

## THE COMMON LAW OF FEDERAL QUESTION JURISDICTION

*F. Andrew Hessick III\**

### ABSTRACT

*The Supreme Court has repeatedly stressed that the role of the judiciary in interpreting statutes is to declare the law as intended by Congress. But the Court historically has not followed that practice in interpreting the statute conferring federal question jurisdiction. The most notorious example is the well-pleaded complaint rule, which the Court developed based on its own policy determinations about the appropriate role of the federal courts. In recent terms, the Court has developed various new doctrines expanding and contracting federal question jurisdiction without regard to Congressional intent. This Article contends that these recent developments reflect that, contrary to its statements about the proper role of the judiciary, the Court increasingly perceives itself as the primary regulator of federal question jurisdiction. This Article also contends that this practice has resulted in a highly manipulable and unstable law of federal question jurisdiction.*

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\* Associate Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. J.D., Yale Law School. B.A., Dartmouth College. I want to thank Michael Berch, Adam Chodorow, Robert Clinton, Linda Demaine, Aaron Fellmouth, Carissa Hessick, Sam Jordan, Mary Sigler, Malcolm Stewart, Judy Stinson, Doug Sylvester, and Steve Vladeck for their helpful comments. Thanks also to Beth Defelice and Kimberly McIntier for their research assistance.

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## INTRODUCTION

In the past eight terms, the Supreme Court has heard eleven cases involving the meaning of 28 U.S.C. § 1331, the federal statute conferring jurisdiction on district courts over cases “arising under” federal law.<sup>1</sup> It is

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1. See *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007) (addressing exception to § 1331 jurisdiction under False Claims Act); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006) (examining § 1331 jurisdiction over private action for reimbursement under federal health insurance plan); *Whitman v. Dep't of Transp.*, 547 U.S. 512 (2006) (considering whether Civil Service Reform Act creates exception to § 1331); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) (considering whether state claim involving interpretation of federal law arose under federal law); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) (determining whether *Rooker-Feldman* doctrine precluded § 1331 jurisdiction where federal claim filed before state claim resolved); *Rasul v. Bush*, 542 U.S. 466 (2004) (examining whether § 1331 conferred jurisdiction over claims filed by non-citizens detained in Guantanamo Bay); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) (resolving whether ERISA completely preempted state claims); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003) (determining whether National Bank Act completely preempted state usury claims); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) (asking whether a compulsory counterclaim confers jurisdiction under § 1331); *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 (2002) (whether Telecommunications Act divests

somewhat surprising that the meaning of the statute is still so unclear as to warrant the Court's repeated intervention. The statute was enacted in 1875, and one would think that after more than a century, the statute's definitional kinks would have been worked out.

One reason for the uncertainty over the statute's meaning is that the Court has treated the statute as creating an outside perimeter of potential jurisdiction within which the Court may develop its own jurisdictional doctrines, instead of precisely defining federal question jurisdiction.<sup>2</sup> Congress enacted the federal question jurisdiction statute in the wake of the Civil War. Its purpose was to vest jurisdiction in the federal courts to the full extent authorized by the clause in Article III that extends the federal judicial power to all cases "arising under" the Constitution, federal law, and treaties. Yet virtually since the statute was enacted, the Court has interpreted the statutory provision more narrowly than the constitutional provision it was designed to implement. Two of the earliest and most well-known restrictions that the Court imposed on the statute are the well-pleaded complaint rule and the requirement that federal law be essential to the plaintiff's claim.

The Court's restrictive readings of the federal question statute were not obviously the result of the Court's efforts to implement the will of Congress. The Court did not base them on a parsing of the statutory text or an examination of other evidence of congressional intent.<sup>3</sup> Instead, the Court has developed these doctrines based principally on its own perception that restricting federal jurisdiction was necessary to avoid overburdening the federal courts. In rendering jurisdictional decisions on this ground, the Court ignored its frequent proclamation that, under Article III of the Constitution, Congress has the power to prescribe the jurisdiction of the inferior federal courts.<sup>4</sup>

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courts of § 1331 jurisdiction); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) (addressing whether Social Security Act bars jurisdiction under § 1331).

2. Commentators have written extensively on the respective roles of Congress and the courts in prescribing federal jurisdiction. For a small sample, see Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); 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 (1992); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

3. The duty of the courts in interpreting jurisdictional statutes is, as with all statutes, to implement Congress's intent as embodied in that statute. See *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 504 (1870) ("The intention of the law-maker constitutes the law."); see also *infra* note 19 and accompanying text.

4. See, e.g., *Bowles v. Russell*, 127 S. Ct. 2360, 2365 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."); *Cary v. Curtis*, 44

The Court's initial willingness to develop jurisdictional doctrines without regard to Congressional intent set the stage for the judiciary to assume the primary role of regulator of federal question jurisdiction. Throughout the years, the Court has developed other doctrines limiting federal question jurisdiction—such as the *Rooker-Feldman* doctrine and the substantiality requirement—which cannot be discerned from the statutory text, the legislative history, or the motivation behind the statute. Congress has done nothing to dispel the notion that the Court may appropriately regulate federal question jurisdiction. The only amendments Congress has made to the federal question statute were to the now-abolished amount-in-controversy requirement.

The Court's development of doctrines untethered from the statute has inserted instability into the law of federal question jurisdiction. Because requirements such as the well-pleaded complaint rule and the essentiality requirement are essentially common-law doctrines, the Court has not been hesitant to modify those doctrines when it concludes that doing so is necessary to align federal question jurisdiction with its own perception of the proper role of the federal judiciary. In fact, throughout the last century, the Court has issued a number of decisions reshaping those doctrines, resulting in a confusing, and occasionally conflicting, body of law. Recent cases continue this trend of establishing the Court as the primary regulator of federal question jurisdiction. In those cases, the Court has continued to create common-law rules controlling federal question jurisdiction, ranging from creating exceptions to the well-pleaded complaint rule to proclaiming that federal jurisdiction depends on whether a federal court thinks the federal issue is sufficiently important to warrant a federal forum.

In reaching those decisions, the Court has reconfirmed its conception of itself as the principal regulator of inferior court jurisdiction. In none of those decisions has the Court based its analysis on the language of the federal question statute or the reasons why Congress conferred that jurisdiction. Instead, the Court has continued to render interpretations based on its own conception of the appropriate role of the federal courts. Yet, at the same time, the Court has continued to pay lip service to the idea that it is the province of Congress, and not the Court, to define the jurisdiction of the inferior courts.

This Article demonstrates the disconnect between what the Court says about congressional power over federal jurisdiction and what the Court actually does in the federal question context. This Article does not seek to

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U.S. (3 How.) 236, 245 (1845) (“[T]he judicial power of the United States . . . is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.”).

prove that a particular method of statutory interpretation is correct; it takes on the more modest task of illustrating that, when it comes to the federal question statute, the Court does not practice what it preaches. It proceeds in four parts. Part I provides an account of the roles of both Congress and the courts in prescribing federal jurisdiction. It explains the basis for the Supreme Court's conclusion that Congress has the power to regulate jurisdiction of the inferior federal courts. It further explains that the stated goal of courts when interpreting jurisdictional statutes, as with any other statute, is to implement congressional intent. Next, Part II discusses the Court's historical failure to implement congressional intent in interpreting the statute prescribing federal question jurisdiction. It recounts how the Court imposed the well-pleaded complaint rule and the essentiality requirement, not as an effort to implement Congress's intent, but based on other concerns regarding judicial workload and potential tension with the states. Then, Part III begins by noting that, although the Court's historical limitations on federal question jurisdiction are untethered to congressional intent, Congress has not overturned those limitations through legislation and indeed appears to have relied on those limitations in removing the amount-in-controversy requirement. These congressional decisions indicate that Congress may have adopted those limitations. Part III then explains that, even assuming Congress has adopted the Court's limitations, the Court's recent decisions continue the trend of interpreting the federal question statute without focusing on congressional intent. It examines several cases from the last few terms in which the Court has substantially altered the federal question doctrine without mentioning whether these new interpretations accord with the jurisdiction envisioned by Congress. Finally, Part IV addresses various arguments advanced by commentators seeking to justify the judiciary's involvement in prescribing jurisdiction, and ultimately concludes that none of those arguments justify the Court's more recent jurisdictional doctrines.

#### I. INSTITUTIONAL ROLES IN PRESCRIBING JURISDICTION

The Supreme Court has consistently held that the Constitution assigns to Congress the responsibility of prescribing the jurisdiction of the federal courts. As a practical matter, however, the courts have a large role in defining the jurisdiction of the federal courts through interpretation of these jurisdictional statutes.

*A. Congress's Role in Defining Jurisdiction*

Article III of the Constitution vests the federal judicial power in the Supreme Court “and in such inferior Courts as the Congress may from time to time ordain and establish”<sup>5</sup> and extends that judicial power to nine different categories of cases and controversies.<sup>6</sup> The “ordain and establish” language makes clear that Article III does not mandate the creation of the inferior federal courts but instead leaves the decision of whether to create such inferior courts to Congress.<sup>7</sup> Entrusting Congress with the power to create inferior federal courts was the result of a compromise at the Constitutional Convention. The members of the Convention agreed on the need for a supreme national court to ensure the primacy and uniform interpretation of the Constitution and federal laws, but there was disagreement on the need for inferior federal courts. Some argued that inferior federal courts were necessary to provide an unbiased forum to ensure the enforcement of federal and constitutional rights.<sup>8</sup> Others contended that review by the Supreme Court would be adequate to achieve these goals. In their view, inferior federal courts were not only unnecessary because state courts were adequate to resolve federal questions in the first instance but also an evil to be avoided because they would displace the state courts.<sup>9</sup> The compromise was to leave it to Congress’s judgment whether to create inferior federal courts to ensure the uniformity and supremacy of federal and constitutional law or to leave enforcement of federal and constitutional rights to the state courts.<sup>10</sup>

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5. U.S. CONST. art. III, § 1.

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

7. See Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 845 (1975) (“Congress is free not only to refrain from establishing a lower federal judiciary, but to change its mind about this matter, or about any of the details of this matter, ‘from Time to Time.’”); Gunther, *supra* note 2, at 914. For an argument that Congress cannot abolish lower courts because they are necessary to enforce federal rights, see Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 513 (1974). But while this argument may represent good policy, it cannot be squared with the language of Article III, which clearly leaves to Congress the decision whether to create inferior federal courts. Moreover, even Eisenberg does not contend that Congress must invest those courts with full Article III jurisdiction; rather he says that restrictions are appropriate to avoid overloading the docket of the inferior courts. See *id.* at 515–16.

8. See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 8 (5th ed. 2003) [hereinafter HART & WECHSLER]; 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., revised ed. 1937). More precisely, these proponents argued that, unless there were inferior courts, there would be an overwhelming number of appeals to the Supreme Court, and that those appeals would often be fruitless because the Court often could do nothing more than to remand to the state court, which would subsequently impose the same judgment. See HART & WECHSLER, *supra*, at 8.

9. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 8, at 124. For a summary of the history, see *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 362 (1959); HART & WECHSLER, *supra* note 8, at 7–8.

10. See Sager, *supra* note 2, at 48 (detailing the history).

Courts and commentators agree that Congress's power to create inferior courts carries with it the power to prescribe the jurisdiction of those courts within the limits of Article III.<sup>11</sup> The Supreme Court has consistently stated that this power to regulate lower court jurisdiction is virtually unlimited and that Congress is not required to invest inferior courts "with all the jurisdiction it was authorized to bestow under Art. III."<sup>12</sup> Instead, Congress may "prescribe" or "withhold" any portion of jurisdiction from the inferior courts that it may create.<sup>13</sup> This conclusion is based both on the view that the greater power to create the inferior federal courts includes the lesser power to limit the authority of those courts<sup>14</sup> and on the

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11. See, e.g., *Bowles v. Russell*, 127 S. Ct. 2360, 2365 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."). Although commentators have agreed that Congress has the power to regulate jurisdiction, there has been some debate on the scope of that power. Some have argued that Congress's power to regulate jurisdiction is virtually unfettered. See, e.g., Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030 (1982); Gunther, *supra* note 2, at 912–13; Hart, *supra* note 2, at 1372. Others have argued to varying degrees, based on the mandatory language in Sections One and Two of Article III that the judicial power "shall be vested" in the federal courts and "shall extend to" the various cases and controversies, that Article III obligates Congress to confer federal jurisdiction over the various cases and controversies in *some* federal court, be it the Supreme or an inferior court. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 211–12 (1985) (arguing that jurisdiction must be extended to those categories of cases prefaced by the word "all"); see also Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984) (arguing that jurisdiction must be extended to all nine categories of cases and controversies in Article III). Given that Congress has conferred on the Supreme Court the full "arising under" jurisdiction authorized by Article III, see 28 U.S.C. §§ 1254, 1257 (2006), the debate is only tangentially related to this Article.

12. *Palmore v. United States*, 411 U.S. 389, 401 (1973). One notable exception is the Court's now-abandoned dicta in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816), that any jurisdiction permitted under Article III not vested in the Supreme Court must be vested in an inferior federal court.

13. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850); see also *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 772–73 (2008) (noting "the authority of Congress under Art. III to set the limits of federal jurisdiction" (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 747 (1979) (Powell, J., dissenting))); *Bowles*, 127 S. Ct. at 2365 ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."); *Palmore*, 411 U.S. at 401 (making the point that the Court's cases state the rule that "if inferior federal courts were created, [Congress was not] required to invest them with all the jurisdiction it was authorized to bestow under Art. III"); *Railroad Co. v. Mississippi*, 102 U.S. 135, 141 (1880) ("[T]he judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct."); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) ("[T]he judicial power of the United States . . . is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."); *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 617 (1838) (recognizing the legislature's power to make "a partial delegation of its judicial powers to the circuit courts").

14. As Justice Curtis stated in his lectures on jurisdiction: "[W]hen [Congress] create[s] a court, they confer upon it its jurisdiction, and, unless they confer the whole jurisdiction which the Constitution enables them to do, those courts must have a lesser jurisdiction." BENJAMIN ROBBINS CURTIS, *JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES* 115 (Boston, Little, Brown & Co. 1880).

recognition that the compromise's solution of leaving the creation of the inferior courts to legislative judgment would make no sense if Congress lacked the discretion to fashion the court system in a way that meets political exigencies.<sup>15</sup> It also reflects the view that because courts are creatures of law and their powers defined by the law their power should be defined by the entity with law-making authority.<sup>16</sup>

Experience confirms Congress's authority over the jurisdiction of the inferior federal courts. Since the creation of the federal judiciary, Congress has consistently regulated the jurisdiction of the inferior courts. The first Congress itself divided federal jurisdiction between the circuit and the district courts.<sup>17</sup> Since that time, Congress has reapportioned federal jurisdiction among the lower courts on a number of occasions.<sup>18</sup> Under today's system, Congress has divided jurisdiction among the district courts, the court of international trade, the circuit courts, and other courts of limited jurisdiction, and countless opinions confirm that these courts may hear only those cases that fall within their statutory jurisdiction.

### *B. The Court's Role in Defining Jurisdiction*

Although the Court has recognized that the Constitution assigns Congress the role of defining inferior federal jurisdiction, as a practical matter the courts have played an equally prominent role in shaping federal jurisdiction. That is because courts must interpret jurisdictional statutes in order to determine whether they have jurisdiction over a particular case.

As the courts have said time and again, the touchstone of statutory interpretation is to give effect to the intent of the legislature.<sup>19</sup> Under the

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15. See Bator, *supra* note 11, at 1031 ("It would make nonsense of that notion [that the existence of lower courts be a political determination] to hold that the only power to be exercised is the all-or-nothing power to decide whether *none* or *all* of the cases to which the federal judicial power extends need the haven of a lower federal court."); Sager, *supra* note 2, at 35 (arguing that mandatory jurisdiction in the inferior courts "contradict[s] the constitutional compromise that article III seems so clearly to reach").

16. See Sager, *supra* note 2, at 22.

17. Act of Sept. 24, 1789, § 9, 1 Stat. 73, 76-77 (prescribing district court jurisdiction); *id.* § 11, 1 Stat. 73, 78-80 (prescribing circuit court jurisdiction).

18. See, e.g., Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, § 2, 26 Stat. 826, 826 (creating circuit courts of appeals and establishing those courts' appellate jurisdiction).

19. See *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (explaining that the point of canons of statutory interpretation is "to help judges determine the Legislature's intent as embodied in particular statutory language"); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984))); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) ("The key to the inquiry is the intent of the Legislature."); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 504 (1870) ("The intention of the law-maker constitutes the law."); see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 181 (Carolina Academic Press 1987) (1833). ("The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and intentions of the parties."). There are, of course, other



Constitution, Congress, not the courts, has the power to legislate.<sup>20</sup> The role of the judiciary is “to declare the law” as enacted by Congress.<sup>21</sup> Even in those cases presenting situations that Congress did not specifically contemplate in enacting the statute, the judicial task is to ascertain—to the extent possible—what Congress’s intent would have been had Congress considered the situation.<sup>22</sup> As Hamilton explained in Federalist 78, when a court interprets a law in a way that clearly departs from Congress’s intent as expressed in a statute, the court effectively appropriates the role of the legislature.<sup>23</sup> The judiciary may refuse to implement Congress’s legislative judgment expressed in a statute only when it conflicts with the Constitution.

The methods by which courts determine the intent of the legislature are well settled. Courts parse the language of the statute<sup>24</sup> and consider external evidence such as legislative history,<sup>25</sup> though there is some disa-

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methods of statutory interpretation. *See generally* Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389 (2005) (describing the various methods of interpretation). Some have argued that the goal of interpretation is to expand the purpose and spirit of the legislation. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1380 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Others have argued that the statutes should be interpreted to accord with current policy values. *See, e.g.*, GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 2 (1982) (arguing that judges should refuse to enforce statutes that are not in accord with current values). But as Judge Easterbrook has noted, judges have not followed the methods but have “disclaim[ed] entitlement to rely on personal, and perhaps idiosyncratic, views of wise policy.” Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 3 (2004).

20. U.S. CONST. art. I, § 1.

21. *The Harrisburg*, 119 U.S. 199, 214 (1886); *see also* *Salinas v. United States*, 522 U.S. 52, 60 (1997) (stating that the judiciary cannot “rewrite language enacted by the legislature,” for to do so “would trench upon the legislative powers vested in Congress” (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)) (citations omitted)); *United States v. Rutherford*, 442 U.S. 544, 555 (1979) (“Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.”).

22. As the Court has put it, “[O]ur duty as a Court is to construe [an ambiguous word] as our judgment instructs us . . . the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind.” *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 388 (1948); *see also* *Burnet v. Guggenheim*, 288 U.S. 280, 285 (1933) (noting that it is proper for a court to decide “[w]hich choice is it the more likely that Congress would have made” if it had directly dealt with the issue); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 15 (1921) (“[T]he difficulties of so-called interpretation arise . . . when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.”) (internal quotation omitted).

23. *See* THE FEDERALIST No. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”).

24. *See, e.g.*, *Knight v. Comm’r*, 128 S. Ct. 782, 787 (2008) (“‘We start, as always, with the language of the statute.’” (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000))). Courts resolve ambiguities in the text through canons of construction, the purpose of which are “to help judges determine the Legislature’s intent as embodied in particular statutory language.” *Chickasaw Nation*, 534 U.S. at 94; *see also* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 45:5, at 28–29 (7th ed. 2007).

25. *See, e.g.*, HENRY J. FRIENDLY, *BENCHMARKS* 200 (1967) (discussing the use of “extraneous

greement on what external evidence is appropriate.<sup>26</sup> Nothing in the Constitution suggests that jurisdictional statutes should be treated differently from other statutes, and the Supreme Court accordingly has explained that these “[o]rdinary principles of statutory construction” apply equally to jurisdictional statutes.<sup>27</sup>

There is reason to think that careful adherence to congressional intent is more important in the interpretation of jurisdictional statutes than other statutes. Jurisdiction defines the power of the courts. A court that lacks jurisdiction over a case has no power to hear that case;<sup>28</sup> if a court acts without jurisdiction, it acts “ultra vires.”<sup>29</sup> Through an overly broad construction of a jurisdictional statute, a court may assume power that it otherwise does not have.<sup>30</sup>

Faithful interpretation of statutes prescribing inferior federal court jurisdiction also promotes underlying principles of federalism. Federal jurisdiction not only defines the power of the federal courts, but also impacts the state courts. Each grant of federal jurisdiction reduces state courts’ power to resolve disputes and develop law.<sup>31</sup> Conversely, each contraction of federal jurisdiction foists more cases into state court, which increases the states’ costs.<sup>32</sup> Concerns of this sort prompted the decision to place the power to define the jurisdiction of the inferior courts in the hands of Congress,<sup>33</sup> where the states could retain some control over federal jurisdiction because of their representation in Congress.

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documentation” and “external circumstances” in interpreting statutes).

26. Justice Scalia, for example, will consider the whole statutory structure, *see, e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment), but not legislative history, *see, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment). Other Justices, such as Justice Stevens, will consider legislative history. *See, e.g.*, *Conroy*, 507 U.S. at 518 n.12.

27. *E.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 577 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 119 Stat. 2680 (invoking the “normal rules of construction” in interpreting a jurisdictional statute) (internal quotation marks omitted); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005).

28. *See, e.g.*, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”); *accord Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998).

29. *Steel Co.*, 523 U.S. at 101–02.

30. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 772–73 (2008) (“[T]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation” (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 747 (1979) (Powell, J., dissenting))).

31. Justice Benjamin R. Curtis, in 1864, noted that “questions of jurisdiction were questions of power as between the United States and the several states.” *Proceedings of the U.S. Circuit Court for the First Circuit at the Time of Chief Justice Taney’s Death*, 30 F. Cas. 1341, 1343 (1864). The conferral of federal jurisdiction reduces state power even when states retain concurrent jurisdiction because the states no longer have the exclusive power over those claims.

32. State courts do not have the option to decline to hear federal cases unless Congress directs otherwise. *See Howlett v. Rose*, 496 U.S. 356, 371 (1990).

33. *See supra* notes 8–10 and accompanying text.

In addition to promoting separation of powers and federalism, the faithful interpretation of jurisdictional statutes is essential to our system of checks and balances. Because of concerns over political influence on the judiciary, the Constitution minimizes Congress's ability to interfere with the judiciary. Congressional control over jurisdiction is one of the few checks that Congress has on the judiciary. The threat of removing jurisdiction may induce a court to be more scrupulous in its constitutional and statutory rulings.<sup>34</sup> The force of that check, however, depends on the judiciary's faithful implementation of the jurisdictional limits prescribed by Congress. A court that defines its own power poses a threat to the liberties that the system of divided government and checks and balances was designed to protect.<sup>35</sup>

At the same time, jurisdictional statutes present a particular temptation for courts to disregard legislative intent because interpreting and applying those statutes create a conflict of interest for courts. In deciding its jurisdiction, a court determines the scope of its own power.<sup>36</sup> This allows courts to expand their own jurisdiction in order to hear cases in which they have an interest. It also gives the court control of its workload; an overworked court may limit its jurisdiction to reduce the burden of additional cases.<sup>37</sup> Jurisdictional control also facilitates the judiciary's ability to achieve or avoid particular substantive outcomes: the assumption of jurisdiction is necessary to award relief, and the denial of jurisdiction is functionally a dismissal.

The federal district courts and the circuit courts most directly face the temptations to manipulate the jurisdiction of the inferior courts, given that they are inferior courts. But the Supreme Court faces its own temptations as well. Like the lower courts, the Supreme Court can manipulate jurisdiction to achieve particular outcomes,<sup>38</sup> or to avoid awarding relief when it

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34. Professor Sager criticizes the concept of control over jurisdiction as a check, arguing that jurisdiction stripping is costly and Congress can achieve the same ends through substantive legislation. See Sager, *supra* note 2, at 39–40. But the threat of the deprivation of power may be more persuasive to a judge than merely telling him what to do.

35. See Black, *supra* note 7, at 846 (arguing that congressional conferral of jurisdiction “is the rock on which rests the legitimacy of the judicial work in a democracy”); accord Sager, *supra* note 2, at 22 (“From the elemental, legitimating quality of jurisdiction it follows that . . . [a court] cannot generate its own jurisdiction.”).

36. See Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 53 (2007).

37. See *infra* Part II (explaining that workload concerns have led to overly restrictive interpretations of the statute conferring federal question jurisdiction).

38. One example is *Roe v. Wade*, in which the Court expanded the “capable of repetition yet avoiding review” exception to mootness. *Roe v. Wade*, 410 U.S. 113, 125 (1973). Traditionally, the exception applies only when there is a reasonable chance that the plaintiff will experience the challenged conduct at the hands of the defendant. See *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (describing the doctrine as limited to where “there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again”) (internal quotation marks omitted). But in *Roe* the Court applied the exception without regard to whether the issue would arise again between the same

feels that the remedy is too expensive or intrusive,<sup>39</sup> or to avoid (or undo) a ruling on the merits because, for example, the issue is too contentious.<sup>40</sup> The Court may also manipulate jurisdiction to control its workload and the workload of the inferior courts. Although the Supreme Court has jurisdiction to review decisions rendered by the state courts as well as those of the federal courts, the scope of jurisdiction of the inferior federal courts has the most direct impact on the workload of the Supreme Court. On the one hand, broader federal jurisdiction may decrease the need for the Supreme Court's review to resolve conflicts in the law. For reasons ranging from experience with federal law to screening within the appointments process, federal courts may be more likely than state courts to agree on the resolution of questions of federal law.<sup>41</sup> On the other hand, overly broad exercise of jurisdiction in the lower courts may increase the need for Supreme Court review because the excessive work results in less well-reasoned opinions. In addition, as the top of the federal judicial pyramid, the Supreme Court has an interest in ensuring that the federal judiciary is functioning properly.<sup>42</sup> As reflected by the Chief Justice's annual report, the Court is well aware that controls over jurisdiction are one way to accomplish this goal.<sup>43</sup>

## II. FEDERAL QUESTION JURISDICTION

Throughout its history, the Supreme Court has for the most part focused on legislative intent in interpreting jurisdictional statutes.<sup>44</sup> But one

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parties. *See Roe*, 410 U.S. at 125; *see also Honig v. Doe*, 484 U.S. 305, 335–36 (1988) (Scalia, J., dissenting) (describing *Roe* as “dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur *between the defendant and the other members of the public at large*”).

39. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 648 (2006) (arguing that courts develop justiciability doctrines in part to avoid imposing overly intrusive remedies).

40. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (vacating the circuit court's judgment declaring the pledge of allegiance unconstitutional for lack of jurisdiction).

41. *See* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 70–71 (2005). Historically, the Court's workload concern was much more directly linked to the jurisdiction of the lower courts because of the Court's mandatory jurisdiction over appeals from the federal courts. *See infra* note 61 and accompanying text.

42. The Court's control over the federal judiciary is also reflected in the Court's inherent supervisory power over the lower courts. *See generally* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006).

43. *See* WILLIAM H. REHNQUIST, THE THIRD BRANCH, THE 1999 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2–3 (2000), <http://www.uscourts.gov/ttb/jan00ttb/2jan2000.html> (suggesting that restricting jurisdiction could relieve docket backlogs).

44. The instances of the Court doing so even within the past few terms are too numerous to list, but illustrative examples are *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), where the Court closely considered the text of the supplemental jurisdiction statute to determine whether it authorizes a federal court sitting in diversity to exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirement, and *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006), where the Court considered the text of 28

particularly egregious exception comes from the statute conferring federal question jurisdiction.<sup>45</sup> In interpreting the federal question statute, the Court has routinely disregarded both the language of the statute and extrinsic evidence indicating Congress's intent. Instead, the Court has based its interpretation of the statute on its own conclusions about the proper role of the federal courts and the appropriate allocation of the resources of the federal courts.<sup>46</sup> Therefore, the practical consequence has been that, despite purporting to implement the intent of Congress, the Court has consistently interpreted the statute without regard to—and indeed in ways that conflict with—congressional intent.

### A. *The Enactment of Federal Question Jurisdiction*

Article III extends the federal judicial power to “all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties.”<sup>47</sup> The federal question statute virtually tracks the language of Article III. First enacted in 1875, the statute vested lower federal courts with original jurisdiction of all civil actions “arising under” the Constitution, laws, or treaties of the United States where the amount in controversy exceeded five hundred dollars.<sup>48</sup> The deliberate repetition of the language from Article III in the federal question statute strongly suggests that Congress meant to confer on the federal district courts the full “arising under” jurisdiction permitted by the Constitution, so long as the subject of dispute exceeded five hundred dollars.<sup>49</sup> Further support for that conclusion is the

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U.S.C. § 1447 to determine whether there is appellate jurisdiction to review orders remanding cases to state court.

45. 28 U.S.C. § 1331 (2006).

46. *See, e.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005) (relying on the “‘common-sense accommodation of judgment to [the] kaleidoscopic situations’” (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936))).

47. U.S. CONST. art. III, § 2, cl. 1.

48. Judiciary Act of Mar. 3, 1875, § 1, 18 Stat. 470. The statute conferred on circuit courts, which at that time functioned as courts of both original and appellate jurisdiction, original jurisdiction over “all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority,” subject to an amount-in-controversy requirement of five hundred dollars. Section 2 of the Act authorized the removal from state to federal court of civil actions arising under federal law. Since that time, the amount-in-controversy requirement has been abolished, but the remaining language has survived virtually unchanged.

49. *See Ames v. Kansas*, 111 U.S. 449, 471 (1884) (“The language of the act of 1875, in this particular, is identical with that of the constitution, and the evident purpose of congress was to make the original jurisdiction of the circuit courts co-extensive with the judicial power in all cases where the supreme court had not already been invested by law with exclusive cognizance.”). Some commentators have resisted this argument on the ground that the “identity of the words does not . . . require, on that score alone, an identical interpretation.” Harry Shulman & Edward C. Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393, 405 n.47 (1936). But there is much more than mere identity of words at work. Congress deliberately phrased the statute in the same terms as Article III. That suggests that Congress meant to give the statute the same meaning as Article III, and as noted *infra* note 57 and accompanying text, the legislative history and circumstances of the enactment sup-

fact that the federal question statute and Article III are part of the same jurisdictional scheme, and the federal question statute was drafted with Article III in mind.<sup>50</sup>

The legislative history of the 1875 Act, although sparse, confirms the intended breadth of the jurisdictional grant. The principal drafter of the provision, Senator Carpenter, stated, "This bill gives precisely the power which the Constitution confers."<sup>51</sup> The circumstances surrounding the enactment of the federal question statute also indicate that Congress intended to confer expansive jurisdiction on the federal district courts. For the first century after the founding, inferior federal courts did not have general federal question jurisdiction, aside from a brief period in the early nineteenth century.<sup>52</sup> Rather, state courts resolved questions of federal and constitutional law in the first instance, subject to Supreme Court review only in those instances where the state court denied a claim of federal or constitutional right.<sup>53</sup> The 1875 Act was one of a number of acts expanding federal jurisdiction that were prompted by the perception in the wake of the Civil War that state courts could no longer be trusted to vindicate federal or constitutional rights, and that federal district courts should be the principal guardians of those rights.<sup>54</sup>

For its part, the Supreme Court initially acknowledged the breadth of jurisdiction the 1875 Act intended to confer. It proclaimed that it was

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port that conclusion. The amount-in-controversy requirement in the 1875 Act does not alter the scope of issues falling within the federal courts' jurisdiction. The purpose of the requirement was to preserve federal courts for those disputes where the stakes were large.

50. This conclusion, of course, is an example of the canon of statutory construction that laws with similar language should be interpreted to have similar meanings, especially where the two laws are part of the same scheme, and one was drafted with the other in mind. *See* *Dep't of Energy v. Ohio*, 503 U.S. 607, 626 (1992); *Sec. Indus. Ass'n v. Bd. of Governors*, 468 U.S. 207, 219 (1984); *Agosto v. INS*, 436 U.S. 748, 754 (1978); *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam) (similarity of language in two statutes is a "strong indication that [they] should be interpreted *pari passu*"); *Merrill v. Fahs*, 324 U.S. 308, 313 (1945) (stating that identical words in different statutes should be given identical meaning "where obvious reasons do not compel divergent treatment"). To be sure, statutory provisions may be subject to different methods of interpretation than constitutional provisions. *See* Bassett, *supra* note 36, at 56 n.22. But the different methods do not result in different interpretations in this context, since the federal question statute was intended to confer the full jurisdiction authorized by Article III's arising under provision, subject only to the amount-in-controversy requirement.

51. 2 CONG. REC. 4,987 (1874); *see also* Ray Forrester, *The Nature of a "Federal Question,"* 16 TUL. L. REV. 362, 374-75 (1942) (recounting legislative history).

52. *See* Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92 (conferring jurisdiction over suits "arising under the constitution and laws of the United States, and treaties . . . where the matter in dispute shall amount to four hundred dollars"), *repealed by* Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

53. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85.

54. *See* G. Merle Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17, 28 (1947) (noting that the federal question Act was to overcome the "threat of local bias" resulting from the "sectional distrust" caused by the Civil War). Others statutes enacted for similar reasons in the wake of the Civil War include the Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, which created federal review of state convictions, and the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, which created actions to recover for violations of civil rights.

“manifest” that Congress’s intent in enacting the 1875 Act was “to vest in the [lower] courts of the United States full and effectual jurisdiction, as contemplated by the constitution.”<sup>55</sup>

### *B. Judicial Interpretations of Federal Question Jurisdiction*

The Court’s efforts to give effect to Congress’s intent in the federal question statute were short lived. Beginning in the 1880s, the Court ceased interpreting the “arising under” language in the federal question statute as identical to the same language in Article III.<sup>56</sup> The Court has consistently interpreted the arising under language in Article III extremely broadly. The seminal case is *Osborn v. Bank of the United States*.<sup>57</sup> There, in holding that suits against a bank chartered by the United States arose under federal law for purposes of Article III, the Court explained that Article III extends the judicial power to any suit where federal law merely forms an “ingredient” of the case.<sup>58</sup> Under *Osborn*, the federal issue need not be essential to the case, nor must it be controverted by the parties. All that is necessary for a case to arise under federal law for purposes of Article III is that there be some issue of federal law that may potentially be raised.<sup>59</sup>

By contrast, starting in the late nineteenth century, the Court interpreted the “arising under” language in the federal question statute much more narrowly. The principal reason the Court did so was the belief that the expansion of jurisdiction threatened to overwhelm the already over-

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55. *In re Hohorst*, 150 U.S. 653, 659 (1893); *see also* *Ames v. Kansas*, 111 U.S. 449, 471 (1884) (“The language of the act of 1875, in this particular, is identical with that of the constitution, and the evident purpose of congress was to make the original jurisdiction of the circuit courts co-extensive with the judicial power in all cases where the supreme court had not already been invested by law with exclusive cognizance.”). Moreover, the Court applied precedents construing the “arising under” language of Article III in interpreting the “arising under” language of the statute. *See* *Kan. Pac. Ry. Co. v. Atchison, T. & S.F.R. Co.*, 112 U.S. 414, 416 (1884). Likewise, in several cases, the Court relied on constitutional cases to interpret the “arising under” language in the removal statute. *See, e.g.,* *Union Pac. Ry. Co. v. Myers*, 115 U.S. 1, 11 (1885), *superseded by statute*, Act of Feb. 13, 1925, ch. 229, § 12, 43 Stat. 941 (codified as amended at 28 U.S.C. § 1349 (2006)), *as recognized in* *Am. Nat’l Red Cross v. S.G.*, 505 U.S. 247, 251 (1992); *Starin v. City of N.Y.*, 115 U.S. 248, 257 (1885); *R.R. Co. v. Miss.*, 102 U.S. 135, 140 (1880).

56. *See, e.g.,* *Metcalf v. City of Watertown*, 128 U.S. 586, 589 (1888) (dismissing because claim did not raise an issue of federal law); Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 160–61 (1953). Ironically, in interpreting other jurisdictional statutes that use the “arising under” language of § 1331, the Court has pointed to the identity of language to hold that those other jurisdictional statutes incorporate the same narrow tests as those applied to § 1331. *See, e.g.,* *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002).

57. 22 U.S. (9 Wheat.) 738 (1824).

58. *See id.* at 823.

59. *See id.* at 817–18; *see also* *Am. Nat’l Red Cross v. S.G.*, 505 U.S. 247, 264 (1992) (reaffirming “the breadth of [*Osborn*’s] holding”); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492 (1983) (“*Osborn* thus reflects a broad conception of ‘arising under’ jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law.”).

burdened federal courts.<sup>60</sup> Limiting federal question jurisdiction would also reduce the overloaded docket of the Supreme Court, which at the time had mandatory jurisdiction over appeals from inferior federal courts.<sup>61</sup> Although the litigants could raise their federal arguments in state court, the Court had jurisdiction to review only those state court judgments that *denied* a federal claim or defense; the Court had no jurisdiction to review a state court judgment that upheld a federal claim or defense.<sup>62</sup> Shuttling cases to state court thus presented the possibility of substantially reducing the Court's docket over those cases.

One way the Court reduced federal question jurisdiction was through the well-pleaded complaint rule. Under that rule, a suit arises under federal law for purposes of federal question jurisdiction only if the plaintiff's claim rests on federal law.<sup>63</sup> Federal jurisdiction does not exist when a suit will inevitably give rise to a potential federal defense, as in the case where federal law clearly preempts the plaintiff's state law claim, or even when a potential federal question is clear from the face of the complaint, such as when a complaint raises a federal response to an anticipated defense.<sup>64</sup>

The Court announced the well-pleaded complaint rule in *Tennessee v. Union & Planters' Bank*.<sup>65</sup> There, the Court denied jurisdiction where the plaintiff's complaint had anticipated a federal defense.<sup>66</sup> Over Justice Harlan's dissent, the Court stated that a case arises under federal law only if federal law "appeared in the plaintiff's statement of his own claim."<sup>67</sup>

Of course, nothing in the text or legislative history of the federal question statute supports the limits imposed on jurisdiction by the well-pleaded complaint rule. The Court in *Union* did not rest its holding on a parsing of the phrase "arising under" or an examination of the intent of Congress. Instead, the Court stated that the rule had been established in the prior case of *Metcalf v. Watertown*.<sup>68</sup> But *Metcalf* held no such thing. *Metcalf*

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60. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 77-78 (photo. reprint 1972) (1928); Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537, 546 (2007).

61. See FRANKFURTER & LANDIS, *supra* note 60, at 86 (noting that the Court's appellate docket in 1884 had 1315 cases and by 1890 had reached the "absurd total of 1800").

62. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85. It was not until 1914 that Congress granted the Supreme Court jurisdiction over all state cases presenting federal issues. See Act of Dec. 23, 1914, ch. 2, 38 Stat. 790; see also Daniel J. Meltzer, *The History and the Structure of Article III*, 138 U. PA. L. REV. 1569, 1585-93 (1990) (recounting the history).

63. See *Metcalf v. City of Watertown*, 128 U.S. 586, 589 (1888); Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309, 309 (2007).

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

65. 152 U.S. 454 (1894).

66. See *id.* at 464.

67. *Id.* at 460, 464 ("[B]y the settled law of this court, as appears from the decisions above cited, a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws.")

68. 128 U.S. 586 (1888).



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denied jurisdiction because it was not apparent that the case involved an issue of federal law; it did not hold that the statute conferred jurisdiction only when the plaintiff's action rests on federal law.<sup>69</sup>

Since *Union*, the Court has not sought to defend the well-pleaded complaint rule on the ground that it was intended by Congress. Instead, the Court has defended the rule on two other grounds: (1) limiting federal jurisdiction was necessary to avoid overburdening the federal courts, and (2) less federal jurisdiction would reduce the conflicts with the states that would result from federal courts passing on state laws.<sup>70</sup>

The well-pleaded complaint rule is not the only way in which the Court has limited federal question jurisdiction. Recall that a case arises under federal law for Article III purposes if federal law merely forms an ingredient of the case.<sup>71</sup> Although the Court initially adopted that ingredient test in interpreting the federal question statute,<sup>72</sup> the Court soon perceived that the theory would result in the overburdening of the federal courts. As the Court explained in *Shulthis v. McDougal*,<sup>73</sup> if the federal question statute provided jurisdiction whenever federal law formed an ingredient of the case, the federal courts would have jurisdiction over all disputes over title to land in the western states because all those titles originated from federal grants.<sup>74</sup> Placing these types of cases in state courts not only relieved the burden from the federal district courts, but also reduced some of the pressure on the Supreme Court because of the possibili-

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69. *Id.* at 588–90; see also Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CAL. L. REV. 1515, 1554 n.241 (2007).

70. See, e.g., *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9–10 (1983) (“[T]he ‘well-pleaded complaint rule’ . . . avoid[s] more-or-less automatically a number of potentially serious federal-state conflicts.”); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673–74 (1950) (discussing the practical conclusion that extending federal jurisdiction so broadly would “unduly swell the volume of [federal] litigation” and often put the federal courts in the awkward position of trying to interpret state law). Commentators have given various other justifications, for example that the rule avoids a waste of resources by having jurisdictional determinations made at the earliest possible stage of the litigation. See Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1783 (1998) (“The well-pleaded complaint rule also serves the essential administrative function of establishing the existence of a federal question at the onset of litigation.”). But that cost consideration is not an appropriate basis from which to interpret the statute in an artificially narrow way. Congress is the appropriate body to determine whether delaying jurisdictional determinations until the receipt of the answer, or even later, is worth the costs.

71. See *supra* notes 56–59 and accompanying text.

72. See, e.g., *Union Pac. Ry. Co. v. Myers*, 115 U.S. 1, 11–14 (1885), *superseded by statute*, Act of Feb. 13, 1925, ch. 229, § 12, 43 Stat. 941 (codified as amended at 28 U.S.C. § 1349 (2006)), *as recognized in* *Am. Nat’l Red Cross v. S.G.*, 505 U.S. 247, 251 (1992) (citing *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 817–28 (1824)) (reasoning that, where Congress chartered a corporation, its capacity to act would always be a question of federal law that formed an ingredient of the claim, and that a judicial determination on that law adverse to the corporation would result in its losing the case).

73. 225 U.S. 561 (1912).

74. See *id.* at 569–70 (“This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws.”).

ty that the underlying federal issue might not be raised or adversely decided in cases filed in the state courts.

Instead of adopting the ingredient test, the Court held that a case arises under federal law only if the resolution of the plaintiff's claim requires interpretation of federal law.<sup>75</sup> The Court took this requirement to its extreme in *Shoshone Mining Co. v. Rutter*.<sup>76</sup> There, the Court denied jurisdiction where a plaintiff had filed a claim created by a federal mining statute because the federal law instructed courts to apply local customs in resolving the claims.<sup>77</sup> The Court declared that the mere fact that a suit is authorized by federal law is "not in and of itself sufficient to vest jurisdiction in the Federal courts."<sup>78</sup> Instead, the Court said, a suit arises under federal law only if it involves the construction of the federal laws.<sup>79</sup> The *Shoshone* Court did not base its conclusion on the language of the federal question statute or on an examination of whether exercising jurisdiction would further Congress's intent.<sup>80</sup> Instead, the Court focused on the breadth of jurisdiction that would result if jurisdiction were found.<sup>81</sup>

In creating limitations based on workload and tension with the states, the Court was not exercising its power of statutory interpretation; rather, these restrictive jurisdictional doctrines are judicially created limitations, a sort of jurisdictional common law, based on the Court's own assessment of the appropriate role of the federal courts. As the Court itself has explained, statutory interpretation is an examination into Congress's intent, not the wisdom of that intent.<sup>82</sup> Congress did not express any desire to limit federal jurisdiction based on these concerns. Indeed, the limitations

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75. See, e.g., *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 690 (2006).

76. 177 U.S. 505 (1900).

77. See *id.* at 507.

78. *Id.* at 513.

79. See *id.* at 510.

80. That is because those considerations did not support the conclusion. A case that is brought under federal law is indisputably a case arising under federal law. See Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 225 (1948) (stating that the "business" of the federal courts "is the vindication of the rights conferred by federal law").

81. See *Shoshone Mining Co.*, 177 U.S. at 507.

82. See, e.g., *United States v. First Nat'l Bank of Detroit, Minn.*, 234 U.S. 245, 260 (1914) ("The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws."); see also *United States v. Rutherford*, 442 U.S. 544, 555 (1979) ("Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy."); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874) ("Our province is to decide what the law is, not to declare what it should be. . . . If the law is wrong, it ought to be changed; but the power for that is not with us."). To be sure, a court may interpret a statute to avoid an absurd result, on the theory that the legislature surely does not intend the absurd. See *Logan v. United States*, 128 S. Ct. 475, 484 (2007) ("Statutory terms, we have held, may be interpreted against their literal meaning where the words 'could not conceivably have been intended to apply' to the case at hand." (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (L. Hand, J.))). But the possibility of overwork and passing on state laws hardly qualifies under this doctrine.

on jurisdiction forcing many federal issues into the state courts<sup>83</sup> run contrary to the reasons Congress vested federal question jurisdiction in the inferior federal courts—to promote uniform interpretation and application of federal law and to provide a forum that is amenable to federal laws.<sup>84</sup>

While the Court has consistently adhered to the well-pleaded complaint rule and the requirement that the resolution of the cause of action directly involve a question of federal law, it has been less consistent in its application of a third judicially created doctrine.<sup>85</sup> This doctrine presents the converse of the question presented in *Shoshone*—whether federal jurisdiction is appropriate over a claim that turns on federal law but where state law provides the cause of action. In *American Well Works Co. v. Layne & Bowler Co.*, the Court held, without inquiry into congressional intent, that such claims do not arise under federal law, proclaiming that a “suit arises under the law that creates the cause of action.”<sup>86</sup> Thus, in that case, the Court held that a state law libel suit, in which the plaintiff alleged that his right to a patent had been falsely defamed, did not arise under federal law, even though the plaintiff’s right to relief depended on whether the patent was valid under federal law.<sup>87</sup>

Since deciding that case, the Court has waffled on the correctness of the *American Well Works* requirement. In some cases, such as *Moore v. Chesapeake & Ohio Railway*,<sup>88</sup> the Court has reaffirmed the *American Well Works* standard.<sup>89</sup> In other cases, however, the Court has rejected the

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83. See, e.g., William Cohen, *The Broken Compass: The Requirement That a Case Arise “Directly” Under Federal Law*, 115 U. PA. L. REV. 890, 894 (1967) (criticizing the well-pleaded complaint rule as undermining the reason for federal question jurisdiction); Pushaw, *supra* note 69, at 1557–58 (arguing that cases like *Shoshone* are contrary to Congress’s decision to grant federal jurisdiction over federal rights).

84. See *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 826–27 & n.6 (1986) (Brennan, J., dissenting); Bergman, *supra* note 54, at 30 (stating that the 1875 Act “was brought about largely, if not entirely, in order to provide an impartial forum for those cases in which the federal question might be prejudiced in state courts”); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 83–84 (“The primary reason for adding this jurisdiction in 1875 is said to have been the desire for uniformity in the interpretation and application of federal law.”); see also *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005) (stating that federal jurisdiction is appropriate when “resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues” is needed).

85. The three limitations identified in this part are not the only limitations that the Court has imposed on federal question jurisdiction. For example, another limitation is that the federal question presented by the plaintiff’s claim must be non-frivolous. See, e.g., *Hagens v. Lavine*, 415 U.S. 528, 536–37 (1974).

86. 241 U.S. 257, 260 (1916). Despite this statement, *American Well Works* did not overrule *Shoshone*. *American Well Works* merely held that a state-law cause of action did not arise under federal law; it did not address whether a federal cause of action was sufficient by itself to confer federal question jurisdiction.

87. *Id.*

88. 291 U.S. 205 (1934).

89. In *Moore v. Chesapeake & Ohio Railway*, an employee claimed that his employer was liable under state law for violating the Federal Safety Act. Although acknowledging that the case arose under federal law so far as Article III was concerned, the Court held that the claim did not fall within federal question jurisdiction because the federal law did not provide a cause of action, or as the Court put it,

standard. In *Smith v. Kansas City Title & Trust Co.*,<sup>90</sup> for example, the Court held that a suit brought under state law to prevent a corporation from investing in federal bonds arose under federal law because the plaintiff's right to relief depended on the constitutionality of the federal statute under which the bonds were issued. In a direct repudiation of *American Well Works*, the Court stated that a claim arises under federal law if "the right to relief depends upon the construction or application of the Constitution or laws of the United States."<sup>91</sup>

### III. RECENT CASES AND THE CONSIDERATION OF CONGRESSIONAL INTENT

#### A. Congressional Action

Although the Court's doctrines cannot be said to implement the federal question statute faithfully, Congress has not superseded those doctrines. Congress has amended the federal question statute a number of times—most recently in 1980, when it removed the amount-in-controversy requirement<sup>92</sup>—but none of those amendments have addressed the well-pleaded complaint rule or the requirement that the claim turn directly on the interpretation of federal law, nor have they otherwise modified the "arising under" language upon which those doctrines are based.<sup>93</sup>

As courts have often recognized, when Congress reenacts a statute that has been consistently given the same judicial interpretation, that reenactment reflects an intent to preserve the judicial interpretation.<sup>94</sup> Since the

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"did not attempt to lay down rules governing actions for enforcing" the federal rights. *Id.* at 214–15.

90. 255 U.S. 180 (1921).

91. *Id.* at 199; *see also* *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936) ("[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.")

92. *See* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369.

93. *See, e.g., id.* (abolishing amount-in-controversy requirement); Act of Oct. 21, 1976, Pub. L. No. 94-574, sec. 703, § 2, 90 Stat. 2721 (abolishing amount-in-controversy requirement for suits against United States); Act of July 25, 1958, Pub. L. No. 85-554, sec. 1, § 1331, 72 Stat. 415 (increasing amount-in-controversy requirement to ten thousand dollars); Act of June 25, 1948, Pub. L. No. 773, § 1331, 62 Stat. 869, 930 (retaining three thousand dollars amount-in-controversy requirement); Act of Mar. 3, 1911, Pub. L. No. 475, § 24, 36 Stat. 1087, 1091 (increasing amount-in-controversy requirement to three thousand dollars); Act of Aug. 13, 1888, ch. 866, sec. 1, § 1, 25 Stat. 433 (retaining two thousand dollars amount-in-controversy requirement); Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552 (increasing amount-in-controversy requirement to two thousand dollars); Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

94. *See, e.g.,* *Pierce v. Underwood*, 487 U.S. 552, 567 (1988) (stating that when Congress reenacts a statute that has "been given a consistent judicial interpretation," that "reenactment . . . generally includes the settled judicial interpretation"); *United States v. Cerecedo Hermanos y Compañía*, 209 U.S. 337, 339 (1908). Although the doctrine is ordinarily invoked in the context of reenactment, reenactment is not necessary. Courts have held that Congress is assumed to have ratified a judicial interpretation of a statute if Congress fails, for a prolonged period of time, to supersede the interpretation by amending the statute. *See, e.g.,* *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940). The Court explicitly relied on this doctrine to hold that Congress has adopted the domestic relations excep-

1890s, the Court has consistently reaffirmed the well-pleaded complaint rule and the requirement that a claim turn on the interpretation of federal law. Congress's consistent silence on these issues in subsequent reenactments of the federal question statute arguably reflects the legislators' satisfaction with the Court's interpretations.

One might challenge this theory of congressional acquiescence on the ground that the failure to alter a provision might reflect any number of things other than an intent to codify the judicial interpretation.<sup>95</sup> But the theory undoubtedly makes sense when, as is the case with federal question jurisdiction, Congress has relied on the Court's interpretation in subsequent legislation.<sup>96</sup> That appears to be the case with respect to the Court's restrictive interpretations of federal question jurisdiction. The Senate and House Committee reports accompanying the 1980 Act endorsed the removal of the amount-in-controversy requirement—which by that time was \$10,000<sup>97</sup>—on the understanding that doing so would result in only a “minimal” increase in the federal docket.<sup>98</sup> Presumably, this minimal increase was tolerable only because the Court's doctrines preclude jurisdiction over a substantial portion of cases otherwise arising under federal law.<sup>99</sup> Certainly, the Supreme Court has treated the Court's limitations on jurisdiction as attributable to Congress.<sup>100</sup>

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tion to the diversity jurisdiction statute. *See Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992).

95. *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 554–56 (1992) (arguing that “Congress's failure to object” often “means virtually nothing”); *see also* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 282–83 (1996) (making a similar point).

96. *See* FRIENDLY, *supra* note 25, at 232–33 (codification through silence or reenactment is appropriate where the legislative history indicates the rejection of change). A recent example of this doctrine can be found in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000), where the Court held that Congress had implicitly adopted the FDA's longstanding conclusion that the Food, Drug, and Cosmetic Act did not authorize the FDA to regulate cigarettes because Congress had relied on that interpretation in enacting subsequent legislation regulating cigarettes.

97. *See* Act of July 25, 1958, Pub. L. No. 85-554, sec. 1, § 1331, 72 Stat. 415.

98. *See* S. REP. NO. 96-827, at 7 (1980); H.R. REP. NO. 96-1461, at 2 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 5063, 5063.

99. To be precise, there are two requirements for acquiescence: First, Congress must be aware of the interpretation. Second, Congress must have intended to preserve the interpretation. Both requirements appear to be satisfied. Aside from the legislative history of the 1980 Act, it stands to reason that Congress was aware of the well-pleaded complaint rule and other historical limits on federal question jurisdiction because those doctrines are firmly entrenched in over a century's worth of the Court's jurisdictional jurisprudence. Those historical doctrines provide the principal limits on federal question jurisdiction. Logically, Congress's justification for abolishing the amount-in-controversy requirement—that the expansion of jurisdiction would be minimal—rests on the continuing existence of those doctrines to limit federal question jurisdiction.

100. *See, e.g.*, *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 (1983) (“For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case ‘arises under’ federal law.”). Commentators have relied on the acquiescence theory. *See* Freer, *supra* note 63, at 317 (“When Congress reenacts the jurisdictional statutes without undoing such judicial limitations—as it has done throughout history—the Court then may invoke traditional tenets of statutory construction to conclude that Congress approved of the Court's interpretations of the jurisdictional

*B. Recent Decisions*

That Congress may have implicitly adopted the well-pleaded complaint rule and essentiality requirement does not give the Court license to continue to develop law on federal question jurisdiction untethered from the statute. The adoption of those interpretations serves only to justify retroactively those interpretations despite their departure from congressional intent; their adoption does not prospectively justify future interpretations that further depart from congressional intent. But the Court has continued to shape federal question jurisdiction in ways that seem unrelated to congressional intent. As noted before, the Court has issued eleven decisions since 2000 alone that address the contours of federal question jurisdiction.<sup>101</sup> Some of those decisions have expanded the scope of federal jurisdiction; others have contracted jurisdiction; still others have altered the tests for determining jurisdiction in ways that neither clearly expand nor contract jurisdiction. In doing so, the Court has continued its practice of basing its decisions, not on faithful efforts to implement congressional intent, but instead on its own conception of the appropriate role of the federal courts. The Court thus has continued to displace Congress and assume the role of prescribing the jurisdiction of lower courts.<sup>102</sup>

*1. Changes to the Well-Pleaded Complaint Rule*

In several of its recent cases, the Court has modified the well-pleaded complaint rule. One case in which the Court expanded the well-pleaded complaint rule was *Holmes Group, Inc. v. Vornado Air Circulation Sys-*

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statutes.”) (footnote omitted).

101. See *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007) (addressing exception to § 1331 jurisdiction under False Claims Act); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006) (examining § 1331 jurisdiction over private action for reimbursement under federal health insurance plan); *Whitman v. Dep't of Transp.*, 547 U.S. 512 (2006) (considering whether Civil Service Reform Act creates exception to § 1331); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) (considering whether state claim involving interpretation of federal law arose under federal law); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) (determining whether *Rooker-Feldman* doctrine precluded § 1331 jurisdiction where federal claim filed before state claim resolved); *Rasul v. Bush*, 542 U.S. 466 (2004) (examining whether § 1331 conferred jurisdiction over claims filed by non-citizens detained in Guantanamo Bay); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) (resolving whether ERISA completely preempted state claims); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003) (determining whether National Bank Act completely preempted state usury claims); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) (asking whether a compulsory counterclaim confers jurisdiction under § 1331); *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 (2002) (whether Telecommunications Act divests courts of § 1331 jurisdiction); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) (addressing whether Social Security Act bars jurisdiction under § 1331).

102. This continued development of federal question common law is particularly striking given the current Court's commitment to a textualist approach to statutory interpretation. See generally Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883 (2008).

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*tems, Inc.*<sup>103</sup> At issue there was whether a counterclaim could provide the basis for “arising under” jurisdiction. Such a claim clearly arises under federal law for Article III purposes and, accordingly, under the federal question statute as originally enacted. The *Holmes* Court held, however, that a counterclaim cannot provide the basis for “arising under” jurisdiction.<sup>104</sup> The Court did not base that holding on the language of the statute or an inquiry into Congress’s intent. Instead, the Court’s principal reason for rejecting jurisdiction was that a contrary ruling would conflict with its cases holding that an answer cannot provide the basis for federal question jurisdiction.<sup>105</sup>

If this explanation were accurate, the Court’s decision could be justified as compelled by *stare decisis* and consistent with Congress’s intent to the extent that Congress has adopted the well-pleaded complaint rule. But it is not accurate. Indeed, as the Court acknowledged, its prior cases considered only whether a federal *defense* can provide the basis for jurisdiction.<sup>106</sup> None addressed whether a counterclaim may form the basis for federal jurisdiction. The principle underlying the well-pleaded complaint rule (to the extent the rule is principled at all) cannot be that federal jurisdiction is appropriate only when the complaint, as opposed to the answer, relies on federal law; otherwise, an anticipatory response to a federal defense would provide the basis for federal question jurisdiction. Rather, the principle must be that the plaintiff’s right to relief depends on federal law. There is no obvious qualitative difference between claims filed by plaintiffs and claims filed by defendants for jurisdictional purposes. Counterclaims are no different from other claims, except that they are raised by defendants. Thus, the same reasons underlying conferral of federal jurisdiction over federal claims brought by plaintiffs—ensuring uniformity of federal law and a neutral forum for federal claims—support federal jurisdiction over federal counterclaims.<sup>107</sup>

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103. 535 U.S. 826 (2002).

104. Although that case involved the interpretation of 28 U.S.C. § 1338, which grants district courts original jurisdiction over actions “arising under” the federal patent laws, the Supreme Court explained that the “same test” applies to § 1331 as to § 1338, and it relied on § 1331 cases to resolve the issue. *See id.* at 830.

105. *See id.* at 831–32. The Court also justified its decision on the grounds that allowing a counterclaim to form the basis for jurisdiction would undermine the “clarity and ease of administration” of the well-pleaded complaint rule and would not show due regard for state governance because it would result in more state claims in federal court. *Id.* at 832. Neither of these reasons is attributable to Congress. Instead, they both reflect the Court’s own concerns about the function and power of the federal courts. Moreover, neither reason is persuasive. Basing jurisdiction on a counterclaim would hardly detract from the administrability of the well-pleaded complaint rule, since the well-pleaded complaint rule presumably would apply to the counterclaim as well. As for the concern about respect for the states, federal courts regularly rule on state law issues under diversity jurisdiction and supplemental jurisdiction.

106. *See id.* at 831.

107. Indeed, the Court explicitly acknowledged that finding jurisdiction would “further Congress’s goal of ensuring . . . uniformity.” *Id.* at 833.

While the Court fortified the well-pleaded complaint rule in *Holmes*, the Court has also weakened it through the doctrine of complete preemption. Complete preemption is an exception to the well-pleaded complaint rule, authorizing federal question jurisdiction over state law claims even when an issue of federal law does not appear in the complaint.<sup>108</sup> The Court first established the doctrine in 1968 in *Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists*.<sup>109</sup> There, Avco filed suit in state court to enjoin a union and its members from striking at Avco's plant, arguing that the strike violated the collective bargaining agreement. The defendants removed the case to federal court. Removal is appropriate only if the district court otherwise would have jurisdiction over the claim.<sup>110</sup> In *Avco*, the defendants based removal on the ground that Avco's claim arose under federal law. But under the well-pleaded complaint rule, removal should have been improper because Avco's claim was based on a state law theory of breach of contract. The Supreme Court nonetheless held that removal was appropriate, stating that the Labor Management Relations Act (LMRA) provides the "sanctions behind agreements to arbitrate grievance disputes."<sup>111</sup> But this reasoning establishes only that Avco's state law cause of action might be subject to the defense of preemption because of the LMRA. It does not explain why Avco's claim arose under federal law.<sup>112</sup> The Court made no effort to square its decision with the well-pleaded complaint rule; indeed, it did not even mention the rule.<sup>113</sup>

The lack of analysis in *Avco*—and the Court's failure to extend the doctrine to any other federal statutes for almost twenty years—suggests that complete preemption was unique to the LMRA. The Court essentially confirmed this conclusion in its only other decision in thirty-five years to find complete preemption, *Metropolitan Life Insurance Co. v. Taylor*,<sup>114</sup>

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108. See Seinfeld, *supra* note 60, at 547.

109. 390 U.S. 557 (1968).

110. A defendant may remove to federal court any claim filed in state court over which the district court has "original jurisdiction." See 28 U.S.C. § 1441 (2006).

111. *Avco Corp.*, 390 U.S. at 559.

112. Justice Scalia explained this in his dissent in *Beneficial National Bank v. Anderson*, 539 U.S. 1, 14 (2003) (Scalia, J., dissenting). The *Avco* Court did not purport to overrule the doctrine that defensive preemption is not a basis for federal jurisdiction, but it did not explain why claims preempted by § 301 need not satisfy the well-pleaded complaint rule. The only other justification the Court gave was based on a statement from an earlier case, *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957), that "[a]ny state law applied" in a suit under § 301 "will be absorbed as federal law and will not be an independent source of private rights." *Id.* at 457. But as Justice Scalia has explained, this quotation signifies only that, in suits brought under § 301, state law may provide the rule of decision; it does not establish that a state law claim based on a labor dispute is necessarily a federal claim. See *Beneficial Nat'l Bank*, 539 U.S. at 14 (Scalia, J., dissenting).

113. See Seinfeld, *supra* note 60, at 550.

114. 481 U.S. 58 (1987). Aside from *Metropolitan Life*, the Court until 2003 uniformly rejected arguments to extend complete preemption. See *Rivet v. Regions Bank*, 522 U.S. 470 (1998) (holding that claim preclusion resulting from federal judgment does not cause complete preemption); *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) (holding that LMRA does not completely preempt breach of individual employment contracts claims); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463



which held that ERISA completely preempted certain state claims based on the “close parallels” between ERISA and the LMRA.<sup>115</sup>

But in 2003, the Court substantially broadened complete preemption. In *Beneficial National Bank v. Anderson*, which presented the question whether the National Bank Act completely preempted Alabama’s usury laws, the Court held that complete preemption applies whenever federal law “provide[s] the exclusive cause of action” for the wrongs alleged by the plaintiff, even when the plaintiff pleads exclusively a state law claim.<sup>116</sup>

*Beneficial National Bank* thus created a significant exception to the well-pleaded complaint rule and consequently expanded federal question jurisdiction. The Court did not base this expansion on an examination of the federal question statute. Nor did the Court examine whether the expansion of jurisdiction over such actions was consistent with the reasons that Congress conferred federal question jurisdiction on the district courts.<sup>117</sup> Instead, the Court explained the rule simply as the natural outgrowth of both *Avco* and *Metropolitan Life*.<sup>118</sup> But neither *Avco* nor *Metropolitan Life* stated that a state-law claim necessarily arises under federal law when federal law provides the exclusive cause of action.<sup>119</sup>

Of course, federal question jurisdiction would be warranted if the creation of an exclusive federal cause of action reflected the intent to confer federal jurisdiction over a *state-law* claim that the federal cause of action precludes. But the creation of an exclusive federal cause of action establishes no such intent.<sup>120</sup> It signifies only that Congress intended to preempt disparate state-law causes of action.<sup>121</sup> Congress has not indicated any in-

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U.S. 1 (1983) (holding that ERISA generally does not result in complete preemption); *see also* *Livadas v. Bradshaw* 512 U.S. 107, 122 n.16 (1994) (describing *Avco* as based on the LMRA’s “unusual preemptive power”).

115. At the very least, as Professor Seinfeld has observed, the “precise scope of complete preemption doctrine was impossible to pin down.” Seinfeld, *supra* note 60, at 551.

116. 539 U.S. 1, 9 (2003).

117. One might argue that this and other expansions implement the broader intent reflected in the 1980 Act to expand federal question jurisdiction. But it is too large a leap to extrapolate a desire to create exceptions to the well-pleaded complaint rule from the abolition of the amount-in-controversy requirement. Moreover, the legislative history reveals that Congress abolished the amount-in-controversy requirement on the understanding that it would result in only a “minimal” increase in the federal docket; doing away with the well-pleaded complaint rule would have a substantial increase in the federal docket. In any event, several of the Court’s decisions have constricted, rather than expanded, federal jurisdiction.

118. *See Beneficial Nat’l Bank*, 539 U.S. at 8 (“In the two categories of cases where this Court has found complete pre-emption—certain causes of action under the LMRA and ERISA—the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.”) (footnote omitted).

119. *See id.* at 16 (Scalia, J., dissenting).

120. *See* Seinfeld, *supra* note 60, at 558–59.

121. *See Beneficial Nat’l Bank*, 539 U.S. at 10 (describing the Act as designed to protect banks from “possible unfriendly State legislation” (quoting *Tiffany v. Nat’l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1873))).

tent to create an exception to the well-pleaded complaint rule for such defensive preemption.<sup>122</sup> And there is good reason to think that Congress would not want to create such an exception. Before *Beneficial National Bank*, the state courts bore the costs of determining whether state law claims were defensively preempted by an exclusive federal cause of action. *Beneficial National Bank* removed this exclusive screening function from the state courts and distributed it among the state and federal courts.

*Beneficial National Bank* thus not only represents an instance of the Court disregarding congressional intent, but it also arguably presents an instance where the Court created jurisdiction not authorized by Congress. If Congress has adopted the well-pleaded complaint rule, the Court has no ability to confer jurisdiction by creating an exception to that rule. As the Court itself has recently reiterated, the judiciary cannot expand federal jurisdiction beyond that authorized by Congress.<sup>123</sup>

## 2. *The Need for a Federal Cause of Action*

In recent cases, the Court has also altered rules on whether a federal cause of action is a prerequisite to federal question jurisdiction. Recall that historically the Court has issued conflicting decisions on the matter, holding in *Smith* that a federal cause of action was unnecessary, but in *Moore* that a federal cause of action was necessary.<sup>124</sup> Given these inconsistent decisions, the theory of congressional adoption through reenactment does not work because it is difficult to say which line of decisions Congress adopted through acquiescence.<sup>125</sup>

The Court revisited the necessity of a federal cause of action in its 1986 decision in *Merrell Dow Pharmaceuticals Inc. v. Thompson*.<sup>126</sup> There, the Court held that a state law negligence claim, in which the plaintiff relied on a violation of a federal misbranding law as prima facie evidence of negligence, did not arise under federal law because Congress had not provided a cause of action for violations of the federal misbranding law.<sup>127</sup> The Court explained that the absence of a federal remedy for the

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122. One might argue that the well-pleaded complaint rule is irrelevant to the inquiry because Congress enacted the National Bank Act in 1864, well before the enactment of the federal question jurisdiction statute and the development of the well-pleaded complaint rule. But the Court did not limit its analysis to the National Bank Act. It announced a blanket rule that complete preemption applies to any federal statute that provides an exclusive cause of action.

123. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 772 (2008) (“The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation.” (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 746 (1979) (Powell, J., dissenting))).

124. See *supra* notes 88–91 and accompanying text.

125. Cf. *Pierce v. Underwood*, 487 U.S. 552, 567 (1988) (stating that the theory of acquiescence applies only when a statute that has “been given a *consistent* judicial interpretation”) (emphasis added).

126. 478 U.S. 804 (1986).

127. See *id.* at 817.

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violation of the federal misbranding laws reflected Congress's decision that misbranding claims were not "substantial" enough to warrant federal question jurisdiction.<sup>128</sup>

Nothing in the federal question statute suggests that jurisdiction turns on the importance of the federal law. Congress presumably thinks all of its laws are important, even if it does not provide a cause of action. Still, *Merrell Dow* at least suggested a bright line rule: jurisdiction is appropriate only if federal law creates a cause of action.

But in 2005, the Court backed away from the requirement of a federal remedy in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*.<sup>129</sup> There, the Court found that a state law quiet title action over land seized by the IRS arose under federal law because the right to relief turned on the legality of the IRS's seizure under federal law. Although federal law did not provide a remedy for illegal seizures by the IRS, the Court held that the existence of a federal remedy was not a prerequisite to federal question jurisdiction. Instead, the Court said the relevant question was whether the action presented a question of federal law that is "substantial" or important enough to warrant "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."<sup>130</sup> According to the Court, whether an issue is adequately substantial does not depend on the existence of a federal cause of action; an issue may be sufficiently substantial if it implicates an important federal interest.<sup>131</sup>

In so stating, the Court again created a new jurisdictional rule. That rule makes the courts, not Congress, jurisdictional gatekeepers over state-law claims that turn on federal law. Courts may grant or refuse jurisdiction based solely on their determination of whether the federal issue is sufficiently important to warrant federal jurisdiction.

Perhaps out of recognition that it was placing control of jurisdiction in the hands of the courts, the *Grable* Court proclaimed that the ultimate question was whether the exercise of jurisdiction was intended by Congress. It stated that, even when the federal question is substantial, the exercise of federal jurisdiction must be "consistent with congressional judgment about the sound division of labor between state and federal

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128. See *id.* at 812, 814 ("[A] 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.").

129. 545 U.S. 308 (2005).

130. *Id.* at 312; see also *id.* at 315 (stating that the tax issue in the case was an "important issue of federal law that sensibly belongs in a federal court").

131. See *id.* at 313 (clarifying that federal jurisdiction requires "a substantial" federal question, "indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum").

courts.”<sup>132</sup> But despite this statement, the *Grable* Court did not actually examine congressional intent in finding jurisdiction. The Court failed to conduct any real analysis of the two principal sources that might reveal whether Congress intended to confer federal question jurisdiction over claims turning on a particular federal law: the federal tax law itself and the federal question statute. Moreover, the Court did not consult any other statement of Congress.

Instead, the Court based its conclusion on its own assessment of the impact that the exercise of jurisdiction would have on the allocation of judicial power. The Court stated that federal jurisdiction was appropriate in *Grable* because finding jurisdiction would open the doors to only a few state claims,<sup>133</sup> but not in *Merrell Dow* because it would have resulted in too many state claims in federal courts.<sup>134</sup> These concerns cannot be attributed to Congress. Until *Merrell Dow*, the Court had often held, in cases like *Smith*, that all state law claims arise under federal law if resolution of the claim turned on federal law.<sup>135</sup> It is therefore extremely difficult to conclude that Congress was acting on the assumption that jurisdiction would not extend to cases like *Merrell Dow*. The Court certainly cited nothing indicating that Congress had expressed these concerns. Rather, it was the *Court* that had these concerns, and the Court attributed those concerns to Congress merely as a justification.

*Grable* essentially abandons the notion that jurisdiction depends on rules prescribed by Congress. Whether a court has jurisdiction now rests with the discretion of the court.<sup>136</sup> Jurisdiction is appropriate if a court thinks that the issue is important enough to warrant the federal courts' time and the exercise of jurisdiction will not overburden the federal docket.<sup>137</sup>

*Grable's* allocation of power to the judiciary was reconfirmed in *Empire Healthchoice Assurance, Inc. v. McVeigh*.<sup>138</sup> Pursuant to the Federal Employees Health Benefits Act, the Office of Personnel Management entered into a contract with Empire Healthchoice to provide health insurance for federal employees. Under the contract, an insured who receives benefits for an injury caused by a third party is required to reimburse Empire for those benefits upon recovering any compensation for the injury from

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132. *Id.*

133. *See id.* at 319 (“Although Congress also indicated ambivalence in this case by providing no private right of action to *Grable*, it is the rare state quiet title action that involves contested issues of federal law.”).

134. *See id.* (“A general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would thus have heralded a potentially enormous shift of traditionally state cases into federal courts.”)

135. *See, e.g., Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

136. *See Freer, supra* note 63, at 342–43.

137. *See id.* at 343.

138. 547 U.S. 677 (2006).

the third party. Empire filed a suit in federal court against McVeigh for breaching this provision by failing to reimburse Empire for benefits after he recovered in tort. One of the theories that Empire pressed in support of federal jurisdiction was that, even if state law supplied the breach of contract action, federal law was a necessary element of Empire's claim to relief.

The Court held that the claim did not arise under federal law. The Court did not do so on the ground that Empire's claim did not depend on federal law. Instead, the Court explained that, unlike *Grable*, which presented an issue of law whose resolution would control a substantial number of cases, Empire's reimbursement claim was fact-bound.<sup>139</sup> This reasoning suggests that jurisdiction depends on the type of claim alleged: fact-bound disputes over the amount of reimbursement under a contract do not arise under federal law, but disputes over the meaning of the reimbursement provision in the contract might. The Court pointed to nothing indicating that Congress intended this distinction. The only apparent basis for the conclusion is the Court's own concerns about federal workload.

### 3. The Rooker–Feldman Doctrine

The Court's recent decisions have also altered the Court's own judicially created rules regarding the district court's jurisdiction to review state-court judgments. Under Article III, Congress has the power to authorize inferior federal courts to review state-court decisions.<sup>140</sup> In *Rooker v. Fidelity Trust Co.*,<sup>141</sup> the Supreme Court held that Congress had not conferred this power on the district courts through the federal question statute. In *Rooker*, parties who lost in state court filed suit in federal district court, seeking an order declaring the state-court judgment void for unconstitutionality. The Court held that the parties' request was in essence an appeal of the state court judgment and therefore outside the jurisdiction of the district court, which was "strictly original."<sup>142</sup> The Court reaffirmed

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139. *Id.* at 700–01 ("Grable presented a nearly 'pure issue of law,' one 'that could be settled once and for all and thereafter would govern numerous tax sale cases.' In contrast, Empire's reimbursement claim . . . is fact-bound and situation-specific.") (citations omitted).

140. *See* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 338 (1816); *Doe v. Mann*, 415 F.3d 1038, 1043–44 (9th Cir. 2005) (discussing congressional grants of authority to lower federal courts to review state-court judgments). The statutes authorizing habeas review of state-court judgments are examples of this power. *See* 28 U.S.C. §§ 2241, 2254 (2006); *see also* THE FEDERALIST NO. 82, at 557 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (perceiving "no impediment to the establishment of an appeal from the state courts to the subordinate national tribunals").

141. 263 U.S. 413 (1923).

142. *Id.* at 416. Federal appellate jurisdiction over state-court judgments rests exclusively in the Supreme Court under 28 U.S.C. § 1257 (2006). *See* *Verizon Md., Inc v. Pub. Serv. Comm'n*, 535 U.S. 635, 644 n.3 (2002) ("The *Rooker–Feldman* doctrine merely recognizes that . . . § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to this Court.").

*Rooker* sixty years later in *District of Columbia Court of Appeals v. Feldman*.<sup>143</sup>

The *Rooker–Feldman* doctrine is hardly commanded by the text of the federal question statute.<sup>144</sup> Although the statute confers only original and not appellate jurisdiction on district courts, a separate suit in federal courts challenging a state court decision is not an appeal. A case is an appeal when it stems from the same cause of action filed in the trial court.<sup>145</sup> A suit in federal court challenging a state judgment is not of that sort. Rather, it is a collateral attack, resting on a new cause of action, and accordingly is an original suit.<sup>146</sup> The Court did not explain in *Rooker* or *Feldman* why it read the federal question statute not to include such suits. Commentators have justified the doctrine on the ground that it reflects the federalism principle against federal interference with state court proceedings<sup>147</sup>—though this justification is open to doubt given that one of the central reasons for federal jurisdiction is to ensure the states' compliance with the Constitution and federal law.<sup>148</sup>

Because the *Rooker–Feldman* doctrine is a creation of the Court and not of Congress, the courts of appeals have been in disarray regarding when it applies, and the Supreme Court has felt free to alter the doctrine's contours as it sees fit.<sup>149</sup> One of the more recent examples came in 2005. In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*,<sup>150</sup> the Court held that the doctrine does not apply to a federal suit seeking to overturn a state-court judgment so long as the federal suit was filed *before* the state

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143. 460 U.S. 462 (1983) (holding that the district court lacked jurisdiction to hear a suit challenging an order of the D.C. Court of Appeals that denied a petition to waive a rule requiring D.C. bar applicants to have graduated from a law school approved by the American Bar Association).

144. The doctrine is not limited to federal question jurisdiction. It applies to any grant of original jurisdiction to the district courts, though the issue has arisen in the context of federal question jurisdiction in the Supreme Court.

145. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) (“It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.”).

146. See *Feldman*, 460 U.S. at 490 (Stevens, J., dissenting) (“The Court’s opinion fails to distinguish between two concepts: appellate review and collateral attack. If a challenge to a state court’s decision is brought in United States District Court and alleges violations of the United States Constitution, then by definition it does not seek appellate review. It is plainly within the federal-question jurisdiction of the federal court.”); Adam McLain, Comment, *The Rooker–Feldman Doctrine: Toward a Workable Role*, 149 U. PA. L. REV. 1555, 1587 (2001) (“A careful reading of the Supreme Court precedents reveals that the *Rooker–Feldman* doctrine is designed primarily to thwart collateral attacks on state court judgments in lower federal courts.”).

147. See, e.g., Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker–Feldman Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1101 (1999) (“[T]he *Rooker–Feldman* doctrine is first and foremost an integral part of judicial federalism.”); see also McLain, *supra* note 146, at 1586.

148. See Sager, *supra* note 2, at 52.

149. See, e.g., *Verizon Md., Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 644 n.3 (2002) (holding that the rule does not preclude district court review of state agency actions); *Johnson v. De Grandy*, 512 U.S. 997, 1005–06 (1994) (holding that the rule does not apply to suits challenging state judgments brought in federal court by one who was not a party to the state suit).

150. 544 U.S. 280 (2005).

court rendered judgment. The limitation is not obviously compelled by *Rooker* or *Feldman*.<sup>151</sup> Those cases hold that federal courts lack jurisdiction over suits seeking to bar the enforcement of state-court judgments. That rule logically should apply equally to the federal suit in *Saudi*. Although the federal suit in *Saudi* was filed before the state court rendered judgment, once the state court rendered judgment, the consequence of granting federal relief would be to bar enforcement of the state-court judgment.<sup>152</sup>

In finding jurisdiction, the *Saudi* Court did not explain how its decision squared with the theory underlying *Rooker* and *Feldman*. Instead, the Court relied on a line of decisions holding that federal courts have jurisdiction to hear parallel suits with state courts<sup>153</sup>—though none of the cases cited by the Court addressed the effect of the entry of judgment in the state proceeding on a parallel proceeding in the federal courts.

Regardless of whether the Court's decision was "correct," it is clear is that the Court's decision turned not on the language of the statute but on its own assessment of the respective costs and benefits of competing judicially created rules. The Court did not mention, much less focus on, whether limiting the *Rooker-Feldman* doctrine in this way would result in the federal jurisdiction intended by Congress. Instead, its decision was based on the conclusion that the Court's created *Rooker-Feldman* doctrine had been extended too far.<sup>154</sup>

### C. Limitations on Congressional Power

The preceding cases show that the law of federal question jurisdiction is more common law than statutory. The Court has not engaged in its traditional methods of statutory interpretation when rendering decisions about federal question jurisdiction. Instead, the Court has created and modified rules based on the sort of policy considerations that Congress would as-

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151. Neither *Rooker* nor *Feldman* recognized an exception to their rule; to the contrary, they suggest that district courts lack power to review any "final determinations" of the state courts. See D.C. Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) ("[N]o court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment [of the state court] . . .").

152. There is no underlying principle against jurisdiction vanishing in a pending case. Just as jurisdiction may be created by later occurring events in a case, see, e.g., *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 477 (2007), so too jurisdiction may be terminated by subsequent events in a case. Mootness is a clear example of this phenomenon.

153. See *Saudi*, 544 U.S. at 292 ("This Court has repeatedly held that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910))).

154. Of course, it may be that *Saudi* achieved Congress's intent to the extent that Congress never intended the restrictions imposed by the *Rooker-Feldman* doctrine in the first place. But even if that is so, the *Saudi* Court did not rely on that point.

sess—for example, the workload of the federal courts and the balance of federal and state power—in drafting jurisdictional statutes.<sup>155</sup>

Although the decisions recounted above reflect that the Court has assumed the role of regulating federal question jurisdiction, they do not suggest that Congress cannot change those jurisdictional rules. Those decisions do not purport to limit Congress's power to regulate jurisdiction.<sup>156</sup> But the Court took a step towards this limitation in *Arbaugh v. Y&H Corp.*<sup>157</sup> by adopting a presumption against reading statutes as restricting jurisdiction. *Arbaugh* involved a claim of sexual harassment under Title VII of the Civil Rights Act. Title VII prohibits an "employer" from discriminating on the basis of sex,<sup>158</sup> and defines employer to include only those employers having "fifteen or more employees."<sup>159</sup> The question in *Arbaugh* was whether the failure to satisfy the numerosity requirement stripped the district court of jurisdiction under § 1331.<sup>160</sup>

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155. There is a canon of interpretation that judges may consider policy in interpreting statutes. *See, e.g.,* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 ("Policy evaluation is . . . part of the traditional judicial tool-kit . . ."). But this does not mean that the interpretation may be based on the policies that the court considers important. Rather, the relevant policy determinations that the court may consider are those that Congress has expressed through statute. *See* FRIENDLY, *supra* note 25, at 219 ("[E]ach statute must be read in the light of the policy expressed in others."); *see also* Rogers v. Tennessee, 532 U.S. 451, 475 (2001) (Scalia, J., dissenting) (explaining that the canon was developed to mean that courts could consider Parliament's policies in interpreting statutes); D.A. Schulte, Inc., v. Gangi, 328 U.S. 108, 121–22, (1946) (Frankfurter, J., dissenting) ("[T]he 'policy' of a statute should be drawn out of its terms, as nourished by their proper environment, and not, like nitrogen, out of the air."). The Court has on occasion fashioned its federal-question doctrines in light of such policy considerations in other statutes. One recent example is *Lance v. Dennis*, 546 U.S. 459, 466 (2006), where the Court held that the *Rooker-Feldman* doctrine did not apply to federal suits brought by those who were not parties to the state suit but who were in privity with a party to the state suit. The Court had previously held in *Johnson v. De Grandy*, 512 U.S. 997, 1005 (1994), that the *Rooker-Feldman* doctrine did not apply to those who were neither a party to the state suit nor in privity with a party to the state suit. The Court explained that incorporating a privity principle into the *Rooker-Feldman* doctrine might undermine the Full Faith and Credit Act, which directs federal courts to give the same preclusive effect to state court judgments that the state gives to those judgments. *See Lance*, 546 U.S. at 466.

156. This is true except to the extent that they establish that Congress cannot merely track the "arising under" language of Article III if it wishes to confer the full jurisdiction that Article III authorizes. For a recent example where the Court did limit Congress's power to regulate jurisdiction, see *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

157. 546 U.S. 500 (2006). The Court has considered the issue of when a statute prescribes an additional jurisdictional requirement several times over the past few terms in the context of time limits. *See* John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750 (2008); *Bowles v. Russell*, 127 S. Ct. 2360 (2007); *Arbaugh*, 546 U.S. at 510; *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Kontrick v. Ryan*, 540 U.S. 443, 454–55 (2004). In *Bowles*, the Court explained that time limits prescribed by rule are not jurisdictional, while time limits prescribed by statute may be jurisdictional. *See Bowles*, 127 S. Ct. at 2367. This distinction reflects deference to Congress's power to define jurisdiction, but it leaves the question of which statutes are jurisdictional.

158. *See* 42 U.S.C. § 2000e-2(a)(1) (2000).

159. 42 U.S.C. § 2000e(b) (2000).

160. The answer was not clear from the Court's precedents. The Court's decisions had established that a statute is jurisdictional if it defines the "classes of cases . . . falling within a court's adjudicatory authority." *E.g., Eberhart*, 546 U.S. at 16. The numerosity requirement is arguably of this sort because it does not describe the conduct that was illegal under Title VII but instead defines those entities



The Court held that the answer was no. Although acknowledging that the numerosity requirement could be read as restricting jurisdiction, the Court adopted a presumption against treating any limitations on statutory coverage as jurisdictional unless Congress “clearly states” otherwise.<sup>161</sup>

*Arbaugh*'s conclusion that the numerosity requirement is not jurisdictional may well be correct. It seems more likely that Congress enacted the numerosity requirement to exempt small employers from Title VII than to make such employers answerable only in state court. But the broad presumption adopted in *Arbaugh* is difficult to defend.

The presumption not only is inconsistent with statements made by the Court earlier in the same term that Congress need not speak with clarity to modify federal jurisdiction,<sup>162</sup> but also deviates from the ordinary rules of statutory interpretation. Clear-statement requirements are the exception, not the rule. Courts typically impose clear statement rules to protect important legal interests, such as constitutional rights, by increasing the costs to Congress of enacting legislation in that area.<sup>163</sup> Thus, for example, the Court has adopted a presumption in favor of federal jurisdiction over habeas corpus petitions that may be overcome only by a clear statement because the abrogation of habeas jurisdiction potentially violates the Suspension Clause.<sup>164</sup> But the presumption established in *Arbaugh* does not fit this mold. There is no obvious important legal interest in favor of federal jurisdiction. Article III does not require, or even prefer, that a federal court have original jurisdiction over federal claims;<sup>165</sup> to the contrary, by not creating federal courts itself, Article III operates on the assumption that state courts are the default forums for resolving federal and constitutional

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covered by Title VII's substantive provisions.

161. *Arbaugh*, 546 U.S. at 516 (“[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.”).

162. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) (“No sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of federal jurisdiction within appropriate constitutional bounds.”).

163. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595–96 (1992). As Professors Eskridge and Frickey note, clear statement rules reflect policy choices by the Court. *Id.* They tilt the balance in favor of a particular policy by placing restraints on Congress's ability to enact legislation contrary to that policy.

164. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 298–99 (2001); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1868) (“We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law.”). The Court has also adopted a presumption in favor of jurisdiction to review administrative determinations to avoid potential due process problems. *See, e.g., Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993) (jurisdiction to review administrative actions is presumed unless there is “clear and convincing evidence” of Congress's intent otherwise).

165. To be sure, the federal question statute itself arguably reflects a preference for federal jurisdiction over federal questions. But that is not a basis for imposing a clear statement rule. A statute may impose a clear statement rule only if Congress intends it to do so, and absent compelling evidence, there is no reason to think that Congress means to hamper its ability to legislate in that way. In any event, the Court did not rely on the preference expressed in the federal question statute in creating the presumption.

claims. This suggests that the presumption, if anything, should be against federal jurisdiction.

The Court adopted the presumption to avoid the “unfair[ness]” and “waste of judicial resources” that would result from classifying the rule as jurisdictional.<sup>166</sup> It noted that, because jurisdictional challenges can be raised at any time, treating the rules as jurisdictional would result in the dismissal of *Arbaugh*’s claims even though they had already been tried to and decided by a jury.<sup>167</sup> But whether to tolerate these consequences is precisely the sort of policy choice to be left to Congress, as the Court itself has acknowledged elsewhere.<sup>168</sup> Although late jurisdictional dismissals impose costs, more expansive jurisdiction results in costs as well. Greater jurisdiction means more suits, which results in delays in deciding cases and may affect the quality of decisions. Congress may opt to reduce the costs resulting from expansive jurisdiction instead of the costs associated with late dismissals; indeed, that is the primary reason why Congress often limits jurisdictional grants through amount-in-controversy requirements.<sup>169</sup>

Moreover, the presumption poses the possibility of vesting district courts with jurisdiction that Congress did not mean to confer. Before *Arbaugh*, Congress was not required to speak clearly when it sought to limit jurisdiction,<sup>170</sup> and the historical tenor of the Court’s opinions had been against finding jurisdiction, as is reflected in the narrow constructions of not only the federal question statute but other jurisdictional statutes as

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166. *Arbaugh*, 546 U.S. at 515.

167. *Id.* at 515. This focus on the consequences suggests that the Court’s concern was not so much whether the numerosity requirement is jurisdictional but whether it is waivable. The Court has often equated waivability and jurisdiction, but the two are not synonymous. A nonjurisdictional rule may be mandatory, *see* *Eberhart v. United States*, 546 U.S. 12, 17–18 (2005) (per curiam) (holding time limit in FED. R. CRIM. P. 33(a) for seeking new trial is nonjurisdictional but unwaivable), and a jurisdictional rule may be waivable, *see* *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (holding that sovereign immunity bars jurisdiction unless waived). Drawing a distinction between waivability and jurisdiction would go far to remove the confusion in jurisdictional doctrines, and recent decisions indicate that the Court is wise to the point. *See, e.g.*, *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753 (2008) (stating that the term “jurisdictional” is merely “convenient shorthand” to refer to unwaivable rules).

168. In *Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S. Ct. 2411 (2007), the Court criticized the dissent’s argument that the jurisdictional rules should be created based on their consequences, with the following remark:

We have no idea whether [the avoidance of the consequences noted by the dissent] is a wise balancing of the various values at issue here. We are confident, however, that the dissent is wrong to think that it would improve the ‘law in this democracy’ for judges to accept the lawmaking power that the dissent dangles before them.

*Id.* at 2420 n.5.

169. Although the amount-in-controversy requirement has been abolished, other jurisdictional statutes continue to have them. *See, e.g.*, 28 U.S.C. § 1332 (2006) (limiting diversity jurisdiction to claims where “the matter in controversy exceeds the sum or value of \$75,000”). A similar cost concern motivated the decision in the Seventh Amendment to require a jury only for controversies over amounts exceeding twenty dollars. *See* U.S. CONST. amend. VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

170. This explains the fact that *Arbaugh* itself did not cite any authority in support of the rule.

well.<sup>171</sup> Congress therefore had no reason to think that it needed to speak with particular clarity when seeking to limit jurisdiction. To the contrary, it had reason to think that any ambiguity would be construed against jurisdiction.<sup>172</sup> But after *Arbaugh*, ambiguous statutes may well be treated as nonjurisdictional statutes.<sup>173</sup>

#### IV. ARGUMENTS SUPPORTING THE COURT'S INTERPRETATIONS OF THE FEDERAL QUESTION STATUTE

Although the Court has not focused on the language of the federal question statute or Congress's reasons for conferring federal question jurisdiction, this does not necessarily establish that the Court's decisions are unjustifiable. For example, as discussed above, one can make a respectable claim that the Court's older doctrines are consistent with congressional intent because they have been adopted by Congress.<sup>174</sup> Of course, this theory of adoption does not provide a method for prospective interpretation; it merely legitimates prior decisions. And it cannot justify the Court's more recent decisions because there is no evidence that Congress has adopted those interpretations. But aside from the theory of congressional adoption, there may be other ways to justify the Court's doctrines regarding federal question jurisdiction. One might argue, for example, that the Court's doctrines are indeed consistent with congressional intent because

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171. See, e.g., *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (noting the "deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes"); Eskridge & Frickey, *supra* note 163, at 605 (perceiving from the Court's decisions a "canon that statutes conferring jurisdiction upon federal courts should be narrowly construed to assure that Congress and not the courts make decisions about the extent of jurisdiction").

172. Nor should Congress have suspected that the potential for wasted resources would result in the doctrine being classified as nonjurisdictional. The Court has often treated a rule as jurisdictional despite the potential for wasted resources. The doctrine of mootness, for example, requires a court to dismiss a case for lack of jurisdiction if a plaintiff loses his interest in the case after it has been filed. See *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). Because a case cannot be moot at the outset (such a case would be dismissed for lack of standing), a case may be dismissed for mootness only after resources have been spent.

173. To add insult to injury, even when Congress has spoken explicitly in terms of jurisdiction, the Court has occasionally refused to treat that statute as jurisdictional. For example, the Norris Laguardia Act provides that "[n]o court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute." 29 U.S.C. § 104 (2006). Although the Act explicitly speaks in terms of jurisdiction, the Supreme Court said that the statute does not limit subject matter jurisdiction, but limits only the relief that the courts may grant. See *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 469–70 (2007) ("It is facially a limitation upon the relief that can be accorded, not a removal of jurisdiction over 'any case involving or growing out of a labor dispute.'"); see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (construing 42 U.S.C. § 11046(c)). But the Court itself has said that subject matter jurisdiction may hinge on the relief sought. For instance, the Court has required a plaintiff to "demonstrate standing separately for each form of relief sought." See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000); *City of L.A. v. Lyons*, 461 U.S. 95, 109 (1983).

174. See *supra* Part III.A.

Congress has delegated the role of prescribing jurisdiction to the judiciary. Moreover, several commentators have offered various theories for justifying the Court's interpretations of the federal question statute even if they diverge from congressional intent. This part examines those arguments.

### A. Congressional Delegation

Although the Court has largely ignored both the language of the federal question statute and Congress's reasons for conferring federal question jurisdiction, this does not necessarily establish that the Court's decisions are inconsistent with Congress's intent. Congress often drafts open-ended or ambiguous statutes, leaving it to the judiciary to fill in the gaps.<sup>175</sup> The phrase "arising under" is hardly unambiguous, so one might think that Congress meant the judiciary to develop the law of federal question jurisdiction.

But this argument misses the mark. While the precise contours of the arising under jurisdiction might be unclear, it is relatively clear that the statute was meant to confer jurisdiction commensurate with that allowed by Article III.<sup>176</sup> The two were meant to be interpreted hand in hand, not separately, as the Court has done. The only reason that the two are no longer understood to have the same scope is that the Court has said otherwise.

Still, one might argue that Congress's failure to amend the federal question statute in response to the Court's narrow interpretations of the statute reflects Congress's decision to leave the scope of the statute in the hands of the judiciary. But the conclusion does not follow from the premise. Congress's actions signify only that it might have subsequently adopted some of the Court's particular interpretations of the statute; it does not establish that Congress's intent is to delegate to the courts the power to define jurisdiction. Inferring a broader delegation of power to define jurisdiction from Congress's failure to overturn a judicial interpretation would mean that courts could assume the role of legislator through congressional inaction.<sup>177</sup> Providing such a means for the judiciary to ac-

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175. See FRIENDLY, *supra* note 25, at 47 (describing the phenomenon where the legislature writes "broadly framed statutes" to "leave the courts . . . free to perform their historic role of formulating more definite standards within the general mandate").

176. See *supra* Part II.A.

177. Cf. *Texas v. United States*, 497 F.3d 491, 502-03 (5th Cir. 2007) ("Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.") (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995)); *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) ("Were courts to presume a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."), *opinion amended by* 38 F.3d 1224 (D.C. Cir. 1994).

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quire legislative power would drastically upset the balance of powers<sup>178</sup>—doubly so in the context of defining the jurisdiction of the federal courts because the power to prescribe jurisdiction is one of the few checks that Congress has on the federal judiciary.<sup>179</sup>

Moreover, such a delegation would make little sense. For one thing, the judiciary is ill suited to making jurisdictional rules. Courts make rules only in the context of deciding cases. A case presenting a question about the well-pleaded complaint rule is unlikely to contain a question about the *Rooker-Feldman* doctrine as well. Consequently, a court is susceptible to develop each of the doctrines of federal question jurisdiction independently instead of with a single cohesive vision of federal question jurisdiction in mind. It perhaps therefore is unsurprising that there is no clear unifying theme running through the Court's recent decisions. In some decisions, like *McVeigh*, *Grable*, and *Holmes*, the Court restricted jurisdiction based on concerns about workload and maintaining the balance of power between the federal and state governments; but in other decisions like *Beneficial National Bank* and *Saudi*, the Court increased federal workload and expanded federal power at the expense of the states. And as *Holmes* reflects, the Court has not been driven by a desire to increase uniformity in federal law or to ensure a forum amenable to federal claims.

The problem is exacerbated by the fact that it is not simply the Supreme Court that may alter the scope of federal question jurisdiction. The reasoning in the Supreme Court's decisions frees the lower courts to interpret the federal question statute without regard to congressional intent as well. This poses the potential for a vast array of inconsistent jurisdictional rules.

More generally, the jurisdiction of the federal courts is but one facet of a larger, more complex issue about structuring and administering federal justice.<sup>180</sup> The caseload resulting from federal jurisdiction bears directly on whether to expand the number of federal judges, whether to authorize more magistrate judges, whether to assign certain cases to administrative agencies for initial review, and even whether to enact federal laws that would lead to more lawsuits in federal court.<sup>181</sup> It would make little sense for Congress to delegate one aspect of one component of this calculus—

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178. The nondelegation doctrine, while seldom found to be violated, is evidence of the sense that we should not blithely assume that Congress delegates its power. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

179. Other checks include the appointments process, *see* U.S. CONST. art. II, § 2, cl. 2, and impeachment process, *see* U.S. CONST. art I, § 2, cl. 5; § 3, cl. 6. The paucity of checks can be attributed to concerns about preserving judicial independence. *See THE FEDERALIST NO. 78*, at 527 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“[I]ndependence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours . . .”).

180. *See* Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 501 (1928).

181. *See id.* at 515–16.

federal question jurisdiction—while retaining control of the other components.

For another thing, the judiciary is simply ill equipped to determine the appropriate scope of jurisdiction on its own terms. Federal jurisdiction involves questions about the allocation of power between the federal and state governments.<sup>182</sup> Each expansion of federal jurisdiction reduces state power, and each contraction of federal jurisdiction imposes a heavier burden on the state courts. The appropriate distribution between the state and federal courts does not depend on fixed legal principles to be ascertained and applied by the courts. Rather, how judicial power should be distributed depends on many variables ranging from the resources available to the state and federal courts to the public's perception of the appropriate role of those courts.<sup>183</sup> These are precisely the sorts of considerations that are beyond the ken of the judiciary; there is no particular norm that the courts can seek to enforce through the development of a legal test.<sup>184</sup> It is for this reason and others that the members of the Constitutional Convention decided to place the power to define federal jurisdiction in the hands of Congress.<sup>185</sup>

### *B. Reasons Independent of Congressional Intent*

Commentators and the Court have also offered justifications for the Court's jurisdictional doctrines independent of Congress's intent. They have suggested that those doctrines are justifiable because they are necessary to avoid overburdening the federal judiciary. Some commentators—most notably David Shapiro—have offered a different defense. They have argued that the Court's doctrines are the legitimate product of the judiciary's historical discretion to decline jurisdiction and that the judiciary has an equal role in defining jurisdiction.

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182. Justice Benjamin R. Curtis, in 1864, noted that “questions of jurisdiction were questions of power as between the United States and the several states.” *Proceedings of the U.S. Circuit Court for the First Circuit at the Time of Chief Justice Taney's Death*, 30 F. Cas. 1341, 1343 (1864). Justices Holmes, Brandeis, and Frankfurter all expressed similar views. See FRANKFURTER & LANDIS, *supra* note 60, at 2; Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism”*, 27 GA. L. REV. 697, 713 n.88 (1993) (citing conversation between Louis D. Brandeis and Felix Frankfurter).

183. See Frankfurter, *supra* note 180, at 503.

184. In this sense, the assignment of jurisdiction is similar to a nonjusticiable political question because it is not subject to judicially manageable standards. See *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) (plurality) (dismissing case challenging political gerrymandering on the ground that it involved judicially unmanageable standards); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1297 (2006).

185. See, e.g., Frankfurter, *supra* note 180, at 500–01. It is conceivable, though extremely unlikely, that the Court's jurisdictional decisions define jurisdiction precisely as Congress would. But that is beside the point. Regardless of whether the Court's decisions are correct in that sense, the problem is that the Court has exceeded its appropriate function by developing doctrines without regard to Congress's intent.

### 1. *Burdens on the Judiciary*

On several occasions, the Supreme Court has stated that, to avoid overburdening the judiciary, it must interpret the federal question statute “‘with an eye to practicality and necessity.’”<sup>186</sup> Thus, although the Court has repeatedly stressed that the “normal rules of construction” apply to jurisdictional statutes in general,<sup>187</sup> those rules do not apply to the federal question statute. In interpreting the statute, it will consider not only “congressional intent,” but also the need for a federal forum (as the Court sees it) to resolve the particular claim.<sup>188</sup>

The Court’s statements on federal question jurisdiction may be accurate descriptions of the process that the Court has employed in developing the doctrines of federal question jurisdiction, but the accuracy of the description does not justify the practice. The Court has not explained *why* Congress’s intent is determinative for all statutes except the federal question statute, nor has the Court given any indication as to why federal question jurisdiction is different from other jurisdictional statutes for purposes of statutory interpretation. The Court has stressed time and again that it is Congress’s job to fashion policy into law, and the task for the courts is to declare the meaning of the law enacted by Congress.<sup>189</sup> There is no principled basis—or at least the Court certainly has not identified one—for ignoring this division of labor when it comes to the federal question statute. The federal question statute is no different from other jurisdictional

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186. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 810 (1986) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 20 (1983)); *see also* *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (“[The federal question statute] has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act’s function as a provision in the mosaic of federal judiciary legislation.”); *Gully v. First Nat’l Bank*, 299 U.S. 109, 117 (1936) (referring to the need to interpret the federal question statute with a “common-sense accommodation of judgment to kaleidoscopic situations”).

187. *E.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 577 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 119 Stat. 2680; *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) (“[o]rdinary principles of statutory construction” apply to jurisdictional statutes).

188. *See Merrell Dow*, 478 U.S. at 810. Several commentators have endorsed this view, arguing that extending federal jurisdiction to all cases presenting a federal question would result in a crippling caseload that would leave the federal courts incapable of performing their core function of remedying violations of federal rights. *See* Mishkin, *supra* note 56, at 162 (granting full constitutional jurisdiction would result in an “unnecessary burden”); *see also* Freer, *supra* note 63, at 343.

189. *The Harrisburg*, 119 U.S. 199, 214 (1886), *overruled by* *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *see also* *Salinas v. United States*, 522 U.S. 52, 60 (1997) (declaring that the judiciary cannot “rewrite language enacted by the legislature,” for to do so “would trench upon the legislative powers vested in Congress” (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985))); *United States v. Rutherford*, 442 U.S. 544, 555 (1979) (“Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.”); *United States v. Harriss*, 347 U.S. 612, 635 (1954) (Jackson, J., dissenting) (“Judicial construction, constitutional or statutory, always is subject to hazards of judicial reconstruction.”).

statutes or other statutes generally. All are products of the legislative process. In the absence of a principled reason for treating the statute differently, the Court's statements are either merely descriptions of what has occurred in the past, in contradistinction to prescriptions for interpretation, or are nothing more than unjustified *ipse dixit*.<sup>190</sup>

Nor is it clear why avoiding a potential workload crisis should be a valid basis for interpreting a statute. The argument suggests that the courts should abandon those restrictions on jurisdiction if the number of cases filed in federal court suddenly dropped or if Congress expanded the federal judiciary. It is hard to see why the adjudicative authority of the courts should vary depending on such circumstances. The number of cases on the courts' dockets should have nothing to do with whether the courts have the *power* to hear a particular case. More important, recognizing a judicial power to shape jurisdiction based on workload would shift congressional power to the judiciary. Under the Constitution, Congress has the power to create federal rights and remedies, and it has the power to determine how those rights are to be enforced.<sup>191</sup> Recognizing in the judiciary the power to limit jurisdiction based on workload would mean that the courts could refuse to enforce certain rights to reduce their workload. To avoid this problem, it would seem that where the judiciary is overworked, the proper course is to seek redress from Congress, not for the courts to take matters into their own hands. Experience supports this conclusion. There are many instances where the courts have requested Congress for relief from the strains of work instead of refusing to perform their work as required.<sup>192</sup>

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190. One possible explanation for the apparent inconsistency is that the Court made some of these statements regarding federal question jurisdiction during an era when the Court occasionally interpreted statutes to achieve what the Court perceived to be just ends regardless of whether they were intended by Congress. More recently, the Court has more vigorously stressed the central role of congressional intent in interpreting statutes. Decisions on finding implied rights of action illustrate the evolution of the Court's approach to statutory interpretation. During the 1960s and '70s, the Court found implied rights of action in statutes irrespective of whether Congress meant to allow such actions, *see J.I. Case Co. v. Borak*, 377 U.S. 426, 432–33 (1964) (finding implied right of action based solely on finding that doing so would facilitate enforcement of statute), but the Court now focuses solely on congressional intent in determining whether an action is implied, *see Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 772 (2008) (“Though the rule once may have been otherwise it is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one.”) (internal citation omitted). Still, several of the Court's statements come from the more modern era of deference to Congress. Moreover, although the modern Court has stressed the centrality of congressional intent, it has continued to interpret the federal question statute without regard to that intent.

191. *See* U.S. CONST. art. I, § 1.

192. Examples include the Justices' requests in the 1790s that Congress abolish circuit riding, *see* David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1719 (2007) (recounting that Justices petitioned the President and members of Congress for relief from circuit riding), and Chief Justice Taft's request that Congress make the Supreme Court's jurisdiction discretionary instead of obligatory, *see* Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1364 (2006) (recounting Chief Justice Taft's efforts at securing discretionary jurisdiction for the Supreme Court).



Finally, even if older doctrines like the well-pleaded complaint rule could be justified as necessary to preserve the functionality of the federal judiciary,<sup>193</sup> the Court's more recent decisions developing jurisdictional rules cannot be justified by the same sort of necessity defense. The Court has not based all of its recent jurisdictional rulings on the ground that they were necessary to avoid overburdening the federal courts, though the Court's opinion in *McVeigh* certainly implies that this was an animating concern.<sup>194</sup> Indeed, in many cases, the Court has not sought to reduce the federal workload: *Beneficial National Bank* and *Saudi* expanded federal question jurisdiction,<sup>195</sup> and in *Grable* and *Arbaugh* the Court rejected rules that would have limited federal question jurisdiction.<sup>196</sup>

## 2. Judicial Discretion

David Shapiro has argued that courts should have discretion to decline to exercise jurisdiction, and he suggests that this discretion extends to defining the scope of federal question jurisdiction.<sup>197</sup> According to Shapiro, this discretion has the value of promoting both the separation of powers, by averting conflicts between the courts and other branches, and federalism, by reducing tensions in federal-state relations.<sup>198</sup>

Although allowing courts to decline jurisdiction might further the separation of powers by permitting courts to avoid ruling on matters better left to the political branches,<sup>199</sup> it is difficult to see how allowing courts to *define* statutory jurisdiction is consistent with the separation of powers. It

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193. See Mishkin, *supra* note 56, at 176–78 (relying on necessity to justify well-pleaded complaint rule); see also *id.* at 165–69 (similarly justifying the requirement that the case directly involve the interpretation of federal law).

194. See *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006) (declining jurisdiction because Empire's claim was "fact-bound and situation-specific"); see also Freer, *supra* note 63, at 343 (arguing that *McVeigh* reflects concern about workload).

195. See Stephen I. Vladeck, *The Increasingly "Unflagging Obligation": Federal Jurisdiction After Saudi Basic and Anna Nicole*, 42 TULSA L. REV. 553, 553 (2007) (arguing that many of Court's recent decisions expand original jurisdiction). Professor Vladeck gives a variety of potential theories as to why the Court might be expanding federal jurisdiction, ranging from a response to congressional efforts to strip jurisdiction in particular instances to an effort to federalize the law to create national uniformity. See *id.* at 569–76.

196. The Court's lack of concern about workload is reflected in other jurisdictional doctrines. One example is the injury-in-fact test for standing. Traditionally, a plaintiff had standing to bring suit in the federal courts only if he had suffered a violation of a private right. But in 1970, the Court abandoned this doctrine as too restrictive because it often left individuals who had been injured by an administrative agency's actions without judicial remedy, instead holding that any individual who suffered a factual injury had standing to bring suit. See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 293–95 (2008). This switch vastly expanded the jurisdiction, and consequently the dockets, of the federal courts. See HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 116 (1973).

197. See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 562 (1985).

198. *Id.* at 582–83.

199. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 132 (2d ed. 1986) (arguing that denials of certiorari are appropriate to give "electoral institutions their head").

is one thing for courts to have the power to determine whether to exercise jurisdiction granted to them; it is another for courts to have the power to determine whether they have jurisdiction at all.<sup>200</sup> Affording the Court the power to define statutory jurisdiction would undermine both legislative supremacy, by allowing courts to rewrite statutes, and the notion that the respective branches of government should not have the power to define the scope of their authority.<sup>201</sup> This latter point becomes particularly clear when one considers that granting discretion to define statutory jurisdiction should mean not simply that courts may deny jurisdiction within a statutory grant, but also, that the courts may exercise jurisdiction beyond that conferred by statute.

It is also not clear that principles of federalism warrant granting the courts discretion to determine the existence of jurisdiction. To be sure, the preservation of federal–state relations may dictate that federal courts should minimize their interference with state law and governance. But this does not mean that courts should have the power to construe the federal question statute to deprive them of jurisdiction when exercising jurisdiction would present a conflict with the states. Doing so would undermine one of the reasons that Congress conferred federal question jurisdiction—to ensure that federal courts would have the power to interfere with states when necessary to protect federal rights and interests.<sup>202</sup>

### 3. *Inter-Branch Dialogue*

Barry Friedman has perhaps the most interesting theory to justify the Court's federal question doctrines.<sup>203</sup> Friedman rejects the theory that

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200. Indeed, this point also follows from the usual understanding of the word “discretion.” Discretion is the power to determine whether to exercise power. See BLACK'S LAW DICTIONARY 499 (8th ed. 2004) (defining judicial discretion as “a court's power to act or not act”). It is not the power to determine whether there is power at all.

201. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (holding that Congress cannot enact legislation beyond its powers conferred by the Constitution because otherwise it “would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits”). To be fair, Shapiro makes his separation of powers argument principally to justify a court's discretion to decline jurisdiction that has been granted by a statute, Shapiro, *supra* note 197, at 574–75, 585, or to refuse jurisdiction based on constitutional concerns, *id.* at 585–86, not to justify a court's ability to redefine statutory jurisdiction. Still, Shapiro does not make that distinction in his discussion.

202. See Bergman, *supra* note 54, at 29–30 (noting the various ways in which a prejudiced state might avoid enforcing federal rights). Professor Redish had made a similar argument with respect to abstention, which occurs when a court refuses to exercise jurisdiction granted by statute. See generally Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (arguing that abstention undermines separation of powers). But there is a principled distinction between the act of refusing to exercise jurisdiction and the act of redefining statutory jurisdiction to remove jurisdiction. The former is a traditional function of the Court; the latter is a traditional function of Congress.

203. Although I address Friedman's argument only in the federal question context, Friedman does not limit his argument to the federal question statute.

Congress has the primary role in defining jurisdiction.<sup>204</sup> Instead, Friedman argues that the Court's decisions establish that the judiciary and Congress are equal partners in a dialogue designed to ascertain the optimal bounds of federal jurisdiction.<sup>205</sup> But Friedman's theory faces several substantial objections.

Assigning the Court an equal role in defining inferior court jurisdiction cannot be squared with the text of Article III. Article III, which enumerates all the powers of the judiciary, does not empower the Court to define federal jurisdiction.<sup>206</sup> It states that the courts have the power only to decide various cases and controversies.<sup>207</sup> Article III vests control over the jurisdiction of the inferior federal courts in Congress by granting Congress the power to create or abolish those courts.<sup>208</sup> Granting the courts an equal role in defining jurisdiction also conflicts with the historical background of Article III. The decision to grant Congress control over inferior federal courts establishes that the need for inferior federal courts was to be a political question. Placing control of jurisdiction in the hands of the courts hampers the role of politics in jurisdictional determinations.<sup>209</sup>

The dialogue theory also fails on its own terms. The Court has repeatedly emphasized Congress's primacy in defining jurisdiction,<sup>210</sup> and Congress has consistently conveyed through its actions that it perceives itself to have the power to regulate jurisdiction. Thus, to the extent that there is a dialogue, both speakers, Congress and the Court, have said the same thing—that Congress has primary power over jurisdiction.

In any event, there is reason to think that Congress does not regularly engage in a dialogue on jurisdictional matters. There are costs for the legislature to monitor Court decisions, and the cost of actually generating a legislative response to a disfavored decision is even higher.<sup>211</sup> Jurisdiction-

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204. See Friedman, *supra* note 2, at 2, 10.

205. *Id.* at 29–30. Friedman also points out that Congress has, on occasion, adopted interpretations by the Court. But the fact that Congress has done so establishes only that Congress recognizes that it may learn from the Court's decisions, not that Congress perceives the Court to have an equal role in defining jurisdiction.

206. Friedman himself acknowledges this. Friedman argues only that Article III grants federal courts discretion to decline jurisdiction. See Friedman, *supra* note 2, at 51 (“[Article III] does not compel the exercise of jurisdiction, but requires only that the jurisdiction be available.”).

207. See U.S. CONST. art. III, § 2.

208. Of course, the courts can shape jurisdiction to some extent in the course of deciding cases or controversies. But that power is ancillary to the power of resolving cases. Congress is the only branch with a claim to a specific power to define federal jurisdiction.

209. Friedman claims that the dialogue model is preferable to leaving control of jurisdiction exclusively in the hands of Congress because a dialogue permits the federal court system to adapt in response to the changing conception of the role of the federal courts. See Friedman, *supra* note 2, at 48. But the whole point of granting Congress power over inferior courts was so that Congress could fashion a federal judicial system that met the necessities of the time.

210. See *supra* note 9.

211. See generally Nancy C. Staudt, René Lindstädt & Jason O'Connor, *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005*, 82 N.Y.U. L. REV. 1340, 1353 (2007) (providing statistics for tax decisions mentioned by Congress and those prompting a

al decisions are unlikely to warrant these costs. Constituents are bound to be less concerned about jurisdictional issues than about substantive ones.<sup>212</sup> Legislators therefore are likely to direct their attention more toward substantive laws than jurisdictional ones.<sup>213</sup> This may explain why most legislative efforts on jurisdiction prompted by court decisions have been in response to decisions on substantive law.<sup>214</sup> Bills have often been introduced to strip jurisdiction over controversial substantive issues such as school busing, school prayer, abortion, official acknowledgement of God, the pledge of allegiance, and same sex marriage.<sup>215</sup> More recently, Congress enacted the Schiavo bill to ensure third-party standing to Terri Schiavo's parents and to avoid the potential jurisdictional bar posed by the *Rooker-Feldman* doctrine.<sup>216</sup>

To be sure, Congress has occasionally enacted jurisdictional laws in response to jurisdictional decisions. Recent examples include the Detainee Treatment Act of 2005<sup>217</sup> and the Military Commissions Act of 2006,<sup>218</sup> both of which Congress enacted in response to the Court's decisions finding jurisdiction to hear habeas petitions filed by aliens detained at Guantanamo;<sup>219</sup> and the 1990 enactment of the Judicial Improvements Act,<sup>220</sup> which codified supplemental jurisdiction, in response to *Finley v. United States*.<sup>221</sup> But these enactments are the exception rather than the rule.<sup>222</sup>

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successful legislative response).

212. Just as Judge Friendly observed that "[n]o congressman would lose a vote if orders of [an agency] were made reviewable by courts of appeals rather than by a district court of three judges," FRIENDLY, *supra* note 25, at 58, so too it is hard to imagine a congressman losing votes over a vote to move some cases from state to federal court or vice versa.

213. As one recent study put it, "Congress's inclination to respond to Supreme Court cases is likely to vary from issue to issue, making it problematic to use facts and circumstances from one legal context to draw conclusions about another." Staudt, Lindstädt & O'Connor, *supra* note 211, at 1346.

214. On a more general level, although Congress has enacted occasional jurisdictional statutes, it has not for over a century undertaken a comprehensive reevaluation of the jurisdictional laws to determine whether the federal courts are being put to the best possible use. See Frankfurter, *supra* note 180, at 501-03 (making the same point in 1927).

215. For a catalogue of recent examples, see James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 191-96 (2007). For older examples, see HART & WECHSLER, *supra* note 8, at 321-22; Gunther, *supra* note 2, at 897; Sager, *supra* note 2, at 18 n.3. This is not to say that Congress never enacts jurisdictional legislation; rather it is that Congress rarely enacts jurisdictional legislation in response to judicial decisions.

216. See Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1004 (2006).

217. Pub. L. No. 109-148, 119 Stat. 2680 (2005).

218. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

219. The Detainee Treatment Act was enacted in response to the Court's holding in *Rasul v. Bush*, 542 U.S. 466 (2004), which found federal jurisdiction over habeas petitions filed by aliens held at Guantanamo. The Military Commission Act was enacted in response to *Hamdan v. Rumsfeld*, 548 U.S. 557, 583-84 (2006), which held that the Detainee Treatment Act did not strip jurisdiction over habeas petitions filed before the Detainee Treatment Act's enactment. The Court held the Military Commission Act unconstitutional in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

220. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

221. 490 U.S. 545 (1989). Perhaps a third example is the Class Action Fairness Act of 2005. That

And even the Detainee Treatment Act and the Military Commissions Act may be more an effort to achieve a substantive result—easier convictions of enemy combatants<sup>223</sup>—than the product of concerns about the proper allocation of judicial power.

Only a miniscule portion of the jurisdictional decisions rendered by the courts prompt any legislative action. That is certainly so for federal question jurisdiction. Congress has never enacted legislation responding to the Court's limitations on federal question jurisdiction; it has not even held any hearings on the matter since 1980. Although this might reflect that Congress agrees, or at least accepts, the Court's decisions, a more likely explanation is that the issue is not important enough to Congress to warrant examination.

### CONCLUSION

The present state of the law of federal question jurisdiction is only remotely tied to the statutory text conferring that jurisdiction. The limitations on federal question jurisdiction are the product of judicial policy choices, not an effort to implement the statute. At the same time, however, the Court has not retreated from its position that the power to prescribe jurisdiction rests with Congress.<sup>224</sup> There is a deep disconnect between what the Court is saying and what it is doing. This disconnect alone places the Court's jurisdictional doctrines in question.

This is not to say that the Court should undo its decisions. Doing so is implausible especially for doctrines like the well-pleaded complaint rule or the requirement that the plaintiff's claim require the interpretation of fed-

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Act abrogated the complete diversity requirement and the rule against aggregation of multiple plaintiffs' claims in certain class actions. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1711–1715 (2006)).

222. Consider *Bowles*, which may be the most publicly criticized jurisdictional decision of the past few years. *See* Adam Cohen, *Larry Craig's Great Adventure: Suddenly, He's a Civil Libertarian*, N.Y. TIMES, Sept. 24, 2007, at A22. In that case, the Court held that the time to file a notice of appeal is jurisdictional and consequently cannot be extended by a district court. Although the decision caught the attention of some legislators, *see* Edward M. Kennedy, *The Supreme Court's Wrong Turn—And How to Fix It*, AM. PROSPECT, Nov. 19, 2007 (describing the decision in *Bowles* as a “display of bureaucratic inhumanity”), available at 2007 WLNR 24389329; Press Release, Sen. Charles E. Schumer, Schumer Declares Democrats Hoodwinked into Confirming Chief Justice Roberts, Urges Higher Burden of Proof for Any Future Bush Nominees (July 27, 2007), available at [http://schumer.senate.gov/new\\_website/record.cfm?id=280107](http://schumer.senate.gov/new_website/record.cfm?id=280107) (describing *Bowles* as “a particularly outrageous decision”), it has not prompted a legislative response.

223. Among other things, under the Acts detainees who are tried before military commissions are not entitled to counsel, cannot rebut the factual basis underlying their alleged enemy combatant status, and have limited access to discovery. *See Boumediene*, 128 S. Ct. at 2269.

224. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 772–73 (2008) (noting “the authority of Congress under Art. III to set the limits of federal jurisdiction” (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 746 (1979) (Powell, J., dissenting))); *Bowles v. Russell*, 127 S. Ct. 2360, 2365 (2007) (“Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.”).

eral law, which decades of cases have firmly entrenched in the law. Nor is it clear that the Court should abandon these doctrines given the indications that Congress has adopted them.

But the persistence of these doctrines is no reason for the Court to continue to tinker with the scope of federal question jurisdiction. Each time the judiciary expands or contracts federal question jurisdiction, it assumes the role of making laws as opposed to interpreting them and of regulating the balance of power between state and federal courts—tasks, the Court has stated, that the Constitution assigns to Congress.

The continued modifications obfuscate the law of federal question jurisdiction. The existing doctrines implementing the federal question statute are complex and unpredictable. The Court's recent decision in *McVeigh*, in which the justices disagreed 5–4 on whether the case arose under federal law, illustrates the point. Each change adds a layer of confusion and unpredictability.<sup>225</sup> The problem is exacerbated by the fact that not only the Supreme Court but also the lower courts have the power to develop jurisdictional doctrines. The sheer number of courts, combined with the absence of a decisional reference such as statutory language or congressional intent to guide decisions, makes the development of disjointed jurisdictional doctrines almost inevitable.<sup>226</sup> This leaves many litigants without a clear sense of whether they may file suit in federal court.<sup>227</sup> Although there are undoubtedly many cases that are unaffected by the Court's recent changes in federal question jurisdiction, the mere fact that the Court found the issues important enough to address on so many occasions in recent cases suggests that the Court's decisions have an impact on a nontrivial number of cases.

The constant development of new jurisdictional doctrines also places on Congress the burden of staying apprised of the judicial interpretations to ensure that jurisdiction is available in cases that should be in federal court. Congress ordinarily does not need to vigilantly monitor judicial interpretations of statutes because those interpretations are based on good faith efforts to implement Congressional intent. But that premise does not hold in the federal question statute context. And in all likelihood, Congress is unwilling to bear the costs of monitoring judicial interpretations of jurisdictional statutes.

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225. See e.g., Pushaw, *supra* note 69, at 1535 (“*Merrell Dow* and its progeny have added a confusing wrinkle to one subset of federal question jurisdiction cases.”). Confusing jurisdictional doctrines caused by the Court's decisions is not unique to federal question jurisdiction. See, e.g., Hessick, *supra* note 196, at 276 (noting that the Court's decisions have also “produced an incoherent and confusing law” of standing).

226. This may explain in part the frequent need for the Supreme Court's intervention regarding the meaning of § 1331.

227. To be sure, the Court's jurisdictional changes leave the vast majority of cases untouched. In those cases, it is clear whether or not there is federal question jurisdiction.

It may be that the federal courts should not have the full “arising under” jurisdiction available under Article III. States no longer harbor widespread prejudice against assertions of federal rights, and especially with easy access to federal decisions through electronic databases, state judges are less likely to render decisions leading to disuniformity in federal law. But this does not justify the Court’s decision to continue molding the scope of federal question jurisdiction. Whether to modify federal question jurisdiction and how to do so is a task for Congress.

Of course, Congress is partly to blame for the Court’s common law approach to federal jurisdiction. Congress’s failure to provide any guidance to the courts for over a century on the scope of the “arising under” provision has no doubt contributed to the judiciary’s assumption of control over federal question jurisdiction.<sup>228</sup> But that failure may well be prompted by the Court’s decisions. The reason that Congress amends existing legislation is to make corrections in the law; legislative corrections are unnecessary if the Court has already made those corrections. But when Congress does not intervene, the Court continues to make jurisdictional law. Ideally, Congress should break this vicious cycle and revisit the federal question statute to state whether it adopts the Court’s interpretations and determine what it considers to be the appropriate scope of federal question jurisdiction. But until it does so, the judiciary should do its best to remain faithful to its obligation to enforce the law as opposed to write it.

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228. The problem is not unique to federal question jurisdiction or to these times. In 1927, then-professor Frankfurter made a similar observation about Congress’s conduct towards federal jurisdiction generally. *See* Frankfurter, *supra* note 180, at 502 (chastising Congress for not reassessing federal jurisdiction for over forty years).