standard permits “the decision-maker to take into account all relevant factors,”¹⁰⁹ such as treacherous road conditions, whereas the

103. Larry Alexander, *Incomplete Theorizing: A Review Essay of Cass R. Sunstein’s Legal Reasoning and Political Conflict*, 72 NOTRE DAME L. REV. 531, 541 (1997).

104. *Id.*; see also, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND LIFE* 136 (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992).

105. Alexander, *supra* note 103, at 541.

106. *Id.*

107. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

108. There are, of course, other “background principles” that likely inform the choice of a 65 mph speed limit, such as fuel conservation or road maintenance costs. For the purposes of brevity and clarity, however, only the principle of safety is used here.

109. See Sullivan, *supra* note 107, at 59. It is important to note at this juncture that the term

rule does not.

Because of the differing nature of rules and standards, they each impose different costs when used. These costs have been studied in detail by numerous commentators, who widely agree as to the relative costs of each legal form.¹¹⁰ Accordingly, a detailed tracing of each type and manner of cost incurred is unnecessary; instead, a listing and weighing of the relative costs is sufficient for the purposes of this Article. Thus, relative to standards,¹¹¹ rules are costly to promulgate,¹¹²

“decisionmaker” in the rules/standards scholarship is usually understood to simultaneously refer to two different entities. One is the regulated entity (the driver of a car) and the other is the enforcement entity (a traffic court judge). Both entities must determine for their own purposes (whether driving home from the store, or resolving traffic disputes) the meaning of a legal norm. Such a determination must be made whether the norm is a rule (“Drive 65”) or a standard (“Drive safely”). “Drive 65” strongly constrains both the driver and the judge in deciding the appropriate speed whereas “Drive safely” permits both entities more leeway in determining the appropriate speed. See SCHAUER, *supra* note 104, at 138 (noting the “two types of decision-maker,” one of which is the “rule-enforcer” and other of which is the “primary addressee of the rule”).

110. For the leading discussions of the relative costs of rules and standards, see generally SCHAUER, *supra* note 104; Kaplow, *supra* note 104; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Sullivan, *supra* note 107; Sunstein, *supra* note 5; Russell B. Korobkin, *Behavior Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000).

Some commentators contend that analyzing legal forms only according to their costs overlooks other important attributes of each, such as their association with different political philosophies or notions of individual rights. For example, in a landmark article examining rules and standards, Duncan Kennedy argued that particular strains of political ideology (such as altruism or individuality) lead us to prefer one type of legal form over the other (such as standards to further altruism, and rules to further individuality). Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Although the insights of Professor Kennedy and others advancing non-economic perspectives on the issue are valuable to our understanding of legal form, they contribute comparatively little to the specific issue addressed in this Article. This is because § 1331 and the case law interpreting it do not regulate primary conduct, but rather regulate the forum for resolving disputes over primary conduct. For example, jurisdictional rules do not define one’s right to use his or her private property, but do determine in which court one may seek redress for an infringement of that right. Thus, arguments premised on democracy and individuality (among others) carry substantially less weight in the jurisdictional context.

One might reply, however, that federal jurisdiction is often a dispositive factor in the vindication of a substantive right. If one buys the claim of Professor Burt Neuborne and others that federal judges are more likely to be more solicitous of civil rights claims than state judges, the choice of forum is likely to be quite important. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Yet, in the particular case of embedded federal questions, this argument carries little force. Of the 67 circuit court opinions published since 1986 reviewed for this Article, only five sought the vindication of a federal civil right. See *supra* text accompanying notes 76–79. Thus, civil rights claims comprise only a small portion of the issues present in embedded federal question cases.

111. Because it is only possible here to speak of the costs of rules and standards in relative terms, one could easily rephrase this description of costs with a primary focus on standards. Thus, relative to rules, standards are cheap to promulgate, costly to apply and costly to research. Standards also have lower costs of regulatory failure, higher costs of adjudicatory failure and higher costs of primary actor failure.

112. Promulgation costs are the costs of creating a rule or standard. For example, when a legislature wishes to use a rule to control the speed at which individuals drive, it would likely perform a detailed—and costly—evaluation of each of several background factors (such as traffic flow, safety and

cheap to apply¹¹³ and cheap to ascertain.¹¹⁴ Rules also have higher costs of regulatory failure,¹¹⁵ lower costs of adjudicatory failure¹¹⁶ and lower costs of primary actor failure.¹¹⁷

This cost structure makes possible the identification of the situations in which rules would be preferable to standards and vice versa. This Part now turns to the issue of making those identifications.

B. Rules and Standards: Preferable Uses

Given their differing natures, rules and standards are each fit for different situations. As explained below, the appropriateness of a rule or standard in a given situation hinges on (1) the frequency with which a legal question arises, (2) the homogeneity of the questions arising and (3) the resources of the actor making the decision.

1. Frequency

Because rules involve higher promulgation costs than standards, rules are preferable to standards in situations where a particular legal question will arise frequently. High-frequency legal questions allow the high promulgation costs of rules to be fully amortized over the life of the rule's application. Each *ex ante* application of a rule by the rule's addressee and *ex post* application of a rule by a judge will require less

pollution) to choose the optimum speed for any given road. See Kaplow, *supra* note 104, at 579–80; Korobkin, *supra* note 110, at 31–34.

113. Application costs are the costs of applying the rule or standard. One a rule is set defining the speed limit, for example, drivers, police officers and judges can easily—and cheaply—apply the rule. See Alexander, *supra* note 103, at 542; Kaplow, *supra* note 104, at 581.

114. Research costs are the costs that litigants will spend to determine the content of a rule or standard. For example, a speed limit set by a rule can be discerned quite cheaply (*e.g.*, by merely looking at the road sign) as compared to discerning a speed limit set by a standard. See Kaplow, *supra* note 104, at 571.

115. Regulatory failure costs are the costs imposed by a rule that is inartfully drafted. For example, the United States voting age is set at 18-years-old, even though there are many 17-year-olds who are mature and educated enough to participate in government and there are many 19-year-olds who lack the necessary maturity and education. Thus, the voting age “rule” gets it wrong sometimes. A standard, on the other hand, would likely have a lower rate of over- and under-inclusion (though its cost of administration in this example would be extremely high). On the subject of regulatory error, see Sunstein, *supra* note 5, at 992–93; Korobkin, *supra* note 110, at 36; Alexander, *supra* note 103, at 542.

116. Adjudicatory failure costs are the costs incurred when a judge improperly applies a rule or standard. Rules, because they give judges less discretion than standards, are less frequently misapplied than standards. See Alexander, *supra* note 103, at 542–43; Korobkin, *supra* note 110, at 38–39.

117. Primary actor costs are the costs incurred when a primary actor fails to apply the rule appropriately. For example, in the case of speed limits, primary actor failure occurs when the driver chooses an improper speed to drive. Because rules give the primary actor less discretion, primary actor costs are less with rules. See Korobkin, *supra* note 110, at 36–38.

effort compared to a standard, making the rule, over the long term, preferable to the standard.¹¹⁸

Again, the speed limit example is illustrative. Hundreds of millions of Americans drive cars every day. Determining the appropriate speed for each stretch of road obviously involves higher up-front costs than simply determining that individuals should “drive reasonably.” But the sheer volume of decisions on speed—both *ex ante* by drivers *ex post* by police officers and judges—makes rule preferable to standards.¹¹⁹ While the costs of setting an exact speed limit will initially be higher than adopting a reasonableness standard, the extra effort required by every driver and judge in determining the appropriate speed on their own will, over time, far exceed the up-front costs exacted by the creation of a rule.

Importantly, inasmuch as the cost of promulgating a rule approaches that of promulgating a standard, the frequency of a legal question becomes less important. The reverse is also true; to the extent that rule-promulgation costs greatly exceed standard-promulgation costs, the frequency of the legal question becomes centrally important. To illustrate, consider a legislative body charged with determining on which side of the road motorists should drive. The body could adopt either a rule (drive on the right side) or a standard (drive on the side reasonable under the circumstances). Adopting a rule in this case would cost scarcely more, if any, than adopting a standard. Thus, the frequency would take on lesser importance in the choice of legal form. On the other hand, in a situation where a rule would be substantially more costly to promulgate than a standard, such as in antitrust law, for example, where something akin to a standard has been chosen,¹²⁰ the *ex post* frequency of the legal question takes on exceeding importance.

118. Korobkin, *supra* note 110, at 33.

119. Other examples analogous to speed limits are easy to imagine. In the case of welfare entitlements, “[i]t is very hard, for example to decide who is poor, and who, among the class of poor is entitled to what. It would be particularly hard to decide who is poor through case-by-case judgments based on analogy, and even harder to make decisions about appropriate social entitlements in that fashion.” CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 97 (1996). Similarly, in the case of taxes, it would be wholly unworkable to have citizens and companies pay a “fair share” of taxes according to the government benefits received. See Alexander, *supra* note 103, at 543 (noting the tax example); Kaplow, *supra* note 104, at 573 (same). For a study of rules and standards in the tax field, see James W. Colliton, *Standards, Rules and the Decline of the Courts in the Law of Taxation*, 99 DICK. L. REV. 265, 322–23 (1995) (explaining that tax law is generally dominated by rules but that standards apply in rare circumstances where the regulated activity is diverse, such as capital expenditures).

120. See 15 U.S.C. § 1 (2006) (prohibiting contracts in restraint of trade); see also Scalia, *supra* note 110, at 1183 (noting that “[o]ne can hardly imagine a prescription more vague than the Sherman Act’s prohibition of contracts . . . in restraint of trade”).

2. Homogeneity

Because rules are inflexible, they are best fit for situations in which the legal issue in question arises in much the same way each time. Where the legal issues arise differently each time, however, standards are often preferable.

Using the speed limit example, decisions about how fast one should travel, whether made by the driver or a judge, generally involve the same fact each time: a car, a road and a person driving to some destination. Accordingly, applying a rule will generate fewer adjudication and primary-actor failures.¹²¹ Of course, some regulatory failures are inevitable, such as when one is driving to the hospital in an emergency. But these cases are rare in the universe of driving situations.

The speed limit example, however, contrasts with another high-frequency legal question: negligence cases.¹²² While negligence suits arise regularly, thus suggesting that a rule might be preferable, the extraordinary variety of situations in which negligence arises—ranging from professional malpractice to car accidents to infliction of emotional distress—makes a rule inappropriate because it would generate huge error costs. Any attempt to reduce the multitude of appropriate behaviors we expect of each other to a specific rule or set of rules would certainly fail to account for the innumerable nuances that we all find relevant in determining how to behave. Thus, a rule in negligence cases would necessarily be broadly under- and over-inclusive, resulting in large costs of regulatory failure. Accordingly, even though negligence cases arise with high frequency, the heterogeneous circumstances from which they arise merit a “reasonable person” standard instead of bright-line rule.

3. Resources of Decisionmakers

Where decisionmakers—including primary actors and adjudicators—are unlikely to expend sufficient resources to apply standards, which take more effort to apply than rules, rules are preferable. Without the expenditure of sufficient resources, primary actors and judges are more likely to resolve legal questions incorrectly, resulting in higher error costs.

121. This assumes, of course, that the rule was properly calibrated at the time it was promulgated. That issue, however, is not relevant to a consideration of homogeneity (or heterogeneity) dictated by the structure of error costs in rules and standards.

122. See Alexander, *supra* note 103, at 542 (noting that “[p]erhaps ‘act as would a reasonable person’ is the closest we get to a pure standard”).

Before explaining this point in further detail, a couple clarifications are in order. The term “resources” in this Article refers to anything available to the decisionmaker that would assist her in resolving a dispute. Perhaps the most primary resource for any decisionmaker is his or her analytical ability. Without sufficient knowledge and intellect, decisionmakers will not be able to resolve legal questions.¹²³ Other resources include the time available to the decisionmaker to resolve the question and any personnel, such as a lawyer or clerk, upon which the decisionmaker may rely during the process. Another important resource is money. A primary actor with little disposable income is less likely to invest in determining the content of a standard than a rule.¹²⁴ Similarly, inasmuch as we, as a society, employ judges to resolve legal questions through standards, which require more time to apply, we will be required to hire more judges or pay them more.¹²⁵

One further clarification is in order. As stated above, rules are appropriate where “decision makers are unlikely to expend sufficient resources.” Two situations make this scenario likely. The first is where the resources are simply unavailable. The second occurs when the resources are available but the decisionmaker is unwilling to expend them because the marginal gains from the expenditure do not exceed the marginal costs. In the case of a primary actor, this concept is relatively simple to grasp. No company is likely to spend \$5,000 on legal advice in order to avoid a possible \$1,000 fine, assuming the fine is the total cost of the infraction. In the case of judges, however, the concept is a bit more elusive. Judges’ main costs of deciding cases are time and analytical effort. The gains from deciding a case correctly are a bit more difficult to ascertain, but clearly involve aspects of personal fulfillment in deciding a case appropriately and fear of reversal by a higher court (which is essentially inapplicable to circuit courts). Given this cost and benefit structure of judging, commentators have observed that judges may be hesitant to expend their resources in applying standards because “adjudicators will often determine that the marginal administrative costs of applying a standard precisely, rather than haphazardly, based on its underlying principles will not always exceed the marginal benefit of doing so.”¹²⁶ Thus, summarizing these clarifications, decisionmakers’

123. SCHAUER, *supra* note 104, at 229 (noting the importance of “mental capacity” and opining, in the context of standards, that “none of us, ordinary or not, have the mental capacity incessantly to consider all of the things that an ‘all things considered’ decision-making model requires of us”).

124. See Kaplow, *supra* note 104, at 571.

125. In theory, judges may balk at work that they might otherwise accept if they were paid an annual salary of \$300,000 instead of \$150,000. Salary is a commonly understood drawback to a federal judgeship.

126. Korobkin, *supra* note 110, at 38; Kaplow, *supra* note 104, at 595 (stating that “it is sensible

resources, i.e., analytical ability, time, help from others, and money, as well as their willingness to expend the resources, are relevant to the choice of form.

As in many other instances, the speed limit example illustrates why resources should be evaluated in choosing the appropriate legal form. A strict “Drive 65” rule takes very few resources to apply; it merely requires the decisionmaker—driver or judge—to assess the speed of a vehicle. This assessment requires relatively little brain power, time, or money and is not likely to exact marginal costs greater than marginal benefits. A standard, such as “Drive Reasonably”, however, demands much more from the decisionmaker.¹²⁷ She must have knowledge of driving and the ability to analyze the many factors that inform the reasonableness standard. If the decisionmaker does not have such ability, and likewise has few alternative resources, i.e., time, help, money, the likelihood of an incorrect result is higher.

An analogy imagined by Larry Alexander perhaps illustrates the importance of analytical ability more clearly.

A useful analogy is that of following a cookbook [*i.e.*, following a rule] versus acting like a master chef [*i.e.*, following a standard]. Cookbook recipes do not capture precisely what a master chef would do. Because most of us are not master chefs, however, we do better—come closer to what master chefs would do—if we follow the cookbook than if we try to emulate master chefs.

Rules are the cookbook approach to achieving the Good and the Right. Standards are the master chef approach. Those who favor rules are somewhat pessimistic about the abilities of those who must decide under norms. Those who favor standards are optimists and picture decisionmakers as master chefs.¹²⁸

Thus, to the degree decisionmakers have the analytical expertise and the willingness to decide multi-factorial, standard-based matters, standards will not increase the error rate significantly.¹²⁹ However, to

to oversimplify greatly” when one is faced with applying a standard to a situation that will, in all likelihood, never come before the decisionmaker again); SCHAUER, *supra* note 104, at 229 (explaining that even if we are not “paralysed by [the] uncertainty [of standards], and stumble into numerous errors just because we have too little time to consider too much, we often simplify our thought processes, using a form of decision-making that limits us to the consideration of a manageable array of factors”).

127. See SCHAUER, *supra* note 104, at 229–30 (noting that rules are easier to apply than standards); Kaplow, *supra* note 104, at 570 (stating that the costs of adjudication is “greater if a standard governs because the adjudication will also require giving content to the standard”).

128. Alexander, *supra* note 103, at 543.

129. Regardless of the resources of a decisionmaker (or willingness to expend them) a certain systemic error rate will always exist in standard-based cases. See Korobkin, *supra* note 110, at 38 (“Some economic analysts recognize that adjudicators will sometimes fail to draw the legal boundary [of a standard] optimally.”). Of course, rule-based adjudication will itself involve at least some systemic

the degree that one doubts that the analytical ability of decisionmakers is sufficient to task at hand, a rule would be preferable to a standard.

*C. The Appropriate Legal Form for Deciding
Jurisdictional Questions in Hybrid Law Cases*

In *Grable & Sons*, the Supreme Court rejected a rule-based approach for deciding whether federal jurisdiction should lie in suits involving embedded federal questions. The Court explained that a “single, precise, all-embracing”¹³⁰ test was inappropriate because such a test could not account for the “welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.”¹³¹ The Court here is referring to the costs of adjudication failure and while such costs are relevant to the decision, the Court erred in failing to consider the many other categories of costs attendant upon rules and standards. The Court seems oblivious to the fact that standards will impose costs on the system as well. Only through comparing the two sets of costs can one determine the appropriate legal form. This section does just that. It applies the criteria identified above to the specific jurisdictional questions faced by judges in embedded federal question cases and concludes that a rule is preferable to a standard in making jurisdictional decisions in these cases.

1. Frequency

As explained above, when a legal issue arises with relative frequency, rules are preferable to standards. The example of a frequently-arising legal question presented above was speeding. Given this example, one might think that jurisdictional questions in hybrid law cases lie at the opposite end of the spectrum. This, however, would be an exaggeration. Although only 67 published circuit court opinions from 1987 through 2005 addressed federal jurisdiction in embedded federal question cases, this number represents merely the tip of the iceberg.¹³² That published

amount of error, though it is likely less than standard-based adjudication. In any event, I leave to side in this Article the likely small percentage of errors that will result even in cases of unlimited resources.

130. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2368 (2005) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 821 (1988) (Stevens, J., concurring)).

131. *Id.* at 2367 (quoting *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 28 (1983)).

132. Moreover, there are likely more than 67 published circuit court opinions on this issue. As explained above, *see supra* note 60, these cases were located by searching the Westlaw database for published circuit cases citing *Smith* or *Merrell Dow*. It is likely that some courts—though admittedly,

opinions constitute only a small minority of all issued opinions is well established. Nationally, the federal publication rate sits at about only 20%¹³³ and seems to be decreasing every year.¹³⁴ At the district court level, the number of embedded federal question cases increases dramatically. While this Article does not calculate the number of published district court opinions, the civil appeal rate—which sits at about 9%—provides a rough estimate of the number of cases decided in the district courts.¹³⁵ Extrapolating from the publication and appeal rate, one can conclude that district courts handled approximately 3,700 such cases over that past two decades.¹³⁶ Yet even the district court cases do not account for the entire number of embedded federal questions. As

not likely very many—resolved the jurisdictional question without citing either of these cases. Some courts may have simply cited *Franchise Tax Board* or no case at all.

Opinions that do not cite any precedent or only cite *Franchise Tax Board*, but yet deal with the jurisdictional issues in this Article, are exceedingly difficult to track down. If a court fails to cite any case in its analysis, one may only find the case through Boolean searches on Westlaw or Lexis, which is often a haphazard method of finding cases. While looking for cases that cite *Franchise Tax Board* eases the search somewhat, it is still onerous because *Franchise Tax Board* is often cited for several different propositions, the main one of which is the well-pleaded complaint rule. Thus, a search of cases that cite *Franchise Tax Board* that do not also cite *Smith* or *Merrell Dow* turns up over 800 cases within the date range used in this Article. Most of these cases will not involve the question of federal jurisdiction over embedded federal questions, but it is likely that at least a couple do. With sufficient resources, this batch of cases could be read and would likely yield several additional cases. However, given the rather modest number of cases that would be uncovered, as well as the onerous amount of work required, these cases were not reviewed.

133. See Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOY. U. CHI. L.J. 1, 7 (1989) (finding, *inter alia*, that 80.7 percent of the Sixth Circuit's decisions went unpublished in 1987); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 189 (1999) (finding that, nationally, 78.9 percent of appellate decisions went unpublished in 1995 and 1996 and that, in the Fourth Circuit, that rate was as high as 90.3 percent); David Greenwald & Frederick A.O. Schwarz, *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133 (2002) (“[A]ppellate judges designate for exclusion from the Federal Reporter approximately 80% of the opinions they write.”)

134. Publication rates seem to be a factor of judicial resources and caseloads. If caseloads increase at greater rate than judgeships, as has happened in the past decade, publication rates are like to fall. See Greenwald & Schwarz, *supra* note 133, at 1141–42 (2002) (noting the connection between caseload, judgeships and publication rates); David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, And Asylum Law In The Ninth Circuit*, 73 U. CIN. L. REV. 817 (2005) (noting that the “proportion [of unpublished to published opinions] continues to rise as caseloads increase”).

135. See Carol Krafka, Joe S. Cecil & Patricia Lombard, *Stalking The Increase In The Rate Of Federal Civil Appeals*, 18 JUST. SYS. J. 233, 244 (1996). Although some have calculated the civil appeal rate somewhat higher, see Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1609 n.38 (2000) (finding appeals rates in circuits to range between 10.3 percent and 18.6 percent), these figures are skewed by prisoner and federal civil rights appeals. According to researchers at the Federal Judicial Center, when one ignores these classes of high-appeal of cases, “the relationship between appeals and district court terminations [has remained] steady through the years, with approximately 8.6 appeals filed for every 100 district court terminations.” Krafka, 18 JUST. SYS. J. at 244. Because prisoner cases rarely involve an embedded federal question and federal civil rights cases never do, the 9 percent appeal rate is a more accurate figure than the overall rate.

136. To reach this estimate, I multiplied the number of published opinions (67) by the inverse of the publication rate (1/.2) by the inverse of the appeal rate (1/.09). This calculation yielded 3,722 cases.

explained above, two types of decisionmakers operate in the judicial system; one is the judge, and the other is the primary actor. For every jurisdictional decision made by a district court, certainly many more such decisions are made by litigants prior to filing. Thus, the frequency of jurisdictional questions involving an embedded federal question is likely considerably higher than the 3,700 questions calculated above.

Admittedly, these estimates are not built on hard empirics. Possibly, for example, the publication rate on hybrid law questions is much higher than in other areas of law and the total number of hybrid law cases is therefore actually much lower than this Article's rough estimate. Yet *even if* the frequency of these cases is significantly lower than this estimate, the frequency factor still suggests that a rule is preferable to a standard. As explained above, to the extent that rules and standards have similar promulgation costs, the frequency factor becomes less significant in choosing between the two forms.¹³⁷ This, in fact, is likely the case here.

The similarity of promulgation costs in this instance is mainly attributable to the institutional nature of the Supreme Court. When the Court chooses a rule or standard for a particular area of law, its members and clerks chiefly rely on case briefs (including those submitted by the parties as well as amici), prior case law, academic writings, and any other literature bearing on the issue in the case. When faced with a difficult legal question, such as one involving the Clean Air Act for example, the Supreme Court *does not* commission its own study of the issue as the EPA might do. Given the Court's method of deciding cases—cases that, under the principle of *stare decisis*, amount to a legal directive—the costs involved are chiefly the costs of labor, such as clerks and other staff; operational costs, such as Westlaw subscriptions and building maintenance costs; and the justices' personal opportunity costs. Importantly, these costs (with the exception of opportunity costs) are all "sunk"; that is, regardless of the effort expended on each case, the costs will remain constant and cannot be recouped. Thus, regardless of whether the Court labors intensely on a particular issue in order to promulgate a rule, or works less hard in adopting a standard, the promulgation costs will be essentially identical.

Moreover, even if costs were not sunk and instead varied with the amount of effort expended on a particular case, rule-promulgation likely does not require significantly more effort by the Court than standard-promulgation. Consider the example of *Miranda v. Arizona*, in which the Court promulgated a bright-line rule on the issue of custodial

137. See *supra* text accompanying note 120.

interrogations.¹³⁸ Prior to *Miranda*, the voluntariness of a confession was determined using a totality of the circumstances standard. How much “effort” the Court put into crafting its bright-line rule is impossible to know, but a safe surmise is that the effort expended was likely similar to the effort that would have been required by a standard.

Therefore, given that the promulgation costs of rules and standards are likely similar in the Supreme Court and that the jurisdictional question presented by hybrid law cases are not as rare as often thought, the frequency factor suggests that a rule is preferable to a standard on this issue.

2. Homogeneity

According to the legend promulgated by the Supreme Court, hybrid law cases arise in a “kaleidoscopic [range of] situations.”¹³⁹ At first glance, the Supreme Court’s claim of heterogeneity is understandable. Embedded federal questions *do* arise in a broad variety of cases. There are contract actions that implicate the Clean Water Act,¹⁴⁰ tort actions that involve federal land grant statutes,¹⁴¹ malicious prosecution claims predicated in part on federal maritime law,¹⁴² and state statutory claims related to the American with Disabilities Act,¹⁴³ to name just a few. In this sense, the cases are heterogeneous because they involve a variety of different *subject matters*. Yet a different—and more appropriate—way exists to assess the heterogeneity of these cases. Seen in this different perspective, the cases are not heterogeneous at all but are in fact homogeneous. This alternate perspective involves imagining how the Supreme Court would decide each case if it considered them one at a time. If, despite the heterogeneous facts, most jurisdictional questions were decided the same way—*i.e.*, cases were sent mostly to state court or mostly to federal court—then the cases as a whole, seen through a jurisdictional lens, are rather homogenous. As explained below, hybrid

138. 384 U.S. 436 (1966).

139. Every single Supreme Court decision on this issue in the modern era has paid tribute to Justice Cardozo’s proclamation in *Gully v. First Nat’l Bank in Meridian*, 299 U.S. 109, 117–18 (1936) that embedded federal question cases arise in “kaleidoscopic situations.” See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 125 S. Ct. 2363, 2367 (2005); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 821 (1988); *Dow Pharm. v. Thompson*, 478 U.S. 804, 813 (1986); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 20 (1983).

140. *Templeton Bd. of Sewer Comm’rs. v. Am. Tissue Mills of Mass.*, 352 F.3d 33 (1st Cir. 2003).

141. *Nicodemus v. Union Pac. Co.*, 318 F.3d 1231, 1236–38 (10th Cir. 2003).

142. *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383 (3d Cir. 2002).

143. *Jairath v. Dyer*, 154 F.3d 1280 (11th Cir. 1998).

law cases are in fact rather homogenous with respect to jurisdictional considerations, making a rule preferable to a standard on this factor.

What are the components of this jurisdictional lens? They are factors used by courts and scholars to assign cases to either state or federal courts, or both. While these factors are familiar to most who have studied the issue, this Article pauses here to present them. Afterwards, the Article applies them to several hybrid law cases and concludes that the cases, though varied in terms of the facts and law involved, are generally homogenous in terms of the jurisdictional considerations.

*a. The factors relevant to the allocation of
cases between state and federal courts*

In defining the scope of federal question jurisdiction, jurists and scholars typically consider several factors. Among these factors are the following (1) the purposes behind federal question jurisdiction, which include guarding against state hostility to federal law or interests, taking advantage of federal expertise on matters of federal law, and developing relative uniformity in the interpretation and application of federal law;¹⁴⁴ (2) a sovereign's interest in applying its own law; and (3) the possible benefits of interjurisdictional dialogue.¹⁴⁵ These factors are each briefly

144. Though federal jurisdiction scholars are in general agreement as to why federal question jurisdiction is needed, there is nonetheless disagreement on the number and/or organization of reasons supporting federal question jurisdiction. See Doernberg, *supra* note 21, at 647 (finding that federal question jurisdiction exists for two reasons: "the fear of state hostility to federal laws and the need for uniformity in their interpretation and application"); Patti Allewa, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine*, 52 OHIO ST. L.J. 1477, 1495–96 (1991) (listing four reasons for federal question jurisdiction: "(1) an expertise in discerning and interpreting federal interests, (2) a sympathetic, but respectful, national perspective, (3) the potential for uniform interpretation of federal law, and (4) the impartiality and confidence afforded by independence"); Thomas B. Marvell, *The Rationales for Federal Court Jurisdiction: An Empirical Examination of Student Rights Litigation*, 5 WIS. L. REV. 1315 (1984) (listing three rationales for federal question jurisdiction: "sympathy with federal law," "expertise" and "uniformity").

In this Article, I rely on three factors chiefly because they are the factors most commonly cited and also the ones the Supreme Court relied on in *Grable & Sons*, 125 S. Ct. at 2367 ("[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."). To be sure, I have doubts that federal question jurisdiction does indeed serve these ends. See John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. (forthcoming Mar. 2007) (arguing that neither uniformity nor state hostility should be used to assess federal question jurisdiction issues).

145. This list of factors is by no means exhaustive. Martin Redish, for example, has developed seven factors to consider in setting up a system of federal jurisdiction. Redish, *supra* note 21, at 1772–87. While I borrow several of his factors, I leave others out, primarily because his goal was to identify all the factors one must consider in establishing an entire jurisdictional system from scratch. Because the issue in this Article relates primarily to federal question jurisdiction, some of his considerations are inapplicable. For instance, one of his factors is "institutionalism" which he describes as a concern over

described below.¹⁴⁶

State Hostility. The notion that states might be hostile to federal laws or interests pre-dates the Constitution. In Federalist No. 80, for instance, Alexander Hamilton explained that federal law would not be “scrupulously regarded” by the states because they would be possessed of an intense self-interest.¹⁴⁷ Half a century later, state hostility played a major—though unstated—role in *Osborn v. Bank of United States*, a seminal case on federal question jurisdiction.¹⁴⁸ Yet the United States is no longer the country it was in 1824. It is significantly more unified and, although states occasionally grumble about federal intrusion into

which institution will establish the rules of jurisdiction. *Id.* at 1783–84. Because I assume for purposes of this Article that the Supreme Court has the authority to define federal court jurisdiction through a reasonable interpretation of 28 U.S.C. § 1331, I deem it unnecessary to consider this factor. Another factor I leave to the side is litigation efficiency, which Redish connects with joinder and pendant jurisdiction. *See id.* at 1778–79. These considerations likewise lie beyond the scope of this Article. Other of Redish’s factors, I consider in a different context. For instance, his concern over “fundamental fairness” (which he describes as the concern that a litigant appear before a forum that is unbiased), I consider in the context of federal question jurisdiction—as it is one of the purposes behind the jurisdictional grant. *Id.* at 1779–82. Similarly, Redish’s concern over litigant interests (which is shared by other commentators, *see* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 302–06 (1988)) is unnecessary to discuss because the litigant interests mainly relate to their choice of forum, which they invoke according to their understanding of hostilities and expertise, both of which I discuss in terms of the purposes of federal question jurisdiction. *Id.* at 1775–78.

146. One factor that I do not discuss, but which is sometimes discussed in case allocation, is the caseload of the federal judiciary. According to some commentators, because overcrowded dockets affect courts’ ability to mete out justice, caseloads should be “an accepted factor in judicial decision-making.” POSNER, *supra* note 92, at 314–19. Other commentators, however, insist that “[t]he federal courts do not exist for the purpose of clearing their dockets, . . . [but to] interpret and enforce federal law . . . [and if] the commitment of significant resources is required to accomplish this goal, then so be it.” *See* Redish, *supra* note 21, at 1786.

While a comprehensive analysis of the caseload rationale is beyond the scope of this Article, I note here some initial skepticism of analyzing federal caseloads to define the contours of federal question jurisdiction. While legal pragmatism—a theory that would justify the analysis of caseloads in these situations—has much to say about federal jurisdiction, it is not clear that the baldly pragmatic analysis of caseloads is appropriate here. Nonetheless, even if such pragmatism were justified, it is certainly a less important factor than the others. Thus, its use or non-use is not likely to affect the analysis in this Article.

147. THE FEDERALIST NO. 80, at 535 (A. Hamilton) (J. Cooke ed., 1961).

148. 22 U.S. 738 (1824). The role of state hostility is revealed in Justice Johnson’s dissent in *Osborn*. *See id.* at 871–72 (Johnson, J., dissenting) (stating that the “policy of the decision is obvious,” namely to “render[] all the protection necessary, that the general government can give to this Bank”) Years later, Justice Frankfurter made the same observation. *See* *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 481 (1957) (Frankfurter, J., dissenting) (“Marshall’s holding [in *Osborn*] was undoubtedly influenced by his fear that the bank might suffer hostile treatment in the state courts that could not be remedied by an appeal on an isolated federal question.”); *see also* James E. Pfander, *Article I Tribunals, Article III Courts, And The Judicial Power Of The United States*, 118 HARV. L. REV. 643, 713 n.314 (2004) (“*Osborn* itself grew out of a perception that federal instrumentalities may need protection from hostile state officers and state court judges who would otherwise adjudicate common law claims.”).

state affairs, pervasive regulation by the federal government is the widely-accepted norm. Thus, both courts and commentators have claimed that the notion of state hostility to federal law is outdated and unrealistic.¹⁴⁹ Although some still maintain that federal courts are more solicitous of civil rights than state courts,¹⁵⁰ few studies have confirmed this¹⁵¹ and many seem to have disproved it.¹⁵² Still others doubt that the

149. See also *Younger v. Harris*, 401 U.S. 37 (1971) (refusing to intervene in state proceedings in part because states can be trusted to reach the right result); *Stone v. Powell*, 428 U.S. 465, 517 (1976) (refusing to recognize federal habeas claims premised on Fourth Amendment violations in part because of an “unwilling[ness] to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States”); *Dombrowski v. Pfister*, 380 U.S. 479, 484–85 (1965) (“It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings.”); *Wisconsin v. Constantineau*, 400 U.S. 433, 440 (1971) (Burger, C.J., dissenting) (claiming that “no one could reasonably think that the judges of Wisconsin have less fidelity to due process requirements of the Federal Constitution than we do”); *Amalgamated Clothing Workers v. Richmond Bros. Co.*, 348 U.S. 511, 518–19 (1955) (refusing to allow injunction of state court proceedings) (“The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the ‘gap’ complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. . . . We cannot assume that this confidence has been misplaced.”); In *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) (refusing “to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities”); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 69–70 (1923) (“[T]here is now little danger that the State court will not amply protect persons claiming Federal rights.”)

150. See, e.g., Neuborne, *supra* note 110; *Merrell Dow Pharm. v. Thompson*, 478 U.S. 804, 826 n.6 (1986) (Brennan, J., dissenting) (“Although this concern [over state hostility] may be less compelling today than it once was, the American Law Institute reported as recently as 1969 that ‘it is difficult to avoid concluding that federal courts are more likely to apply federal law sympathetically and understandingly than are state courts.’”) (citing AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969)). For an analysis of the ways in which parity affects jurisdictional issues, see Chemerinsky, *supra* note 145, at 239–55.

151. See Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206, 1221–22 (1997); Andrew Gelman, et al., *A Broken System, The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 230–31 (2004); Thomas B. Marvell, *The Rationales for Federal Court Jurisdiction: An Empirical Examination of Student Rights Litigation*, 5 WIS. L. REV. 1315 (1984) (finding that, of 267 attorneys surveyed in student rights cases, most preferred to file in federal court); Neal Miller, *An Empirical Study of Forum in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 428 (1992) (finding that 50.7 percent of defense attorneys and 26.3 percent of plaintiff’s attorneys cited local bias as the reason for removal to federal court).

152. MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 34–62 (1999) (examining empirical evidence on parity and arguing that it demonstrates that claims of federal rights are equally likely to be upheld in state court and federal court); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 232–46 (1983) (claiming that empirical evidence supports a finding of parity between state and federal courts with respect to enforcement of federal rights); Brett Christopher Gerry, *Parity Revisited: An Empirical*

thesis is empirically testable.¹⁵³

Expertise. Federal expertise in the field of federal law is another reason often advanced for federal question jurisdiction. Although this factor was not an original reason for vesting federal courts with jurisdiction to interpret federal law (the first Article III courts, of course, began without any experience in federal law whatsoever), it has become a widely proffered reason for § 1331 jurisdiction. In a report titled “Study of the Division of Jurisdiction Between State and Federal Courts,” the American Law Institute explained that “[t]he federal courts have acquired a considerable expertness in the interpretation and application of federal law which would be lost if federal question cases were given to the state courts.”¹⁵⁴ More recently, Judge Guido Calabresi of the Second Circuit boldly declared that state judges “are not experts on federal law and, with great respect to them, they are not good at it.”¹⁵⁵ The Supreme Court as well has endorsed this theory, most particularly in *Grable & Sons* itself.¹⁵⁶

Uniformity. The final reason typically proffered for federal question jurisdiction is to promote the uniform interpretation of federal law. On this matter as well, Alexander Hamilton was the first to explain the rationale in detail, stating that “[t]hirteen independent courts of final

Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission, 23 HARV. J. L. & PUB. POL’Y 233, 285 (1999) (concluding that there is “strong evidence of parity in the takings area”); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999) (concluding, with respect to gay rights, that state courts may be as solicitous (or more) than federal courts); DANIEL PINELLO, GAY RIGHTS AND AMERICAN LAW 109–16 (2003) (stating that state courts were more hospitable to gay rights and federal courts); See Sara C. Benesh & Wendy L. Martinek, *State Court Decision Making in Confession Cases*, 23 JUST. SYS. J. 109 (2002) (analyzing 661 state court confession cases and concluding that state courts generally complied with federal supreme court precedent).

153. See, e.g., MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 3 (1980) (“There are, to my knowledge, no statistical data to support the assertion that federal courts are, on the whole, better equipped to guard federal interests than their state counterparts. Indeed, it would be difficult to devise a system of measurement which could be used to answer that question empirically.”); LARRY W. YACKLE, FEDERAL COURTS 23 (1999) (“The question does not lend itself to empirical testing.”); Erwin Chemerinsky, *supra* note 145 at 256 (“[F]ocusing on parity is futile because ultimately the issue of parity is an empirical question for which no empirical measure is possible.”).

154. AMERICAN LAW INSTITUTE, *supra* note 150, at 164–65 (1969).

155. Guido Calabresi, *Federal And State Courts: Restoring A Workable Balance*, 78 N.Y.U. L. REV. 1293, 1304 (2003) (“We are federal judges, we have more knowledge of federal law. You are state judges, you have more knowledge of state law. Let each of us do our job and not be insulted.”); see also Kurland, *supra* note 1, at 487 (“I start with the principle that the federal courts are the primary experts on national law just as the State courts are the final expositors of the laws of their respective jurisdictions.”); Friedman, *supra* note 97, 1236–37.

156. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 125 S. Ct. 2363, 2368 (2005) (noting that the federal government and litigants “may find it valuable to come before judges used to federal tax matters”).

jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.”¹⁵⁷ In the more-than-two-hundred years since Hamilton’s statement of the uniformity principle, numerous courts¹⁵⁸ and commentators¹⁵⁹ have concurred with his view. Indeed, the Supreme Court noted at the outset of *Grable & Sons* that the “hope for uniformity” in the interpretation of federal law should partially define the contours of § 1331 jurisdiction.¹⁶⁰ Although some have questioned the view that federal court jurisdiction will result in greater uniformity than state court jurisdiction,¹⁶¹ the principle nonetheless remains firmly established in the law of federal jurisdiction.

Sovereignty Interests. Courts and commentators widely agree that a sovereign, whether a state government or the federal government, should have primary authority to decide cases involving its own laws. “The reason for the rule is that only the courts of the sovereign (and particularly the sovereign’s highest court) can render an authoritative interpretation of that sovereign’s laws.”¹⁶² Thus, a jurisdictional rule should ensure that, as a general matter, state courts decide questions of state law and federal courts decide questions of federal law. Of course, federal diversity jurisdiction belies this claim.¹⁶³ While that is true, the jurisdictional grant is premised on the notion that state court biases against foreigners are a greater ill than the federal interpretation of state law. The fact of the matter remains, however, that federal interpretation of state law has “the potential to create a variety of problems, from the

157. THE FEDERALIST NO. 80, at 535 (A. Hamilton) (J. Cooke ed., 1961).

158. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (stating that the “rules of international law should not be left to divergent and perhaps parochial state interpretations”); *Martin v. Hunter’s Lessee*, 14 U.S. 304, 347–48 (1816) (federal jurisdiction is required because without it, federal law “would be different in different states” and may “never have precisely the same construction, obligation, or efficacy, in any two states”); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (noting that concern over the uniformity of federal law counsels in favor of the creation of federal common law).

159. Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 158 (1953) (noting that federal jurisdiction is key to “achieving widespread, uniform effectuation of federal law”).

160. *Grable & Sons*, 125 S.Ct. at 2368 (“[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.”).

161. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.2, 266 (4th ed. 2003) (noting that “[o]n a controversial issue, there are likely to be two or three different positions adopted among thirteen federal courts of appeals” and that “[e]ven if all fifty state judiciaries consider the issue, there still are likely to be just two or three different positions on a given legal question”).

162. Friedman, *supra* note 97, at 1237.

163. 28 U.S.C. § 1332 (2006).

minor to the chaotic” and the same can be said of state interpretation of federal law.¹⁶⁴

Interjurisdictional Dialogue. Another factor to consider in allocating cases between state and federal courts is the extent to which either sovereign might benefit from having the courts of another sovereign apply its law. Commonly referred to as “cross pollination,” the idea captures the hope, and occasional reality, that a federal court may be able to help develop state law, or that a state court may be able to help develop federal law. The assistance stems from a sovereign’s fresh view of the law in question. There is a dialogic quality to this factor; it relies on different sovereigns’ having different perspectives on a particular law, and on an assumption that more perspectives generally lead to a better substantive result.¹⁶⁵ David Shapiro has argued, for example, that states have benefited from federal court interpretation of their laws.¹⁶⁶ Other commentators have generally agreed.¹⁶⁷

Of course, the presumed benefits of cross pollination seem to conflict with the sovereignty interests identified above. In permitting federal courts to “cross pollinate” state laws, federal jurisdiction—at least to some extent—supplants states as sovereigns. If the ability to define its own law is part of what makes a sovereign “sovereign,” then cross pollination can only have a delegitimizing effect. The problem is

164. Friedman, *supra* note 97, at 1238; *see also* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1677–79 (1992) (explaining the effects of diversity jurisdiction on state law); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1674 n.3 (2003) (listing instances where federal courts have erroneously interpreted state law and noting the sometimes long delay before such interpretations are rectified by state courts).

165. *See* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1465 (characterizing cross pollination as a type of “dialog”).

Of course, this is not always true, as one can imagine that sometimes there are “too many cooks in the kitchen” to accomplish a desired task. In the context of federal-state cross pollination, however, there are only two “cooks” in the kitchen and the likelihood for conflict is significantly reduced.

166. David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and Proposal*, 91 HARV. L. REV. 317, 325 (1977).

167. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 16–17 (1985) (noting the contribution of foreign jurisdictions to the development of one jurisdiction’s laws); William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. LEGAL STUD. 367, 386 (1980) (same); Schapiro, *supra* note 165, at 1467 (noting that “territorial or systemic boundaries need not disqualify a court from making a valuable contribution to the ongoing interpretive exercise”); Redish, *supra* note 21, at 1773 (noting that “intersystemic cross-pollination” is one of seven factors to consider if one were to set up a jurisdictional system from scratch); Shapiro, *supra* note 166, at 324–27 (noting federal court contribution to development of state law); Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 325–26 (1994) (discussing notion that “federal court ascertainment of state law, even if subsequently proven wrong, has a positive, normative effect on the development of state law”); Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1505–06, n.116 (1987) (discussing the usefulness of having multiple interpreters of federal law).

particularly acute where a novel state law question is involved. In such situations, the benefits from cross pollination by a federal court are likely smaller than the costs of a potential misstatement of state law.¹⁶⁸ Moreover, with respect to a novel legal question, the federal decision would carry no authority.¹⁶⁹ On the other hand, where a state law is settled or a novel state law may implicate federal statutory or constitutional issues, the costs of cross pollination are likely low and the new perspective on the law may prove helpful.¹⁷⁰

Thus, in allocating cases between federal and state courts, interjurisdictional dialogue is worthy of consideration inasmuch as cases call for one sovereign to assist the other in handling cases premised on settled law. Inasmuch as unsettled questions of law are involved, however, interjurisdictional dialogue is an inappropriate consideration.

*b. The homogeneity of hybrid law cases
from a jurisdictional perspective*

Although hybrid law cases involve a variety of different facts and federal laws, and thus might be considered heterogeneous, when one views them according to the factors relevant to federal jurisdiction decisions, they are in reality quite similar.

State Hostility. Among the hybrid law cases analyzed for this Article, the amount of expected state hostility to the federal laws embedded within state suits is roughly similar. More specifically, in the great majority of cases, there is little reason to expect hostility. As described above, the majority of hybrid law cases involve only insignificant

168. See Friedman, *supra* note 97, at 1240. This principle is recognized through state certification statutes, which roughly mimic the principle (though not procedure) established in *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). See 17A C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4248 (2d ed. 1988 and Supp. 1996) (explaining that most states now have certification statutes). Using this tool, federal courts are permitted to certify novel state law questions to state high courts. Although certification is rather commonplace today, some have called for its increased usage. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75–76 (1997); Calabresi, *supra* note 155, at 1301 (stating that, on the question of avoiding the ills of diversity jurisdiction, the “answer is . . . [to] certify, certify, certify”).

169. See Ann Althouse, *The Authoritative Lawsaying Power of the State Supreme Court and the United States Supreme Court: Conflicts of Judicial Orthodoxy in the Bush-Gore Litigation*, 61 MD. L. REV. 508, 510 (2002) (noting that, except where federal law affects the outcome, it is “axiomatic . . . [that] a state’s highest court is the final, authoritative expositor of a state’s statutory and constitutional law”); Friedman, *supra* note 97, at 1239–40 (“No matter how clever, original, or even persuasive a federal court’s interpretation of state law is, it is not authoritative.”).

170. Shapiro, *supra* note 166, at 325–26 (stating that federal judges serve the states by “setting [federal] statutory or constitutional boundaries”); Friedman, *supra* note 97, at 1239 (citing Shapiro and noting that “setting (federal) statutory or constitutional boundaries . . . is precisely what federal judges should do”).

interpretations of federal law.¹⁷¹ It is difficult to see how a state court can express hostility to federal law, for example, by referring to a federal drug schedule to see if a certain drug is listed there,¹⁷² or by determining whether a written contract complies with a federal law requiring banking contacts to be written.¹⁷³ Although a certain number of hybrid law cases do involve the actual interpretation and application of federal law, little reason exists to expect hostility in many of these cases. The fear of state hostility to federal law has typically been linked to civil rights cases¹⁷⁴ and, among the hybrid law cases requiring federal law to be interpreted, very few are civil rights cases.¹⁷⁵

State courts could plausibly harbor hostility for federal laws that intrude upon the state regulatory sphere. Federal telecommunications or environmental laws might fall into this category.¹⁷⁶ These cases, however, represent a small minority of hybrid law cases.¹⁷⁷ Thus, when viewed as a whole, hybrid law cases are generally quite similar with respect to the amount of expected state hostility.

Expertise. At first glance, hybrid law cases would seem to be uniform in their need for expertise in the interpretation of federal law. After all, each case, by definition, involves a federal law, and would therefore profit equally from federal expertise. This uniformity, however, does not hold true for two reasons. First, as already noted, the majority of hybrid law cases do not call for any meaningful interpretation of federal law. Second, the cases that do call for an interpretation of federal law vary in the complexity of the federal law involved. While some cases involve rather simple and straightforward federal laws, others involve complex laws such as the Telecommunications Act, ERISA, and environmental statutes.

171. See *supra* text accompanying notes 80–89.

172. *Bailey v. Johnson*, 48 F.3d 965, 968 (6th Cir. 1995) (suit under state statute prohibiting dispensation of certain drugs without prescription required reference to federal regulations because state statute applied to drugs listed in the federal regulation).

173. *Dunlap v. G&L Holding Group, Inc.*, 381 F.3d 1285, 1291–93 (11th Cir. 2004) (suit alleging breach of contract related to formation of internet bank required reference to federal banking regulations because said regulations required contract to be in writing).

174. See *supra* text accompanying note 110.

175. See *supra* text accompanying note 76 (noting that only 5 out of 67 hybrid law cases seek to vindicate federal civil rights).

176. See, e.g., *City of Rome, N.Y. v. Verizon Commc'ns, Inc.*, 362 F.3d 168, 174–76 (2d Cir. 2004) (suit alleging breach of duty to re-negotiate telecommunications contract required reference to federal Telecommunications Act because statute regulated re-negotiation duties).

177. Moreover, such federal laws are not always intrusive of state authority. The Telecommunications Act of 1996, for example, specifically gives states a role in controlling the administration of the Act within their respective jurisdictions. See 47 U.S.C. § 252 (2006) (granting state utility commissions authority to contracts between local carriers).

The homogeneity of hybrid law cases with respect to the importance of expertise in federal law is thus a difficult judgment call. While the majority of cases considered for this Article would not likely profit from federal expertise, a significant number of cases would benefit. The difficulty, of course, is quantifying this number so as to determine, on the whole, whether hybrid law cases are generally homogeneous or heterogeneous. As it turns out, this difficult task is not necessary because the other four factors used to assess the homogeneity of hybrid law cases from a jurisdictional perspective cut decidedly in favor of homogeneity.

Uniformity. Hybrid law cases all implicate the concern for uniformity in much the same way, which is to say almost not at all. As an initial matter, uniformity becomes an issue only when federal law is interpreted, which, as explained above, occurs in a minority of hybrid law cases. Among the cases that do involve interpretation of federal law, however, the concern for uniformity is infinitesimal because state courts rarely publish their interpretations of federal law. As explained above, of the 67 hybrid law cases studied for this Article, 44 were remanded to state court. Of those remanded to state court, not a single one resulted in a published opinion interpreting federal law. Either of two reasons might cause this result. First, the state court did not interpret the federal law for some reason, such as because the parties settled or because the case was resolvable without referring to federal law. Where federal law is not interpreted, uniformity of federal law is obviously not a concern. Second, the state court interpreted the federal law but did not publish its opinion. An unpublished opinion certainly cannot breed disuniformity, for it will never be used as precedent in successive cases.¹⁷⁸

Thus, because many hybrid law cases do not call for the interpretation of federal law, and the cases that do call for an interpretation rarely result in published opinions, hybrid law cases are exceedingly homogenous in how they implicate uniformity concerns.

Sovereignty Interests. By definition, all hybrid law cases involve state and federal law. Thus, all hybrid law cases implicate the sovereignty interests of states and the federal government. This is not to say, of course, that the sovereignty interests of each sovereign are roughly equal. As explained below, state interests are almost always greater than the federal interests. Rather, it is to say that the conflict between state and federal interests is roughly similar in most hybrid law

178. As noted above, I define an "unpublished" opinion as any opinion not available through LexisNexis or Westlaw. See *supra* note 94.

cases.

Most hybrid law cases implicate state sovereignty interests significantly and federal sovereignty interests only minimally. The famous hybrid law case of *Smith v. Kansas City Title & Trust*—which tested a major Congressional program and turned solely on a federal constitutional issue—is an outlier on the spectrum of hybrid law cases. Most hybrid cases are mainly creatures of state law and implicate federal law only tangentially. For example, breach of contract suits typically focus (as one might expect) on the rights and duties of the parties under the contract as interpreted under state law and involve federal law only inasmuch as federal law regulates the field of commerce generally, or the specific contract in particular.¹⁷⁹ In very few cases is federal law the only disputed portion of the case.

Therefore, with respect to sovereignty interests, hybrid law cases look quite similar. They generally implicate state interests significantly and federal interests minimally, if at all.

Interjurisdictional Dialogue. The importance of dialogue between state and federal courts applies with similar force in most hybrid law cases. The typical hybrid law case calls for the interpretation of a significant amount of state law and a small amount of federal law. As noted above, federal law occasionally appears in a case more prominently than usual. This does not mean, however, that the value of interjurisdictional dialogue is different in these cases; rather, it suggests that the sovereign likely to profit from the dialogue will differ.¹⁸⁰ If a federal court hears a case involving significant amounts of settled state law, a state is likely to benefit somewhat from the federal view of its laws. In the opposite situation, where a case involves significant amounts of settled federal law, the federal government is likely to benefit to some degree from a state opinion.

Notably, the hybrid law cases studied for this Article did not involve novel questions of state or federal law. Were novel questions, whether of state or federal law, appearing routinely, but not uniformly, in hybrid law cases, the interjurisdictional dialogue principle might apply with varying force. As explained above, inasmuch as interjurisdictional

179. See e.g., *AmSouth Bank v. Dale*, 386 F.3d 763, 777 (6th Cir. 2004) (breach of contract suit by banks against insurance companies required reference to the federal Bank Secrecy Act because the federal statute regulated portions of parties obligations relevant to the loss event); *Interstate Petrol. Corp. v. Morgan*, 228 F.3d 331, 335 (4th Cir. 2000) (suit alleging breach of gas station franchise agreement required reference to Petroleum Marketing Practices Act because certain franchising agreements are regulated by the Act).

180. Put another way, interjurisdictional dialogue is a jurisdiction-neutral principle. It does not prefer state jurisdiction over federal, or vice versa. Instead, it merely prefers that each jurisdiction benefit from potential dialogue with the other.

dialogue impinges upon principles of sovereignty, it is thought to yield in cases where the interests of the sovereign are at their highest, such as in cases involving novel questions of law. Because hybrid law cases rarely involve novel questions of law, the interjurisdictional dialogue principle generally applies with similar force along the spectrum of hybrid law cases.

* * *

To summarize this section, hybrid law cases are generally homogenous when viewed according the jurisdictional principles applicable to allocating federal question cases between state and federal court. First, state hostility to federal law applies to the great majority of hybrid law cases in much the same way. Second, although the majority of cases would benefit equally from federal expertise, a significant number would benefit to a different degree. This lack of homogeneity, however, is overcome by the other three factors discussed—namely uniformity, sovereignty interests and interjurisdictional dialogue. Each of these principles applies with similar force in hybrid law cases. Therefore, hybrid law cases are, on the whole, quite homogenous. The Article now turns to the resources of decisionmakers, another factor that bears on the choice between rules and standards.

3. Resources of Decisionmakers

As explained above, rules are preferable to standards where decisionmakers are unlikely to expend the additional resources to resolve a standard. Decisionmakers are unlikely to expend the extra resources for one of two reasons: they either do not have the resources, or the marginal gains from the expenditure do not exceed the marginal costs. Thus, in choosing between a rule and a standard for dealing with hybrid law cases, the question is one of whether resources are so scarce among decisionmakers that the interpretation of a standard (as opposed to a rule) will lie beyond their means *or* whether the marginal benefits of interpreting standards are likely less than the marginal costs.

Both of these questions present almost insurmountable empirical problems. Ascertaining the resources litigants might bring to bear on hybrid law cases or any of the marginal benefits they would expect to receive from such suits is nearly impossible. Though ascertaining the same information for judges is difficult, one significant difference makes this determination easier: Judges leave evidence of their decisions, *i.e.*, their judicial opinions. Although one must be careful not to infer too much from such opinions, some general conclusions present themselves on the issue of the expenditure of resources.

For judges, the most important resource is their mental ability.¹⁸¹ Judges with exceptional analytical abilities—those Larry Alexander would call “master chefs”—will likely be equipped to apply legal standards. On the other hand, judges lacking such abilities—those Alexander would simply call line cooks—will more likely find standards challenging to apply, thus resulting in a higher error rate. In considering the resources of judges then, the question becomes whether the federal judiciary is made up of master chefs or line cooks. Given the widely-held view that federal judges are cut from a finer judicial cloth,¹⁸² one might expect there to be far more chefs than cooks. Yet, on the issue of discretion in hybrid law cases, Professor Daniel Meltzer offers notable dissent from this view. In a recent article, he asked whether “the men and women who comprise the federal bench have been or will be able to craft a sufficiently determinate body of doctrine by following the [discretionary] approach [Professor David] Shapiro proposes.”¹⁸³ Speaking specifically on the issue of jurisdiction in hybrid law cases, Meltzer opined that “Shapiro may at times be just a little too sanguine” about the workability of a discretion-conferring standard, as opposed to a discretion-constraining rule.¹⁸⁴ Thus, after having read a substantial number of lower court opinions, he expressed “doubt[]” as to “whether federal judges, as intelligent and dedicated as most of them are, can in fact establish a coherent framework for the boundaries of subject matter jurisdiction predicated . . . upon a federal ingredient in a state law claim for relief.”¹⁸⁵ He suggested that academics, such as Shapiro, who have analyzed the issue are “experts in a way that generalist federal judges are not.”¹⁸⁶ “Academics are unusually good analysts,” Meltzer explained, and often “have a taste, as a matter of professional inclination, for complexity.”¹⁸⁷

181. The availability of other resources—such as time and money—generally does not constrain judges. While judges might prefer to have extra money so as to hire more clerks, judges do have the luxury of time. In the great majority of cases, there is no deadline before which they must issue an opinion. Opinions that are not finished today can generally be finished tomorrow, or the next day, or the next month. In this sense, the truism that “time is money” applies with force to judging. That is, time is a abundant resource that compensates for any monetary constraints.

182. See Neuborne, *supra* note 110, at 1121 (claiming that a “competence gap exists between the state and federal courts”).

183. See Meltzer, *supra* note 2, at 1911.

184. *Id.* at 1912.

185. *Id.* at 1913.

186. *Id.* at 1911 (citing Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 888 (2003) as support for this proposition).

187. *Id.* (citing Peter H. Schuck, *Legal Complexity: Some Causes, Consequences and Cures*, 42 DUKE L.J. 1, 34–38 (1992) as support for this proposition). Professor Meltzer was quick to add that “[m]any academics . . . are entirely lacking in other qualities necessary to be a good judge.” *Id.*

Thus, judicial opinions in hybrid law cases suggest, to some extent at least, that federal judges may not be sufficiently competent to apply a standard. A more empirical method exists for assessing this contention, however. The reversal rate in hybrid law cases is roughly four times the rate of reversal for all civil cases.¹⁸⁸ While one must be careful not to infer too much from this fact,¹⁸⁹ this high reversal rate suggests that, for one reason or another, federal judges may not be investing the analytical effort necessary to resolve hybrid law jurisdiction questions that they invest on many other legal questions.¹⁹⁰

* * *

Using guidelines developed in Part III.C for choosing between a rule and standard, this section sought to determine whether a rule or standard is preferable in resolving jurisdiction questions in hybrid law cases. As established above, such questions arise with significant frequency, are generally homogenous with respect to jurisdictional principles, and, for whatever reason, do not seem to elicit adequate analyses from the district courts. Accordingly, a rule is preferable to a standard on this issue. Having established the preferability of a rule over a standard for hybrid law cases, the Article now turns to the appropriate jurisdictional rule in hybrid law cases.

IV. THE PROPER RULE IN HYBRID LAW CASES

Unlike the choice between a rule and standard—which was based on an analysis of the costs of promulgation and application of each legal

188. See *supra* text accompanying notes 90–93.

189. For a variety of reasons, the reversal rate in hybrid law cases may be artificially high compared to similar cases. Nonetheless, the rate is still likely higher than the average reversal rate. See *supra* text accompanying notes 90–93.

190. One might argue that the reversal rate is high not because judges fail to put in enough effort, but because the *Merrell Dow* doctrine was confusing and therefore more difficult to apply than other doctrines. It follows, the argument goes, that now that the confusion created by *Merrell Dow* has been cleared by *Grable & Sons*, the reversal rate should decrease. This argument, while plausible to a certain degree, is nonetheless belied by the fact that many courts read *Merrell Dow* to create a bright-line rule. See, e.g., *Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994) (citing numerous cases holding that “[u]nder *Merrell Dow* . . . ‘if federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a substantial federal question’”) (quoting *Utley v. Varian Assoc., Inc.*, 811 F.2d 1279, 1283 (9th Cir.1987)). Moreover, even if *Merrell Dow* did not create a strict rule, its standard was nowhere near as broad as that adopted in *Grable & Sons*. See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 125 S. Ct. 2363, 2368 (2005) (instructing courts to determine federal question jurisdiction over hybrid law cases by considering the “welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system”). Thus, while *Grable & Sons* clarified some of the confusion surrounding *Merrell Dow*, it did not replace it with a clearly defined standard. It is not at all clear, therefore, that the reversal rate in these cases will decrease.

form—the choice between alternative rules turns on substantive considerations about the allocation of power between the states and the federal judiciary.¹⁹¹ This enterprise necessarily admits of the congressional purposes behind federal question jurisdiction, but also accounts for other factors that courts and scholars have traditionally found compelling in drawing jurisdictional lines. In fact, the considerations employed in this section are those that the Court endorsed in *Grable & Sons*, albeit somewhat indirectly.¹⁹²

This Part identifies the appropriate rule in hybrid law jurisdictional

191. One might think that, because federal question jurisdiction is controlled by statute, the proper analysis in this circumstance should be one solely of statutory interpretation. Yet, the Supreme Court's decisions on federal question jurisdiction under § 1331 have never been efforts at statutory interpretation. See Friedman, *supra* note 3, at 24 ("Congress's intent [in enacting § 1331] has had little or nothing to do with the Court's decisions concerning what constitutes a federal question."). For example, in *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908), the Court adopted the well-pleaded complaint rule—a rule effectively excluding large numbers of cases presenting a federal question. Other cases—most notably *Grable & Sons*—exemplify the same point. See, e.g., *Merrell Dow Pharm. v. Thompson*, 478 U.S. 804 (1986), *Grable & Sons*, 125 S. Ct. 2363; *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 214–215 (1934); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 508 (1900). Of course, an established pattern of ignoring the text of 28 U.S.C. § 1331 does not give one license to ignore it in the future. Yet, because the phrase "arising under" does not admit of an obvious meaning, courts must resort to underlying principles when seeking to give content to the statute. Therefore, in keeping with this observation as well as Supreme Court precedent on the matter, the contours of jurisdiction in this instance will be determined with reference to the principles underlying federal jurisdiction.

Moreover, numerous scholars in this field have taken the same approach—focusing on principles, purposes and logic instead of statutory interpretation. See, e.g., Friedman, *supra* note 97, at 1216 ("A central task of the law of federal jurisdiction is allocating cases between state and federal courts."); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 (1981) ("[State and federal courts] will continue to be partners in the task of defining and enforcing federal constitutional principles. The question remains as to where to draw the lines; but line-drawing is the correct enterprise."); Redish, *supra* note 21, at 1772–87 (discussing seven factors relevant to determining the proper allocation of judicial power between the states and the federal government); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 625 (1991) (stating that "the challenge [of allocating cases between state and federal court] lies in finding a principled means of identifying those cases that belong in federal court"); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 506 (1928) ("[T]he proper allocation of authority between United States and state courts is but part of the perennial concern over the wise distribution of power between the states and the nation.").

192. In its opinion, the Court first noted that the purposes of federal question jurisdiction were relevant to its decision. See *Grable & Sons*, 125 S. Ct. at 2367 ("[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 later noted that the "welter of issues regarding the interrelation of federal and state authority" should be considered as well. While the Court did not specifically enumerate these "issues," it later took into account factors such as respect for state sovereignty and litigant choice. *Id.* at 2368–69 (stating that federal interests in federal tax law will be promoted, state interests in applying their own law would not be greatly diminished, and that litigants may prefer to have access to the expertise of a federal judge).

cases. It does this by first determining the courts in which hybrid law cases are best adjudicated. A comparison of the characteristics of hybrid law cases to the purposes underlying federal question jurisdiction reveals that hybrid law cases, in general, do not implicate the purposes behind federal question jurisdiction and thus belong in state courts. Having established that hybrid law cases generally belong in state courts, this Part then crafts a rule that, when applied, will allocate the majority of hybrid law cases to the state courts. The appropriate rule for accomplishing this allocation is the “cause-of-action test.” That is, federal question jurisdiction should obtain only in cases where a federal cause of action supports the federal law implicated by the plaintiff’s complaint.

A. The Proper Courts to Adjudicate Hybrid Law Cases

To determine where hybrid law cases are best adjudicated, one must compare their characteristics with the purposes underlying federal question jurisdiction. If hybrid law cases implicate the purposes of federal question jurisdiction, then the cases should be adjudicated in federal court. If the cases do not implicate those interests, however, the state courts should adjudicate the cases.

As explained above, the reasons for asserting federal jurisdiction are (1) the need to protect federal law from state hostility,¹⁹³ (2) the importance of federal expertise in resolving federal questions,¹⁹⁴ (3) the need for uniformity in the interpretation of federal law,¹⁹⁵ (4) the sovereignty interests of the states and federal government¹⁹⁶ and (5) the benefits of interjurisdictional dialogue.¹⁹⁷ This section now views hybrid law cases in light of these principles.

State Hostility. The prospect that states might be inhospitable to federal laws or interests is insignificant in hybrid law cases for several reasons. First, as described above, the majority of hybrid law cases involve only a ministerial application of federal law or no application of federal law at all.¹⁹⁸ As noted above, state courts will have difficulty expressing hostility to federal law, for example, by referring to a federal drug schedule,¹⁹⁹ or by determining whether a contract is in writing as

193. See *supra* text accompanying notes 147–153.

194. See *supra* text accompanying notes 154–156.

195. See *supra* text accompanying notes 157–161.

196. See *supra* text accompanying notes 162–164.

197. See *supra* text accompanying notes 165–167.

198. See *supra* text accompanying notes 80–89.

199. *Bailey v. Johnson*, 48 F.3d 965, 968 (6th Cir. 1995) (suit under state statute prohibiting

required by federal law.²⁰⁰ Moreover, the cases that do involve interpretation of federal law are generally not cases where hostility is thought to be most likely—that is, civil rights cases.²⁰¹

State hostility, however, is not always confined to civil rights and states might foreseeably resent federal intrusion into state regulatory domains through telecommunications or environmental laws, for example. This potential for hostility presents only a small risk to federal interests for three reasons. First, no evidence of state hostility exists in any hybrid law cases remanded to state court. Out of the 44 cases remanded to state court, *not a single one* was resolved with a published opinion addressing the federal question. While state courts may possibly vent their hostility to federal law in unpublished opinions, the absence of even a single published opinion suggests that risk of hostility in this area is more imagined than real.²⁰²

The second reason why hostility in this category of cases presents little concern is that, should a state assume a contrarian position, the United States Supreme Court can always take jurisdiction and reverse the state court's holding.²⁰³ Although the Court's ability to superintend the state courts is highly limited,²⁰⁴ the potential for such review serves as at least some disincentive for state courts to flout federal law. Moreover, should a state court decision violate federal law on an important national policy matter, such as telecommunications or environmental law, studies have shown the Supreme Court is much more likely to grant certiorari, especially where the state decision conflicts with other lower court decisions or Supreme Court

dispensation of certain drugs without prescription required reference to federal regulations because state statute applied to drugs listed in the federal regulation).

200. *Dunlap v. G&L Holding Group, Inc.*, 381 F.3d 1285, 1291–93 (11th Cir. 2004) (suit alleging breach of contract related to formation of internet bank required reference to federal banking regulations because said regulations required contract to be in writing).

201. *See supra* text accompanying note 76 (identifying the 5 of 67 hybrid law cases seeking to vindicate civil rights).

202. One might even hypothesize that a state court having hostility for federal law might *prefer* to publish its opinion. Published opinions, because of their precedential force, would be more likely to advance the hostile objectives than an unpublished opinion.

203. *See* 28 U.S.C. § 1257(a) (2006) (granting the Supreme Court the authority, but not the obligation, to review state high court decisions involving federal questions).

204. *See* Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 739, 743 (2001) (noting the Court's decrease in docket size from an about 150 cases prior to the 1980s to between 70–80 currently); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1704–13 (2000) (noting the plenary discretion afforded to the Supreme Court to decline appellate jurisdiction); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 336, 350 (2002) (noting the shrinking caseload of the Supreme Court and its effect on state court decisions, especially at a time when lower federal dockets are expanding).

precedent.²⁰⁵

Third, while one must be careful not to overstate the Supreme Court's ability to mollify state hostility, one must also be careful not to overstate the concept of state hostility itself. As noted above, the fear of state disobedience that made federal question jurisdiction appropriate in 1787 is much less compelling in today's era, where pervasive federal regulation is an accepted norm.²⁰⁶

Thus, although the potential for state hostility exists if state courts are to decide the federal questions in hybrid law cases, this hostility is likely to be quite limited, if existent at all.

Expertise. Hybrid law cases do not typically demand expertise in federal law. As discussed in Part II.B above, the majority of hybrid law cases involve little or no interpretation of federal law. Little expertise is needed, for example, to determine if a party to a contract has fulfilled his contractual duty to obtain federal regulatory approval for a rate increase.²⁰⁷ In other cases, such as a suit over a contract to build a public housing facility that was generally regulated by the Department of Housing and Urban Development, *no* interpretation of federal law is required.²⁰⁸ Even cases that require actual interpretation and application of federal law rarely involve significant analytical challenges. For example, in malicious prosecution or professional malpractice cases—which comprise 16% of cases requiring the interpretation of federal law—the reviewing court need not determine the precise contours of federal law, but need only determine whether the defendant's interpretation of law was grossly incorrect.²⁰⁹

205. See Solimine, *supra* note 204, at 359 (noting “available evidence seems to indicate that the Supreme Court has been able, to a tolerable degree, to carry out the monitoring function [of state courts]” and that “compelling evidence” indicates that the Court usually reviews cases of significant political or social importance). For studies indicating that the Court is likely to review a case where conflict among courts exists, see Gregory A. Caldera & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1120 (1988); S. Sidney Ulmer, *Conflict with Supreme Court Precedents and the Granting of Plenary Review*, 45 J. POL. 474, 474–77 (1983) (concluding that the Court is more likely to grant certiorari in cases where the holding conflicts with Supreme Court precedent); S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901, 906–11 (1984) (finding a relationship between the grant of certiorari and the existence of intercourt conflict or conflict with Supreme Court precedent).

206. See *supra* text accompanying notes 171–177.

207. *Mich. S. R.R. Co. v. Branch & St. Joseph Counties Rail Users Assoc., Inc.*, 287 F.3d 568, 573–74 (6th Cir. 2002) (suit alleging breach of railroad contract required reference to federal railroad laws because contract required party to obtain certificates of operation issued pursuant to federal statute).

208. *Virgin Is. Hous. Auth. v. Am. Arbitration Ass'n*, 27 F.3d 911, 916 (3rd Cir. 1994) (suit alleging breach of contract to build public housing required reference to HUD regulations because contracts were covered under such regulations).

209. See *supra* cases cited in note 89.

Of course, certain cases will benefit from federal expertise. Examples include suits involving major federal regulatory regimes, such as the Telecommunications Act²¹⁰ or the Clean Air Act.²¹¹ State judges will likely be less familiar with these and other similar statutes than federal judges. This weakness, however, is not compelling for four reasons. First, these cases represent a small minority of the whole. Thus, the loss of expertise will occur only in isolated cases. Second, the lack of expertise is likely to have deleterious impacts only on issues of first impression. Where federal precedent exists in either the U.S. Supreme Court or lower federal courts, state courts often follow federal precedent.²¹² Third, even if a state court were faced with an issue of first impression or departed from federal precedent, having the state court decide the issue still has value. Numerous commentators have observed that state courts can contribute effectively to the development of federal law.²¹³ Fourth, because these types of cases, *i.e.*, cases involving large federal regulatory regimes, are typically imbued with important public interests, the Supreme Court is more likely to review them.²¹⁴

Thus, although state review of embedded federal questions will sacrifice some federal expertise, this sacrifice, on the whole, will be quite small. Therefore, state court jurisdiction over hybrid cases is preferable on the issue of expertise.²¹⁵

210. See, e.g., *Metheny v. Becker*, 352 F.3d 458, 460–61 (1st Cir. 2003) (suit against local zoning board alleging erroneous decision by board required reference to the federal Telecommunications Act because Act allegedly dictated board's decision).

211. See, e.g., *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806–07 (4th Cir. 1996) (breach of contract suit by power plant licensee alleging right to federal pollution credits required reference to EPA regulations because regulations defined who an “owner” was for purposes of pollution credits).

212. See Preis, *supra* note 144, at Part III.A.2 (presenting empirical evidence suggesting state courts rely on federal precedent in 58% of the cases involving federal questions).

213. See Martin H. Redish, *Supreme Court Review Of State Court “Federal” Decisions: A Study In Interactive Federalism*, 19 GA. L. REV. 861, 897 (1985) (stating that state courts often can “make contributions to the development of federal law when given the opportunity”); Robert F. Utter, *Swimming In The Jaws Of The Crocodile: State Court Comment On Federal Constitutional Issues When Disposing Of Cases On State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1030–41 (noting a variety of ways in which “[s]tate courts have made a valuable contribution to the analysis and development of federal constitutional law.”).

214. See *Caldiera & Wright*, *supra* note 205, at 1119, 1122 (demonstrating with statistical analysis that the number of amicus briefs filed in favor of certiorari—a presumed indicator of the public interest in the legal issue—is positively correlated with the likelihood of Supreme Court review).

215. One might query why state expertise in state law is not equally important as federal expertise in federal law. Because hybrid law cases implicitly involve both state and federal law, one might think that state expertise would be relevant as well. This, however, ignores the Supremacy Clause and its import in the constitutional system. Under the Supremacy Clause, federal law is superior to state law. And by extension, the correct interpretation of federal law has greater importance than the correct interpretation of state law. Thus, when setting the boundaries of federal jurisdiction, federal expertise overrides state expertise.

This is not to say, however, that all state interests must bow to federal needs. To the contrary, there

Uniformity. Relegating hybrid law cases to the state courts will not result in significant or persistent disuniformity of federal law for five reasons. First, as explained above, the majority of hybrid law cases do not call for any meaningful interpretation of federal law. Where little or no interpretation is necessary, little or no disuniformity will result. Second, even if concern exists over the minority of cases requiring interpretation of federal law, state courts are likely to apply settled federal law where it is extant.²¹⁶ Third, out of the 44 hybrid cases remanded to state courts, not a single one resulted in a published decision reaching the merits of the federal question. Thus, even if state courts were to erroneously decide federal questions after remand, the failure to publish them will eliminate any threatened disuniformity. Fourth, inasmuch as some disuniformity is created, the likelihood of review by the U.S. Supreme Court increases, thereby reducing the likelihood that the disuniformity will persist.²¹⁷ Fifth and finally, because hybrid law disputes can arise between diverse parties as well as non-diverse parties, federal jurisdiction may still be asserted over the federal question at some future time. Thus, while state jurisdiction over hybrid law cases may result in a temporary disuniformity, as the federal issue continues to arise between diverse parties, federal courts will have the opportunity to clarify and unify the federal law. In this way, disuniformity is not a permanent defect, but a temporary disequilibrium.

Sovereignty Interests. In hybrid law cases, state interests figure more prominently than federal interests because the federal question is usually a single, non-dispositive issue embedded within a multitude of state law issues. For example, many cases are similar to *Dunlap v. G&L Holding Group, Inc.*, which involved a host of complicated state law contractual issues.²¹⁸ Federal jurisdiction was alleged on the ground that federal law required one of the contracts to be in writing, which it clearly was, and that the court would therefore have to apply federal law to determine the validity of the contract. While technically true, the magnitude of the federal issue—both in terms of complexity and importance to the case—paled in comparison to the state law issues. Notably rare in hybrid law cases is the situation presented in *Smith v. Kansas City Title & Trust*, where the federal issue was of great magnitude and constituted the only issue disputed in the case.

is near universal agreement among scholars that states are entitled to the rights of any sovereign, namely the presumptive right to apply their own laws in their own courts. See *supra* text accompanying notes 162–164.

216. See, e.g., Preis, *supra* note 144, at Part III.A.2.

217. See *supra* sources cited in note 205.

218. 381 F.3d 1285, 1291–93 (11th Cir. 2004).

Put simply, hybrid law cases almost always involve more state law than federal law. Thus, the sovereignty interests of the states are, on the whole, greater.

Interjurisdictional Dialogue. As previously noted, the notion that a sovereign might profit from another sovereign's interpretation of its laws is in some conflict with the principle that a sovereign should have primary authority to interpret its own laws.²¹⁹ Thus emerges the general rule that interjurisdictional dialogue is wise where settled law is concerned, but unwise where issues of first impression are concerned.

As already noted, hybrid law cases are made up mostly of state law issues and a small amount of federal law. Given this composition, one might think that states therefore have the most to gain from federal input on state laws. In this same respect, however, state courts may also have the most to lose. Because issues of first impression are more likely to appear among the copious state issues in hybrid law cases and less likely to appear in the comparatively few federal issues, many of which are essentially non-issues anyway, states may suffer a higher rate of intrusion into their sovereignty.

In the end, the importance of dialogue in the allocation of hybrid law cases depends on the relative values of dialogue and sovereignty. If sovereignty is highly valued, interjurisdictional dialogue is unlikely to compel federal jurisdiction over hybrid law cases. If, on the other hand, dialogue is considered paramount, the occasional federal interpretation of novel state law issues will not greatly offend sovereignty interests. Although pinpointing the relative values of these two interests is impossible, the sovereignty interests likely surpass dialogue interests. Sovereignty interests occupy the heartland of case allocation decisions while dialogue interests, although valuable to some extent, lie to the edge. Where the two conflict, therefore, sovereignty interests should prevail. Accordingly, the principle of interjurisdictional dialogue likely falls in favor of state court jurisdiction in hybrid law cases.

* * *

Thus, viewing hybrid law cases against the five factors meriting federal jurisdiction, one sees that these cases are properly heard in the state courts. The cases (1) raise little concern of state hostility, (2) require only a small need for federal expertise, (3) present little risk of disuniformity, (4) implicate stronger state sovereignty interests than federal sovereignty interests, and (5) would not benefit from dialogue to a degree that would outweigh costs to sovereignty interests.

219. See *supra* text accompanying notes 162–164.

B. The Rule for Allocating Hybrid Law Cases to State Courts

Given that hybrid law cases are best adjudicated in state courts, the question becomes: What rule will allocate the cases to these courts? Two rules—and only two rules—are possible.²²⁰

First, federal courts might hold that a case presents a federal question only when the case is predicated entirely on federal law. That is, cases that involve both federal and state law are not cases that “arise under” federal law. While such a rule would accomplish the allocation goal, it would undoubtedly run afoul of the federal question statute. A case does not cease to arise under a federal law simply because a state law question is also involved. One might argue in response that the well-pleaded complaint rule operates with similar arbitrariness and is an accepted jurisdictional rule (notwithstanding its criticisms).²²¹ Yet the well-pleaded complaint rule is based on at least a somewhat plausible interpretation of § 1331; that is, a case *arises under* federal law when federal law *gives rise* to the plaintiff’s claim.²²² A rule precluding jurisdiction over a federal question simply because a state law question is also present in the complaint cannot be justified in any similar way. Thus, a rule requiring that federal question cases be devoid of state law issues would not be a proper rule.²²³

A second alternative would be to allow federal courts to assert jurisdiction over hybrid law cases where the federal law implicated in the suit was supported by a federal cause of action. The great majority of hybrid law cases studied in this Article did not involve a federal cause of action; thus, this rule would properly allocate the cases to state court most of the time.²²⁴ Moreover, the cause of action test also clears the

220. Perhaps I lack imagination on this point, but task of allocating hybrid law cases mostly to state courts with a rule seems to admit of *only* two possible rules. As explained in greater detail in the following paragraphs, the cases must either all be relegated to state courts or be allowed in federal courts only.

221. *See supra* note 21.

222. 28 U.S.C. § 1331 (2006).

223. Moreover, such a rule would be in considerable tension with the holding of *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 822 (1824). There, the Court held that a state law replevin action nonetheless arose under federal law because federal law formed an “ingredient” in the state law claim. *Id.* While *Osborn* involved an interpretation of Article III, and not § 1331, of course, the case nonetheless speaks to the fundamental division of labor between the federal and state judicial systems. That division of labor is still extant today and a rule that facially contradicted it would compromise the integrity of the principle.

224. Of course, for the cases that did involve a federal cause of action but did not implicate the purposes underlying federal question jurisdiction, this rule might create undesirable results. Yet that does not render the rule inappropriate; it simply makes the rule less preferable on that ground. And because there is no other rule that is superior to this rule on the whole, it is improper to disqualify the cause of action rule on this ground alone.

§ 1331 hurdle in that it is a plausible interpretation of the statute. While one cannot say that § 1331 *compels* a cause of action test, the expansive—and even ambiguous—“arising under” language certainly does not *foreclose* such an interpretation.²²⁵

The cause of action test, however, has at least one shortcoming: The determination of the existence of a cause of action is not strictly a rule-based analysis. Rather, the determination depends chiefly on a court’s analysis of congressional intent.²²⁶ Therefore, even though the cause of action test proposed herein seems to amount to a rule, it may, in its operation work somewhat like a standard. Although the cause of action test deprives judges of discretion to assert jurisdiction over claims without federal causes of action, it does not deprive them of discretion to determine whether such a cause of action exists.

While this concern does have some merit, it is ultimately unpersuasive because the cause of action inquiry is not nearly as discretionary as is sometimes thought. While courts at one time felt free to create rights of action to “effect[uate] the congressional purpose” behind a statute,²²⁷ courts today focus more narrowly on whether the “text and structure” of the federal statute evince a congressional intent to create a right of action.²²⁸ Under this stricter inquiry, courts *presume* that if Congress did not explicitly create a right of action, it did not intend that the statute be enforced by one.²²⁹ While this presumption

225. While one would expect those who defend judicial discretion to read § 1331 broadly, *see supra* sources cited in note 2, even commentators who define the courts’ role narrowly find § 1331 to admit of many interpretations. *See, e.g.,* Redish, *supra* note 21, at 1794 (stating that the “broadly phrased ‘arising under’ statutory language already in existence easily lends itself, both linguistically and conceptually,” to differing jurisdictional rules).

226. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

227. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

228. *Alexander*, 532 U.S. at 275; *see also* *Karahalios v. Nat’l Fed’n of Fed. Employees*, 489 U.S. 527, 532 (1989) (“The ‘ultimate issue’ is whether Congress intended to create a private cause of action.”) (internal quotation marks omitted). While one might posit that discerning congressional intent is often a wide-ranging inquiry, the Supreme Court has, in the implied right of action context, disapproved of “broad-based notion[s] of congressional intent,” such as those based on committee reports, congressional acquiescence, and failed legislative proposals. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 180 (1994). Circuit courts have generally followed this lead. *See, e.g.,* *Mallett v. Wis. Div. of Vocational Rehab.*, 130 F.3d 1245, 1249 (7th Cir. 1997) (recognizing the Supreme Court’s “evolution in thinking about implied rights of action” and refusing to imply an action where there was no evidence of congressional intent overcoming the presumption against an implying a right of action); *Olmsted v. Pruco Life Ins. Co.*, 283 F.3d 429, 434 (2d Cir. 2002) (explaining that pre-*Sandoval* cases “belong to an ‘ancien regime’” where courts were free to “‘make effective [Congress’] [statutory] purpose’” in enacting a statute) (second alteration in original).

229. *W. Allis Mem’l Hosp., Inc. v. Bowen*, 852 F.2d 251, 254 (7th Cir. 1988) (“A strong presumption exists against the creation of . . . implied rights of action.”); *La. Landmarks Soc’y, Inc. v. City of New Orleans*, 85 F.3d 1119, 1123 (5th Cir. 1996) (recognizing this presumption); *Stowell v. Ives*, 976 F.2d 65, 70 n. 5 (1st Cir. 1992) (same).

can be overcome, courts only rarely do so.²³⁰ Therefore, under the modern cause of action inquiry, judges do not wield discretion freely. Moreover, even if some discretion is unavoidable under the cause of action test, the discretion is much narrower than that accorded courts under the wandering standard promulgated by the Court in *Grable & Sons*.²³¹ Thus, even if the cause of action test is not perfect, it is certainly preferable.

In conclusion, the proper rule for resolving hybrid law jurisdictional questions is whether the federal law implicated in the plaintiff's complaint is supported by a federal right of action. This rule properly allocates the majority of cases to state courts, is consonant with § 1331, and will not likely increase judicial discretion or confusion in the right of action doctrine.

V. CONCLUSION

As this Article has shown, the role of discretion in jurisdictional determinations by the judiciary involves much more than the legitimacy question. Even if the judiciary could legitimately claim discretion to modify its jurisdiction, it is not at all clear that such discretion is functionally advisable. A detailed study of hybrid law cases reveals that the cases are best handled in the lower courts by a bright-line rule and not a discretionary approach. Although this Article focused on only a small area of federal jurisdiction, its conclusions suggest that the debate over discretion must take place not only in the legitimacy sphere but also in the functional sphere. Only then will the proper jurisdictional rules be formulated.

230. See Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, supra note 18, at 91 (noting that, under the Court's current test, judicial creation of implied rights of action are quite rare); *Hamilton v. Allen*, 396 F.Supp. 2d 545, 555 (E.D. Pa. 2005) (noting that *Alexander v. Sandoval* (which instructed courts to focus only on Congressional intent) and subsequent cases, "suggest a distinct narrowing of the implied right of action").

231. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2367–68 (2005) (instructing courts to consider the "welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system" to determine whether or not to assert federal jurisdiction).

VI. APPENDIX

This chart lists 67 published opinions in which federal circuit courts considered whether federal questions embedded within state law actions were “substantial” enough to merit federal jurisdiction pursuant to 28 U.S.C. § 1331. The cases represent almost every opinion published by a circuit court on this issue between July 8, 1986 and June 13, 2005—the span of time between the *Merrell Dow* and *Grable & Sons* decisions.²³²

Case Name	Facts implicating federal law	Federal Jurisdiction	Context of F.Q. ²³³	Degree of Interpretation ²³⁴	Reversal of of dist. court ²³⁵	If remand to st. ct., published op.
Additive Controls & Measurement Sys., Inc. v. FlowData, Inc., 986 F.2d 476, 477–79 (Fed Cir. 1993).	Business disparagement action required reference to federal patent law because defendant’s alleged disparagement involved claims that plaintiff did not own patent rights it was selling	Yes	FLE	S	No	N/A
Almond v. Capital Prop., Inc., 212 F.3d 20, 22–24 (1st Cir. 2000).	Suit alleging breach of contract related to parking rates at public transportation facility required reference to federal law because contract term required parking lot owner to obtain approval of rate changes from federal agency	Yes	CIA	I	No	N/A

232. Because the search for these cases was done by shepardizing *Merrell Dow* and *Smith v. Kansas City Title & Trust Co.*, it is impossible to say that *every* case on this issue has been found. Conceivably, some courts could have addressed the issue without citing either case, although that would be unlikely. See *supra* note 132.

233. With regard to the context in which the federal question arises, the cases are coded in one of three ways. “SIA,” which stands for “statutory incorporation action,” represents cases where the state statute relied upon by the plaintiff incorporates federal law. “CIA,” which stands for “contract incorporation action,” represents cases where the contract forming the basis of the suit incorporated federal law. “FLE,” which stands for “federal law-as-element,” represents cases which federal law serves as an element to a state tort or tort-like cause of action. For a detailed description of these contexts, see *supra* text accompanying notes 62–75.

234. With regard to the degree of interpretation of federal law required of the court, cases are coded as either “S” (for “significant”) or “I” (for “insignificant”). While I recognize that all cases do not fall neatly into one category or the other, it is nonetheless worthwhile to generally classify the cases because there are significant differences in the amount of interpretation required. For an illustration of these differences, see *supra* text accompanying notes 80–89.

235. A reversal is defined as any circuit court conclusion that the district court failed to exercise its jurisdiction properly. Thus, even if a district made no finding as to its jurisdiction (and simply assumed it to exist), a circuit court holding that the district court lacked jurisdiction amounts to a reversal.

Case Name	Facts implicating federal law	Federal Jurisdiction	Context of F.Q. ²³³	Degree of Interpretation ²³⁴	Reversal of dist. court ²³⁵	If remand to st. ct., published op.
Am. Policyholders Ins. Co. v. Nyacol Products, Inc., 989 F.2d 1256, 1263–64 (1st Cir. 1993).	Suit alleging breach of insurance contract required reference to federal CERCLA because loss event involved environmental contamination regulated by CERCLA	No	CIA	I	Yes	No
AmSouth Bank v. Dale, 386 F.3d 763, 777 (6th Cir. 2004).	Breach of contract suit by banks against insurance companies required reference to the federal Bank Secrecy Act because the federal statute regulated portions of parties obligations relevant to the loss event	No	CIA	I	Yes	No
Arthur Young & Co. v. City of Richmond, 895 F.2d 967, 969–71 (4th Cir. 1990).	Suit alleging non-payment for services rendered required reference to federal copyright law because ownership of copyright was predicate to plaintiff's claims	Yes	CIA	S	Yes	N/A
Ayres v. General Motors, Corp., 234 F.3d 514, 519–20 (11th Cir. 2000).	Suit under state RICO statute required reference to federal law because state statute permits federal wire and mail frauds to serve as predicate acts	Yes	SIA	S	Yes	N/A
B.I.W. Deceived v. Local S6, Indus. Union of Marine and Shipbuilding Workers of Am., 132 F.3d 824 (1st Cir. 1997).	Negligence and Misrepresentation suit required reference to collective bargaining agreement entered pursuant to federal law because agreement prescribed certain duties allegedly violated	Yes	FLE	I	No	N/A
Bailey v. Johnson, 48 F.3d 965, 968 (6th Cir. 1995).	Suit under state statute prohibiting dispensation of certain drugs without prescription required reference to federal regulations because state statute applied to drugs listed in the federal regulation	No	SIA	I	Yes	No
Barbara v. N.Y. Stock Exch., Inc., 99 F.3d 49, 53–55 (2d Cir. 1996).	Tort action for improper disciplinary action by New York Stock Exchange required reference to Exchanges internal rules—which are sanctioned by federal agencies—to determine if Exchange violated its internal rules	No	FLE	I	No	No
Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343,	Suit alleging breach of contract in development of movie script required reference to federal copyright law because plaintiff	Yes	CIA	S	Yes	N/A

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Case Name	Facts implicating federal law	Federal Jurisdiction	Context of F.Q. ²³³	Degree of Interpretation ²³⁴	Reversal of dist. court ²³⁵	If remand to st. ct., published op.
347–56 (2nd Cir. 2000).	was asserting ownership of a copyright					
Battle v. Seibels Bruce Ins. Co., 288 F.3d 596, 607–08 (4th Cir. 2002).	Suit for breach of flood insurance contract required reference to federal law because insurance contract was underwritten by the National Flood Insurance Program	Yes	CIA	I	Yes	N/A
Bell Atlantic MD, Inc. v. MCI WorldCom, Inc., 240 F.3d 279, 307–08 (4th Cir. 2001).	Suit against state regulatory commission required reference to FCC ruling because plaintiffs alleged state commission erred in its interpretation of ruling	No	FLE	S	No	No
Berg v. Leason, 32 F.3d 422, 424–26 (9th Cir. 1994).	Malicious prosecution action required reference to federal RICO statute in order to determine if prosecutor had legally tenable ground for prosecution under the law	No	FLE	S	Yes	No
Bracey v. Bd. of Educ. of City of Bridgeport, 368 F.3d 108, 113–16 (2nd Cir. 2004).	Suit under state retaliatory discharge statute required reference to First Amendment of U.S. Constitution to determine employee's free speech rights	Yes	SIA	S	No	N/A
Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1056 (9th Cir. 1997).	Suit by Native American tribes alleging breach of licensing agreement by state government required reference to federal Indian Gaming Regulatory Act because contracts were entered into pursuant to the federal act	Yes	CIA	I	No	N/A
Campbell v. Aerospace Corp., 123 F.3d 1308, 1314–15 (9th Cir. 1997).	Former employee's wrongful discharge claim required reference to federal False Claims Act because plaintiff relied on the federal law to establish public policy, which was relevant to wrongful discharge claim	No	FLE	I	Yes	No
Carpenter v. Wichita Sch. Dist., 44 F.3d 362, 366–68 (5th Cir. 1995).	Free speech claim predicated on state constitution required reference to federal precedent on First Amendment because state courts sometimes rely on such precedent in construing state free speech rights	No	FLE	I	Yes	No
City of Huntsville v. City of Madison, 24 F.3d 169, 173–74 (11th Cir. 1994).	Suit seeking declaration of rights under contract for sale of excess electricity required reference to federal TVA Act because parties agreed in the contract to follow provisions of the Act	No	CIA	S	No	No

Case Name	Facts implicating federal law	Federal Jurisdiction	Context of F.Q. ²³³	Degree of Interpretation ²³⁴	Reversal of dist. court ²³⁵	If remand to st. ct., published op.
City of Rome, N.Y. v. Verizon Communications, Inc., 362 F.3d 168, 174–76 (2d Cir. 2004).	Suit alleging breach of duty to re-negotiate telecommunications contract required reference to federal Telecommunications Act because statute regulated re-negotiation duties	No	CIA	S	Yes	No
Clark v. Velsicol Chem. Corp., 944 F.2d 196, 197–99 (4th Cir. 1991).	Personal injury suit required reference to federal environmental regulations because plaintiff sought to rely on defendant's violation of regulation as per se evidence of negligence	No	FLE	S	No	No
Custer v. Sweeney, 89 F.3d 1156, 1168–69 (4th Cir. 1996).	Legal malpractice claim against pension fund manager required reference to federal ERISA because ERISA provisions regulated certain aspects of pension fund management	No	FLE	S	No	No
D'Alessio v. N.Y. Stock Exch., Inc., 258 F.3d 93, 99–104 (2d Cir. 2001).	Injurious falsehood claims against New York Stock Exchange for banning plaintiff from trading on exchange required reference to federal securities laws because laws controlled Exchange's obligations to its members	Yes	FLE	I	No	N/A
Diaz v. Sheppard, 85 F.3d 1502, 1505–06 (11th Cir. 1996).	Legal malpractice claim against criminal defense attorney required reference to U.S. Supreme Court opinion on Eighth Amendment to determine if attorney's interpretation of case was grossly negligent	No	FLE	S	Yes	No
Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 816–19 (4th Cir. 2004).	Suit under state unlawful termination statute required reference to First Amendment of U.S. Constitution to determine employee's free speech rights	No	SIA	S	Yes	No
Dunlap v. G&L Holding Group, Inc., 381 F.3d 1285, 1291–93 (11th Cir. 2004).	Suit alleging breach of contract related to formation of bank required reference to (1) federal banking regulations because said regulations required contract to be in writing and (2) federal trademark law because plaintiff would have to prove ownership of trademark to prevail in suit	No	CIA	I	Yes	No
Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 550–51 (8th Cir. 1996).	Common law conspiracy claim by Native American tribe required reference to federal Indian Civil Rights Act because tribe alleged defendant had conspired to violate the Act	Yes	FLE	S	No	N/A

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Case Name	Facts implicating federal law	Federal Jurisdiction	Context of F.Q. ²³³	Degree of Interpretation ²³⁴	Reversal of dist. court ²³⁵	If remand to st. ct., published op.
Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 25–27 (2d Cir. 2000).	Suit to reverse allegedly erroneous arbitration award required reference to federal law because arbitrator's decision was predicated in part on federal law	Yes	FLE	S	Yes	N/A
Greenblatt v. Delta Plumbing & Heating Corp., 68 F.3d 561, 570–71 (2d Cir. 1995).	Suit to enforce collective bargaining agreement required reference to federal labor law because law regulated such agreements	No	CIA	I	Yes	No
Griffis v. Gulf Coast Pre-Stress Co., Inc., 850 F.2d 1090, 1091–92 (5th Cir. 1988).	Suit for injury sustained while working as longshoreman required reference to federal harbor workers statute because statute allegedly dictates vicarious liability in certain instances arguably relevant to case	No	FLE	I	No	No ²³⁶
Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 341 (6th Cir. 1989).	Suit under state environmental statute required reference to federal law because environmental plan at issue in the case was required by federal law	No	SIA	I	Yes	No
Heydon v. MediaOne of S.E. Mich., Inc., 327 F.3d 466, 471–72 (6th Cir. 2003).	Trespass action against cable company required reference to federal Cable Act in order to determine whether company had authority to trespass	No	FLE	S	No	No
Hill v. Marston, 13 F.3d 1548, 1549–50 (11th Cir. 1994).	Suit under state securities law required reference to federal securities law because state statute adopted certain federal securities laws verbatim	No	SIA	I	Yes	No
Hudson Ins. Co. v. Am. Elec. Corp., 957 F.2d	Suit alleging breach of insurance contract required reference to federal CERCLA because loss	No	CIA	I	No	No

236. Of the 44 cases remanded to the state court, this is the only one that arguably involved the interpretation of federal law. In *Griffis v. Gulf Coast Pre-Stress Co., Inc.*, 563 So.2d 1254 (La. Ct. App. 1st Cir. 1990), a Louisiana court of appeals affirmed the unpublished decision by the trial court and approved of its adherence to state precedent (*Crater v. Mesa Offshore Co.* 539 So.2d 88 (La. Ct. App. 3rd Cir. 1989)) recognizing that the Louisiana workman's compensation scheme was consistent with federal law regulation worker's compensation for longshoreman. Thus, although federal law was arguably involved in the disposition of this case, the better conclusion is that the state court simply applied state precedent in its one-page opinion and made no determination of federal law. Although a federal statute was cited, it was not quoted and only barely discussed.

Case Name	Facts implicating federal law	Federal Jurisdiction	Context of F.Q. ²³³	Degree of Interpretation ²³⁴	Reversal of dist. court ²³⁵	If remand to st. ct., published op.
826, 829–30 (11th Cir. 1992).	event involved environmental contamination regulated by CERCLA					
Interstate Petroleum Corp. v. Morgan, 228 F.3d 331, 335 (4th Cir. 2000).	Suit alleging breach of gas station franchise agreement required reference to Petroleum Marketing Practices Act because certain franchising agreements are regulated by the Act	No	CIA	I	Yes	No
Jairath v. Dyer, 154 F.3d 1280, 1282–84 (11th Cir. 1998).	Suit under state discrimination statute required reference to Americans with Disabilities Act because state statute adopted certain ADA provisions verbatim	No	SIA	I	Yes	No
Kidd v. S.W. Airlines, Co., 891 F.2d 540, 543–44 (5th Cir. 1990).	Suiting alleging breach of employment contract required reference to federal law because contract adopted certain phrases verbatim from federal statute	No	CIA	I	No	No
Lockyer v. Dynegey, Inc., 375 F.3d 831, 838–41 (9th Cir. 2004).	Suit under state statute regulating unfair business practices statute required reference to tariffs filed with federal agency to determine permissible rate	Yes	SIA	I	No	N/A
MCI Telecomm. Corp. v. Graham, 7 F.3d 477, 478–79 (6th Cir. 1993).	Suit alleging breach of contract to provide telecommunications services required reference to federal law because certain contractual duties were regulated by FCC provisions	Yes	CIA	I	Yes	N/A
Metheny v. Becker, 352 F.3d 458, 460–61 (1 st Cir. 2003).	Suit against local zoning board alleging erroneous decision by board required reference to the federal Telecommunications Act because Act allegedly dictated board's decision	No	FLE	S	Yes	No
Mich. S. R.R. Co. v. Branch & St. Joseph Counties Rail Users Assoc., Inc., 287 F.3d 568, 573–74 (6th Cir. 2002).	Suit alleging breach of railroad contract required reference to federal railroad laws because contract required party to obtain certificates of operation issued pursuant to federal statute	No	CIA	I	No	No
Milan Express Co., Inc. v. W. Surety Co., 886 F.2d 783, 786–89 (6th Cir. 1989).	Suit by motor carriers alleging breach of shipping contract required reference to federal Interstate Commerce Act because Act and regulations addressed substantial portions of contractual duties	Yes	CIA	I	Yes	N/A
Morris v. City of Hobart, 39 F.3d	Suit alleging breach of settlement agreement in discrimination suit	No	CIA	I	Yes	No

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Case Name	Facts implicating federal law	Federal Jurisdiction	Context of F.Q. ²³³	Degree of Interpretation ²³⁴	Reversal of dist. court ²³⁵	If remand to st. ct., published op.
1105, 1111–12 (10th Cir. 1994).	required reference to Title VII of federal Civil Rights Act because suit was originally filed as Title VII claim					
Mulcahey v. Columbia Organic Chemicals Co., Inc., 29 F.3d 148, 151–54 (4th Cir. 1995).	Personal injury suit required reference to federal environmental regulations because plaintiff sought to rely on defendant's violation of regulation as per se evidence of negligence	No	FLE	S	Yes	No
Nashoba Communications Ltd. P'ship v. Town of Danvers, 893 F.2d 435, 438–39 (1st Cir. 1990).	Suit alleging breach of cable TV licensing agreement required reference to federal Cable Act because Act regulated tariffs, which were at issue in the case	No	CIA	S	Yes	No
Nichols v. Harbor Venture, Inc., 284 F.3d 857, 860–61 (8th Cir. 2002).	Malicious prosecution action for pursuit of previous declaratory judgment suit required reference to a consent decree entered by a federal court because the consent decree allegedly foreclosed the declaratory judgment suit	No	FLE	I	Yes	No
Nicodemus v. Union Pac. Co., 318 F.3d 1231, 1236–38 (10th Cir. 2003).	Trespass and unjust enrichment action against railroad company required reference to federal land grant laws in order to determine scope of railroad rights under grants	No	FLE	S	No	No
Oliver v. Trunkline Gas Co., 796 F.2d 86, 88–90 (5th Cir. 1986).	Breach of contract action for sale of natural gas required reference to federal law because federal Natural Gas Act set the price of the contract	No	CIA	I	Yes	No
Ormet Corp. v. Ohio Power Co., 98 F.3d 799, 806–07 (4th Cir. 1998).	Breach of contract suit by power plant licensee alleging right to federal pollution credits required reference to EPA regulations because regulations defined who an "owner" was for purposes of pollution credits	Yes	CIA	S	Yes	No
Pacheco de Perez v. AT & T Co., 139 F.3d 1368, 1374–76 (11th Cir. 1998).	Personal injury action by Venezuelans against U.S. company required reference to federal treaty because treaty impacted plaintiff's right to sue	No	FLE	S	Yes	No
PCS 2000 LP v. Romulus Telecomm., Inc., 148 F.3d 32, 35	Suit alleging breach of contract to bid certain price for FCC license required reference to federal law because FCC regulations regulate	No	CIA	S	Yes	No

Case Name	Facts implicating federal law	Federal Jurisdiction	Context of F.Q. ²³³	Degree of Interpretation ²³⁴	Reversal of dist. court ²³⁵	If remand to st. ct., published op.
(1st Cir. 1998).	bidding practices for licenses (Note: plaintiffs also lodged tort action relying on FCC bidding regulations. The court similarly found federal jurisdiction lacking.)					
Rice v. Office of Servicemembers' Group Life Ins., 260 F.3d 1240, 1245–46 (10th Cir. 2001).	Suit alleging breach of insurance contract to pay death benefits required reference to federal law because decedent's mental state—which was at issue—was defined by federal law (due to the fact that he was a member of the military)	Yes	CIA	S	No	N/A
Rodriguez v. SK & F Co., 833 F.2d 8, 9 (1st Cir. 1987).	Wrongful discharge suit required reference to federal Food Drug and Cosmetic Act because plaintiff alleged discharge occurred in retaliation for refusal to violate the federal act	No	FLE	I	No	No
Rogers v. Platt, 814 F.2d 683, 687–90 (D.C. Cir. 1987).	Child custody suit required reference to federal law because dispute was regulated in part by federal parental kidnapping laws	No	SIA	I	No	No
Sable v. General Motors corp., 90 F.3d 171, 174–75 (6th Cir. 1996).	Trespass action for failure to remove waste from land required reference to federal law because the duty to remove the waste was imposed by a EPA-negotiated consent decree	Yes	CIA	I	No	N/A
Seinfeld v. Austen, 39 F.3d 761, 763–65 (7th Cir. 1994).	Derivative action against corporate directors required reference to federal antitrust laws because alleged malfeasance involved anticompetitive behavior	No	FLE	S	Yes	No
Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125, 1138–39 (3rd Cir. 1995).	Breach of contract suit by motor carrier against shipper required reference to federal Interstate Commerce Act because Act regulated certain aspects of such contracts	No	CIA	I	No	No
Smith v. Indus. Valley Title Ins. Co., 957 F.2d 90, 92–93 (3rd Cir. 1996).	Conversion claim against insurance company for improper title insurance charges required reference to federal IRS law because laws regulated such charges	No	FLE	S	Yes	No
Tamiami Partners, Ltd. v. Miccosuke Tribe of Indians of Fla., 999 F.2d 503, 507–08	Suit alleging breach of duty to arbitrate contractual disputes required reference to federal law because federal law controlled jurisdiction of Native American court, whose judgment was	No	CIA	S	Yes	No

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Case Name	Facts implicating federal law	Federal Jurisdiction	Context of F.Q. ²³³	Degree of Interpretation ²³⁴	Reversal of dist. court ²³⁵	If remand to st. ct., published op.
(11th Cir. 1993).	partially at issue					
Templeton Bd. of Sewer Comm'rs. v. Am. Tissue Mills of Mass., 352 F.3d 33, 37–41 (1st Cir. 2003).	Suit alleging breach of water treatment contract required reference to federal regulations because contract was entered into pursuant to permission granted by EPA	No	CIA	I	No	No
Torres v. S. Peru Copper Corp., 113 F.3d 540, 542–43 (5th Cir. 1997).	Personal injury action against large Peruvian company required reference to the federal common law of international relations because holding a major foreign company liable in U.S. courts could have significant diplomatic implications	Yes	FLE	S	No	N/A
U.S. Express Lines Ltd. v. Higgins, 281 F.3d 383, 388–91 (3d Cir. 2002).	Malicious prosecution action required reference to federal maritime law because plaintiff alleged federal law did not support defendant's claims before the court	Yes	FLE	S	No	N/A
Utley v. Varian Assocs., Inc., 811 F.2d 1279, 1282–83 (9th Cir 1987).	Wrongful termination suit based on race required reference to federal affirmative action laws because federal executive orders placed certain duties on employers	No	SIA	I	No	No
Verizon Md., Inc. v. Global Naps, Inc., 377 F.3d 355, 365 (4th Cir. 2004).	Suit alleging that state regulatory commission incorrectly interpreted federal law during regulatory proceedings required reference to federal law in order to determine the correctness of commission's interpretation	Yes	FLE	S	Yes	N/A
Virgin Islands Hous. Auth. v. Am. Arbitration Ass'n, 27 F.3d 911, 916 (3rd Cir. 1994).	Suit alleging breach of contract to build public housing required reference to HUD regulations because contracts were covered under such regulations	No	CIA	I	Yes	No
W. 14th St. Commercial Corp. v. 5 W. 14th Owners Corp., 815 F.2d 188, 194–96 (2d Cir. 1987).	Suit seeking declaration that condominium contracts were in effect required reference to federal condominium statute because statute regulated parties' obligations under the contract	Yes	CIA	S	No	N/A
W. Union Intern., Inc. v. Data Dev., Inc., 41 F.3d 1494,	Suit alleging failure to pay for services rendered by telecommunications required reference to federal	Yes	CIA	I	Yes	N/A

Case Name	Facts implicating federal law	Federal Jurisdiction	Context of F. Q. ²³³	Degree of Interpretation ²³⁴	Reversal of of dist. court ²³⁵	If remand to st. ct., published op.
1495-96 (11th Cir. 1995).	Telecommunications Act because rates charged for services are regulated by tariffs filed pursuant to Act					
Wander v. Kaus, 304 F.3d 856, 858-60 (9th Cir.2002).	Suit under state discrimination statute required reference to Americans with Disabilities Act because state statute adopted certain ADA provisions verbatim	No	SIA	S	No	No