

**OUTER MARKER BEACON: THE SEVENTH
CIRCUIT CONFIRMS THE CONTOURS OF
FEDERAL QUESTION JURISDICTION IN *BENNETT
V. SOUTHWEST AIRLINES CO.***

WILLIAM K. HADLER*

Cite as: William K. Hadler, *Outer Marker Beacon: The Seventh Circuit Confirms the Contours of Federal Question Jurisdiction in Bennett v. Southwest Airlines Co.*, 3 SEVENTH CIRCUIT REV. 22 (2007), at <http://www.kentlaw.edu/7cr/v3-1/hadler.pdf>.

INTRODUCTION

*“The federal courts do not exist for the purpose of clearing their dockets. They exist to unify the federal system, to interpret and enforce federal law, and to prevent interstate prejudices and allegiances from balkanizing the nation.”*¹ – Professor Martin H. Redish

First principles of our Republic teach that federal courts are courts of limited jurisdiction, the boundaries of which are designated by the Constitution of the United States. Article III provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties.”²

* J.D. candidate, May 2008, Chicago-Kent College of Law, Illinois Institute of Technology; Vanderbilt University, B.S. *magna cum laude*, May 2001. William K. Hadler would like to thank his family, namely his wife, Megan, and his parents, Richard and Jane Hadler, for their love and support.

¹ 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, 1786 (1992).

² U.S. CONST. art. III, § 2, cl.1.

While this precise language was codified in 28 U.S.C. § 1331,³ “it is uncontroversial that the federal question statutory jurisdictional grant is narrower than its identically worded constitutional counterpart, [but] its precise scope is unclear with respect to state law claims that implicate questions of federal law.”⁴ These so-called “hybrid claims” usually occur when a plaintiff brings a cause of action in state court, but uses the violation of a federal statute to satisfy an element of the state law claim.⁵ These cases “force district courts to confront a confusing line of cases in which the Supreme Court’s attempts to articulate an all-purpose, bright line test for the § 1331 inquiry have consistently failed.”⁶ In the field of subject matter jurisdiction, the “question that has caused the most analytical difficulty for the allocation of jurisdiction over the past century is whether a federal court has original federal question jurisdiction when an issue of federal law is embedded in a claim created by state law.”⁷

The most recent Supreme Court case to address this issue was *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*.⁸ In this case, the Court established a new test to govern these hybrid cases and to assess the grant of federal question jurisdiction. The Court announced that the federal courthouse doors are open for a suit that “necessarily raise[d] a stated federal issue,

³ 28 U.S.C. § 1331 (2000) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

⁴ Harvard Law Review Association, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction Over State Law Claims Post-Merrell Dow*, 115 HARV. L. REV. 2272, 2273 (2002) [hereinafter *Mr. Smith Goes to Federal Court*].

⁵ Although at least one commentator has questioned the use of the terminology “hybrid” or “mixed” claims to describe these cases and argues that the term “embedded” is more appropriate, all of these terms are presented in this Note interchangeably to describe a case in which federal issues appear in state law claims. See Douglas D. McFarland, *The True Compass: No Federal Question in a State Law Claim*, 55 U. KAN. L. REV. 1, 2 (2006).

⁶ Adam P.M. Tarleton, *In Search of the Welcome Mat: The Scope of Statutory Federal Question Jurisdiction After Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 84 N.C. L. REV. 1394, 1413 (2006).

⁷ McFarland, *supra* note 5, at 1.

⁸ 545 U.S. 308, 314 (2005).

actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”⁹

Following *Grable*, the Seventh Circuit Court of Appeals ruled on its own hybrid case, *Bennett v. Southwest Airlines Co.*¹⁰ In *Bennett*, the plaintiffs,¹¹ who were injured as a result of a Southwest Airlines crash at Midway Airport in Chicago on December 8, 2005, filed tort suits in Illinois state court.¹² The defendants (Southwest Airlines Co., The Boeing Company, and the City of Chicago) removed these consolidated suits to federal court.¹³ The United States District Court for the Northern District of Illinois “denied the motion to remand [to state court], but certified the decision for interlocutory appeal,” which the Seventh Circuit accepted.¹⁴ On appeal, the defendants’ argued that the state claims rested on federal aviation regulations that required uniform interpretation and application by a federal forum.¹⁵ On the other hand, the plaintiffs argued that the claims in this case represented “garden variety state-law tort claims.”¹⁶ The Seventh Circuit reversed the district court’s decision and remanded the case to state court.¹⁷

While the Seventh Circuit made the correct decision in *Bennett*, the test it used to reject federal question jurisdiction was flawed. This Note discusses and examines the evolution of the tests used to analyze jurisdiction in these hybrid cases. It divides these tests into two categories: the Traditional Test, based on a reconciliation of the issue in the case with the original purposes of the lower federal courts; and

⁹ *Id.* at 314.

¹⁰ 484 F.3d 907 (7th Cir. 2007).

¹¹ Brief of Defendant-Appellee the Boeing Company at 5, *Bennett*, 484 F.3d 907 (No. 06-3486), 2007 WL 414512 at *4-5 (7th Cir. Jan. 24, 2007) (“Plaintiffs in these consolidated cases are various passengers, bystanders, and the estate and family members of the child who was killed.”).

¹² *Bennett*, 484 F.3d at 908.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 909.

¹⁶ Opening Brief of Plaintiff-Appellants at 5, *Bennett*, 484 F.3d 907 (No. 06-3486), 2006 WL 3368827, at *5 (7th Cir. 2006).

¹⁷ *Bennett*, 484 F.3d at 912.

the Modern Test, based on using the effect on the federal docket as a factor in decisions granting federal question jurisdiction. Part I of this Note identifies and explains the traditional Supreme Court test used to decide federal jurisdiction when federal issues presented themselves in state law claims. Part II illustrates the Supreme Court's departure from this traditional method. It shows how the Court moved to a Modern Test that takes into account federal caseload issues in *Merrell Dow Pharmaceuticals Inc. v. Thompson*¹⁸ and *Grable*.¹⁹ Part III discusses the *Bennett* decision, and examines the application of the Modern Test in the Seventh Circuit. Part IV discusses the problems with considering caseload factors in the adjudication of federal question jurisdiction and proposes an alternative analysis the Seventh Circuit could have used that would have reached the same result.

I. THE TRADITIONAL TEST FOR FEDERAL QUESTION JURISDICTION IN STATE LAW CLAIMS

This section identifies the differences between the traditional and Modern Tests for federal question jurisdiction in hybrid claims. Then it examines the origins and development of the Traditional Test to provide context for the evaluation of the Modern Test, as applied by the Seventh Circuit Court of Appeals in *Bennett*.

A. *The Traditional and the Modern Tests*

In *Bennett*, the defendants removed the case to the United States District Court for the Northern District of Illinois after the plaintiffs originally filed a complaint in Illinois state court.²⁰ The federal removal statute permits civil actions “arising under” federal law to be removed from state court to federal court.²¹ Traditionally, a court evaluates the removability of actions based on the well-pleaded

¹⁸ 478 U.S. 804 (1986).

¹⁹ *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

²⁰ *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 908 (7th Cir. 2007).

²¹ 28 U.S.C. §1441(b) (2000).

complaint rule established in *Louisville & Nashville Railroad Co. v. Erasmus L. Mottley*.²² Under this rule, “a suit arises under the Constitution and laws of the United States only when plaintiff’s statement of his own cause of action shows it is based upon those laws or that Constitution.”²³ It is not sufficient for a plaintiff to base subject matter jurisdiction on some anticipated defense based on federal law.²⁴ In *Bennett*, the defendants’ argument for removal was based upon an alternative theory:²⁵ that the claims “arose under” federal law “because federal aviation standards play[ed] a major role in [the] claim[s] that Southwest (as operator of the flight), Boeing (as manufacturer of the airframe), or Chicago (as operator of the airport) acted negligently.”²⁶

Bennett employed the *Grable* two-prong test for federal question jurisdiction over hybrid claims. The plaintiffs called this the “substantial federal issue doctrine.”²⁷ Using this test in *Bennett*, the Seventh Circuit first assessed whether the plaintiff’s claim, “necessarily raise[d] a stated federal issue, actually disputed and substantial.”²⁸ In other words, the *Bennett* court reasoned that there must be a certain quality about the particular issue to warrant adjudication within the federal system. In this first prong, the Seventh Circuit used the Traditional Test espoused by the Supreme Court since the enactment of § 1331. While the Supreme Court’s test for this quality expanded over the subsequent years, the focal point remained the same. Professor William Cohen eloquently articulated this standard. He argued that federal question jurisdiction is only necessary in a specific situation:

²² 211 U.S. 149, 152 (1908).

²³ *Id.*

²⁴ *Id.*

²⁵ *See Bennett*, 484 F.3d at 908. (The defendants abandoned one theory, which focused on complete preemption by federal aviation regulations, therefore preemption will not be discussed in this Note).

²⁶ *Id.*

²⁷ Opening Brief of Plaintiff-Appellants, *supra* note 16, at *5.

²⁸ *Bennett*, 484 F.3d at 909 (quoting the standard established by *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005)).

A novel claim of mixed federal and state law ought to qualify as “arising under” federal law only if it exhibits those features which justify the need for federal trial court jurisdiction of federal question cases. A case that requires expertise in the construction of the federal law involved in the case, and a sympathetic forum for the trial of factual issues related to the existence of a claimed federal right, ought to fall within federal jurisdiction.²⁹

Yet, based on the guidance from the Supreme Court in *Merrell Dow* and *Grable*, the *Bennett* court departed from this traditional inquiry. The second prong of the Seventh Circuit’s inquiry asked whether “a federal forum may entertain [the issue] without disturbing any congressionally approved balance of federal and state judicial responsibilities.”³⁰ The *Grable* Court announced the “importance of having a federal forum for the issue, and the consistency of such a forum with Congress’s intended division of labor between state and federal courts.”³¹ By adding caseload factors to the decision to grant federal question jurisdiction in *Merrell Dow* and *Grable*, the Supreme Court ushered in the Modern Test for granting federal question jurisdiction in these cases.³² This factor proved dispositive in *Bennett*.³³ The Seventh Circuit reasoned that a decision to uphold federal question jurisdiction would move an entire class of cases into federal court.³⁴

²⁹ William Cohen, *The Broken Compass: The Requirement that a Case Arise “Directly” Under Federal Law*, 115 U. PA. L. REV. 890, 906 (1967).

³⁰ *Bennett*, 484 F.3d at 909.

³¹ *Grable*, 545 U.S. at 319.

³² See Tarleton, *supra* note 6, at 1408 (“Th[e] reconciliation of *Grable* and *Merrell Dow* is best viewed as a balancing test wherein the Court weighs the federal interest in providing a federal forum against the competing interest in avoiding excessive burdens on the federal docket.”).

³³ *Bennett*, 484 F.3d at 911.

³⁴ *Id.*

B. *The Development of the Traditional Test*

Having established the difference between the traditional and the Modern Tests for federal question jurisdiction in hybrid cases, it is necessary to examine the development of these tests in order to assess their present day application. Article III of the Constitution of the United States, states that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties.”³⁵ However, the grant of the Article III power was not self-executing and it took Congress until 1801, in the famous Midnight Judges’ Act³⁶, to grant federal courts the powers asserted under Article III.³⁷ But the Act did not survive the Federalists’ departure from power and it was repealed by the Jeffersonian Congress within one year.³⁸ Congress waited until 1875 to again grant original federal question jurisdiction to the lower federal courts, but this time it added removal jurisdiction whereby, upon motion, a case could be transferred from state court to federal court if there was an issue of federal law.³⁹ While very little legislative history exists surrounding the 1875 Act, there is some suggestion that a distrusting post-Civil War Congress adopted § 1331 to protect federal rights from the individual states.⁴⁰

Although a federal question jurisdiction rule began emerging in the three decades following the 1875 Act, it was not until the Supreme Court decided *American Well Works Co. v. Layne & Bowler Co.*,⁴¹ in 1916 that the boundaries were truly clarified.⁴² The case centered on

³⁵ U.S. CONST. art. III, § 2, cl.1.

³⁶ Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

³⁷ McFarland, *supra* note 5, at 3-4.

³⁸ Donald L. Doernberg, *There’s No Reason For It; It’s Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 601 (1987).

³⁹ *Id.*

⁴⁰ Patti Allewa, *Prerogative Lost: The Trouble With Statutory Federal Question Doctrine After Merrell Dow*, 52 OHIO ST. L.J. 1477, 1497 (1991).

⁴¹ 241 U.S. 257 (1916).

⁴² McFarland, *supra* note 5, at 6.

the patent rights between two companies, both of whom manufactured similar pumps.⁴³ The plaintiff sued for slander—a state court tort claim—because of the defendant’s threats to sue under the patent laws.⁴⁴ In denying federal jurisdiction, Justice Oliver Wendell Holmes stated that “[a] suit for damages caused by a threat to sue under the patent law is not itself a suit under the patent law.”⁴⁵ Famously, Justice Holmes stated that “[a] suit arises under the law that creates the cause of action.”⁴⁶

Five years later, in *Smith v. Kansas City Title & Trust Co.*, the Court expanded federal question jurisdiction beyond *American Well Works*.⁴⁷ In *Smith*, a shareholder of Kansas City Title and Trust Company sued to prevent the company from investing its funds in farm loan bonds issued by entities formed under the authority of the Federal Farm Loan Act of 1916.⁴⁸ Seeking to enjoin the defendant, the shareholder claimed that the bonds were invalid because they were issued under an unconstitutional law.⁴⁹ The Court took notice of jurisdiction *sua sponte* and provided the general rule that “where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States . . . the [d]istrict [c]ourt has jurisdiction under this provision.”⁵⁰

Although the case involved a Missouri shareholder, a Missouri corporation, and Missouri corporation law; the Supreme Court still allowed the plaintiff to bring the action in federal district court under federal question jurisdiction because of the presence of a federal act. In a vigorous dissent, Justice Holmes repeated his rule from *American Well Works*, stating, “[t]he mere adoption by a State law of a United States law as a criterion or test, when the law of the United States has

⁴³ *American Well Works*, 241 U.S. at 258.

⁴⁴ *Id.*

⁴⁵ *Id.* at 259.

⁴⁶ *Id.* at 260.

⁴⁷ Mr. Smith Goes to Federal Court, *supra* note 4, at 2273-74.

⁴⁸ 255 U.S. 180, 195 (1921); *see generally* 12 U.S.C. § 641 *repealed by* Pub. L. No. 92-181, 85 Stat. 624 (1971).

⁴⁹ *Id.* at 201.

⁵⁰ *Id.* at 199.

no force *proprio vigore*,⁵¹ does not cause a case under State law to be also a case under the law of the United States.”⁵² *Smith* appears to lower the standard from *American Well Works*, making it possible for a case ostensibly under state law to receive federal question jurisdiction where the interpretation of federal law is at issue.⁵³ This holding represented an important shift in the standard of analysis used to evaluate these hybrid claims, yet the “Supreme Court’s own subsequent elaboration of the statutory grant has left many unanswered questions.”⁵⁴

The evolution of this particular subcategory of federal question jurisdiction continued in *Gully v. First National Bank in Meridian*,⁵⁵ where the Supreme Court appeared to tailor the expansion of the inquiry by the *Smith* Court.⁵⁶ *Gully* centered on a dispute over outstanding taxes owed to Mississippi under an acquisition contract where all of the debts and liabilities of the old bank were to be paid by the new bank.⁵⁷ The plaintiff sued in state court and the defendant removed the case to federal court on the “ground that the suit was one arising under the Constitution or laws of the United States.”⁵⁸ The plaintiff lost the case on the merits and appealed.⁵⁹ The Fifth Circuit affirmed the grant of federal jurisdiction because “the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute.”⁶⁰

The Supreme Court, however, reversed.⁶¹ The Court rejected the reasoning that the claim asserted by the state tax collector arose under

⁵¹ *Proprio vigore*, means “by its own strength.” BLACK’S LAW DICTIONARY 1256 (8th ed. 2004).

⁵² *Smith*, 255 U.S. at 215.

⁵³ See generally *id.* at 199-202; see also Mr. Smith Goes to Federal Court, *supra* note 4, at 2272.

⁵⁴ *Id.* at 2274.

⁵⁵ 299 U.S. 109 (1936).

⁵⁶ McFarland, *supra* note 5, at 11.

⁵⁷ *Gully*, 299 U.S. at 111.

⁵⁸ *Id.* at 112.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 114.

federal law because the fundamental authority to collect taxes derives from the sovereign powers of the United States.⁶² The Court stated that the “federal nature of the right to be established is decisive—not the source of authority to establish [the right].”⁶³ Because countless claims could be found to have their origins in federal statutes, the Supreme Court reasoned that the federal question jurisdiction analysis required more than the mere presence of federal law; it required a “substantial” federal issue.⁶⁴ In *Gully*, the Court, announced a distinction that would bedevil the federal courts over the next 75 years and appear at issue in *Bennett*: the distinction between federal controversies “that are basic and those that are collateral, between disputes that are necessary and those that are merely possible.”⁶⁵

The Supreme Court next addressed hybrid claims fifty years after *Gully* in *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*.⁶⁶ Similar to *Gully*, the parties in *Franchise Tax Board* were at odds over the collection of state taxes.⁶⁷ The defendant was the administrator of an employee vacation fund for union construction workers in the southern California region.⁶⁸ According to California law, the Franchise Tax Board was authorized to seek money directly from the vacation fund for unpaid state personal income taxes by contributor-members because the fund was an ERISA⁶⁹ program.⁷⁰ The Franchise Tax Board filed suit in state court and the defendant-administrator removed to the federal court.⁷¹ The Franchise Tax Board ultimately lost on appeal.⁷²

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 118; *see also* Mr. Smith Goes to Federal Court, *supra* note 4, at 2272.

⁶⁶ 463 U.S. 1 (1983).

⁶⁷ *Id.* at 3-4.

⁶⁸ *Id.* at 4.

⁶⁹ 29 U.S.C. §§ 1001 et seq. (2000).

⁷⁰ *Franchise Tax Board* 463 U.S. at 5-6.

⁷¹ *Id.* at 7.

⁷² *Id.*

The Supreme Court granted certiorari to determine whether jurisdiction was appropriate within the federal court system.⁷³

In contrast to the rule from *American Well Works* and more in line with the opinion in *Gully*, the *Franchise Tax Board* Court declined to grant federal question jurisdiction.⁷⁴ The Court held that “the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.”⁷⁵ The Court reasoned that the “State’s right to enforce its tax levies is not of central concern to the federal statute” and that ERISA did not provide any direct cause of action for the plaintiff’s relief.

As opposed to *American Well Works*’ clear rule that the “suit arises under the law that creates the cause of action,”⁷⁶ *Gully* and *Franchise Tax Board* lowered the threshold and complicated the analysis by allowing for a jurisdictional determination to be made based on the presence of a “substantial” federal issue in a claim that originated under state law.⁷⁷ The *Franchise Tax Board* Court reiterated the rule from *Smith*⁷⁸ and rejected *American Well Works*, which it described as a useful description for the “vast majority of cases that come within the district courts’ original jurisdiction,” but not “an exclusionary principle.”⁷⁹

Thus, in the approximately 100 years since Congress first granted federal question jurisdiction to the lower federal courts, the Supreme Court has extended the reach of the federal courts and increased the

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 28.

⁷⁶ *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

⁷⁷ *McFarland*, *supra* note 5, at 13-4.

⁷⁸ *Franchise Tax Board*, 463 U.S. at 9 (citing *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921)) (“We have often held that a case ‘arose under’ federal law where the vindication of a right under state law necessarily turned on some construction of federal law.”).

⁷⁹ *Franchise Tax Board*, 463 U.S. at 9.

power of the national judiciary.⁸⁰ Immediately following the enactment § 1331,⁸¹ a court granted federal question jurisdiction only when a federal “cause of action” created the claim.⁸² However, the combination of *Smith*, *Gully*, and *Franchise Tax Board* established the Traditional Test.⁸³ A court could grant federal question jurisdiction if a “substantial” federal issue was at stake even if the claim originated under state law.⁸⁴ The prudence of the expansion notwithstanding,⁸⁵ the Traditional Test was firmly rooted in this one tier inquiry, but this would not last for long.

II. *MERRELL DOW* AND *GRABLE* ESTABLISH THE MODERN TEST FOR FEDERAL QUESTION JURISDICTION

This section discusses the transition from the Traditional Test for federal question jurisdiction to the Modern Test. Specifically, it focuses on the emerging importance of the judicial economy and caseload factors in the federal courts’ analysis of state claims that invoke federal issues.

⁸⁰ See generally Jason Pozner, *The More Things Change, The More They Stay the Same: Grable & Sons v. Darue Engineering Does Not Resolve The Split Over Merrell Dow v. Thompson*, 2 SETON HALL CIRCUIT REV. 533, 543-48 (2006).

⁸¹ 28 U.S.C. § 1331 (2000).

⁸² *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

⁸³ See *Gully v. First National Bank*, 299 U.S. 109, 113-4 (1936) (“A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.”).

⁸⁴ *Id.*

⁸⁵ See generally McFarland, *supra* note 5, for a detailed argument in favor of returning to the standard that a claim arises under the law that creates it.

A. Merrell Dow *Introduces the Modern Test*

Following closely on the heels of *Franchise Tax Board*, the Supreme Court granted certiorari to *Merrell Dow Pharmaceuticals Inc. v. Thompson* and issued a decision in 1986.⁸⁶ In *Merrell Dow*, the plaintiffs sued the manufacturer of the drug Bendectin, alleging that their children were born with deformities as a result of the mothers' ingestion of the drug during pregnancy.⁸⁷ The plaintiffs sought damages in Ohio state court on various negligence theories, among them that the drug was misbranded in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA").⁸⁸ The defendants removed the action to federal district court.⁸⁹ As in *Bennett*, the plaintiffs attempted to use a violation of a federal statute to satisfy one element of a state cause of action and the defendants argued for removal because the claim was one arising under laws of the United States.⁹⁰

In contrast to the traditional federal question jurisdiction decisions, in a 5-4 decision, the *Merrell Dow* Court held that the lack of a federal private right of action under the FDCA regime was dispositive.⁹¹ Here, the Court did not expressly overrule the "substantial interest test" from *Franchise Tax Board* and *Gully*,⁹² but instead returned to the logic in *American Well Works*, thereby denying the development of federal question jurisprudence over the previous 100 years.⁹³ According to the *Merrell Dow* Court, when "Congress has decided not to provide a particular federal remedy, we are not free to 'supplement' that decision in a way that makes it 'meaningless'."⁹⁴

⁸⁶ 478 U.S. 804 (1986).

⁸⁷ *Id.* at 805.

⁸⁸ *Id.*; see also 21 U.S.C. §§321 et seq. (2000).

⁸⁹ *Id.* at 806.

⁹⁰ *Id.*

⁹¹ *Id.* at 817.

⁹² *Id.* at 813.

⁹³ Alleva, *supra* note 40, at 1525.

⁹⁴ *Merrell Dow*, 478 U.S. at 812 n.10.

The result in *Merrell Dow* sparked criticism from legal scholars, and more troubling, confusion among the lower courts.⁹⁵

The decision left several different approaches to the analysis of federal question jurisdiction in state law claims in its wake.⁹⁶ Despite the Court's tough rhetoric in the decision regarding the need for "prudence and restraint in the judicial inquiry," the Court actually expanded the lower federal courts' discretion evidenced by "circuit opinions ranging across the spectrum of possibilities."⁹⁷ Some circuits required a private right of action to grant federal question jurisdiction; while other circuits merely required the presence of a "substantial" federal interest.⁹⁸

While the circuit split was an important result of the holding, the Court's focus on the practical consequences of increased federal litigation⁹⁹ distinguishes this case from the past and is the most relevant part of the decision to this Note. The introduction of an examination of the practical circumstances surrounding the litigation signaled a new era in federal question cases. *Merrell Dow* introduced the possibility that judicial economy could factor into the federal question jurisdiction analysis of state court claims,¹⁰⁰ and marked the beginning of the Modern Test of federal question jurisdiction analysis of state court claims.¹⁰¹ The Court tried to explain its reasoning: "the phrase 'arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management

⁹⁵ Compare *Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994) (No right to bring case in federal court where plaintiff seeks use of federal law as element in state cause of action absent a congressionally approved private right of action) with *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 801-801(4th Cir. 1996) (Court concludes that action "arises under federal law within the meaning of 28 U.S.C. § 1331 because resolution of Ormet's claim requires the determination of substantial federal issues."); see also Pozner, *supra* note 80, at 555-71.

⁹⁶ McFarland, *supra* note 5, at 17.

⁹⁷ Pozner, *supra* note 80, at 555-556.

⁹⁸ *Id.*

⁹⁹ See *Merrell Dow*, 478 U.S. at 811-12.

¹⁰⁰ *Id.* at 814 n.12.

¹⁰¹ See generally Alleva, *supra* note 40, at 1557; Tarleton, *supra* note 6, at 1410.

of the federal judicial system.”¹⁰² As opposed to the traditional inquiry into the nature of the issue in dispute, the word “management” suggests that a decision to grant federal question jurisdiction has an administrative quality—based on the amount of work among the state and federal courts.¹⁰³

Next the Court suggested that the rationale for the development of the “implied remedy doctrine” was because of “increased complexity of federal legislation and the increased volume of federal litigation.”¹⁰⁴ Later in the opinion, hidden in a footnote, the Court recognized that not all cases to enforce rights originally based on laws of the United States could be heard in federal court.¹⁰⁵ The footnote states, in part:

A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. 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.¹⁰⁶

In other words, a grant of federal question jurisdiction to any state law claim with federal origins would be impractical because so many state

¹⁰² *Merrell Dow*, 478 U.S. at 808 (quoting Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for S. California, 463 U.S. 1, 8 (1983)).

¹⁰³ See generally Alleva, *supra* note 40, at 1557; Tarleton, *supra* note 6, at 1410.

¹⁰⁴ *Merrell Dow*, 478 U.S. at 811 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377 (1982)).

¹⁰⁵ *Id.* at 814 n.12.

¹⁰⁶ *Id.* (quoting *Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912)).

rights are traceable to federal origins.¹⁰⁷ However, the dissent in *Merrell Dow* rejected these appeals to practicality stating:

These reasons simply do not justify the Court's holding. Given the relative expertise of the federal courts in interpreting federal law, the increased complexity of federal legislation argues rather strongly in favor of recognizing federal jurisdiction. And, while the increased volume of litigation may appropriately be considered in connection with reasoned arguments that justify limiting the reach of § 1331, I do not believe that the day has yet arrived when this Court may trim a statute solely because it thinks that Congress made it too broad.¹⁰⁸

There is a possibility that these practical considerations were pretext for federalism concerns.¹⁰⁹ The focus of the Court appears to be on the federal judiciary, but perhaps this 1986 Supreme Court decision is an early example of the Court's eventual push to limit the power of the national government in favor of increasing the rights of the states.¹¹⁰ The Court noted that the "increased volume of litigation"¹¹¹ in the federal courts was a reason for the *Merrell Dow* holding, however, increased litigation in federal courts as a result of granting federal question jurisdiction to hybrid cases meant fewer cases were litigated in state court. It is possible that *Merrell Dow* was decided to prevent the states from being undermined and to protect their courts' power.¹¹²

The *Merrell Dow* decision resulted in two lingering issues: first, does the lack of a federal private right of action preclude a case from

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 829 (Brennan, J., dissenting).

¹⁰⁹ See Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on 'Arising Under' Jurisdiction*, 82 IND. L.J. 309, 331-32 (2007).

¹¹⁰ *Id.*

¹¹¹ *Merrell Dow*, 478 U.S. at 811 (quoting *Merrill Lynch*, 456 U.S. at 377).

¹¹² See Freer, *supra* note 109, at 331-32.

reception in the federal courts; and second, how much weight does the impact of judicial economy have on a decision to grant federal question jurisdiction?¹¹³

B. Grable Establishes the Modern Test

The Supreme Court's answers to these questions came by means of the unanimous decision in *Grable & Sons Metal Products, Inc., v. Darue Engineering & Manufacturing*.¹¹⁴ In *Grable*, the plaintiff's property was sold to the defendant by the government to satisfy an outstanding tax liability.¹¹⁵ The plaintiff brought a quiet title action in state court.¹¹⁶ The plaintiff-corporation claimed that the sale of their property was invalid because it had not been properly notified of the sale by the IRS.¹¹⁷ The defendant removed the case to federal district court on the ground that resolution of the notification rules in the federal statute required federal question jurisdiction.¹¹⁸ First, *Grable* resolved the question of whether a private right of action was necessary to qualify for federal question jurisdiction.¹¹⁹ The Court held that a federal private right of action is only evidence of substantiality.¹²⁰ After 100 years, the "substantial interest test" survived: the court granted federal jurisdiction where "state-law claims . . . implicate[d] significant federal issues."¹²¹

The Court did not want to give up all of the federal courts' discretion to hear cases with federal issues embedded in state law claims.¹²² In reaching this conclusion, the Court reasoned that federal courts offer distinct characteristics that make them uniquely suited to

¹¹³ See generally *Merrell Dow*, 478 U.S. at 808, 814-815.

¹¹⁴ 545 U.S. 308 (2005).

¹¹⁵ *Id.* at 310.

¹¹⁶ *Id.* at 311.

¹¹⁷ *Id.* at 310.

¹¹⁸ *Id.* at 311.

¹¹⁹ *Id.* at 318.

¹²⁰ *Id.*

¹²¹ *Id.* at 312.

¹²² *Id.*

hear certain hybrid cases.¹²³ The Court reasoned that the doctrine approving federal question jurisdiction in state law claims “captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.”¹²⁴

The Supreme Court then added another factor to the federal question jurisdiction analysis.¹²⁵ *Grable* held that even with a substantial federal issue in dispute, federal question jurisdiction ultimately rests on “congressional judgment about the sound division of labor between state and federal courts.”¹²⁶ The Court described this new second prong of the analysis as a possible “veto” where federal question jurisdiction would otherwise be valid.¹²⁷ Compared to *Merrell Dow*, the power of judicial economy moved “from footnote to text, and from hint to holding” in *Grable*.¹²⁸ The Court continued, “the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive.”¹²⁹ In other words, the efficiency of the judicial economy may supersede the traditional basis for federal question jurisdiction.¹³⁰

The *Grable* Court officially announced the new two-prong test: (1) “does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, [(2)] which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”¹³¹ Applying the rule to the facts in dispute, the *Grable* Court pointed out that the meaning of the notice requirement within the federal tax code was the only matter

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 313-14.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ McFarland, *supra* note 5, at 31.

¹²⁹ *Grable*, 545 U.S. at 314.

¹³⁰ See McFarland, *supra* note 5, at 20; Tarleton, *supra* note 6, at 1408.

¹³¹ *Grable*, 545 U.S. at 314.

contested in the case.¹³² First, the Court discussed the importance of the federal issue at stake, stating, “[t]he Government thus has a direct interest in the availability of a federal forum to vindicate its own administrative action.”¹³³ Second, the Court concluded that the case deserved federal question jurisdiction because of the diminutive effect the result would have on the overall federal caseload.¹³⁴ Thus, the Court held that federal question jurisdiction was appropriate.¹³⁵

The Court resolved the problematic circuit split¹³⁶ from *Merrell Dow* and held that a federal cause of action is not a necessary condition for federal question jurisdiction.¹³⁷ However, in doing so, the Supreme Court gave the lower federal courts discretion to deny federal question jurisdiction because of caseload factors.¹³⁸ Writing for a unanimous court, Justice Souter focused on the risk posed by the multitude of cases that would surely emerge if every violation of federal law embedded in a state law tort claim was allowed to reach the federal judiciary.¹³⁹ In other words, the Court desired a federal forum for substantial federal issues embedded in state law claims, but only to the extent that those issues would not overwhelm the federal courts’ dockets.¹⁴⁰

III. THE APPLICATION OF THE MODERN TEST BY THE SEVENTH CIRCUIT IN *BENNETT*

This section analyzes the Seventh Circuit’s application of the Modern Test for federal question jurisdiction in *Bennett v. Southwest*

¹³² *Id.* at 315.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 316.

¹³⁶ See generally Pozner, *supra* note 80, for an explanation of the circuit split.

¹³⁷ *Grable*, 545 U.S. at 316-17.

¹³⁸ *Id.* at 313-14.

¹³⁹ *Id.* at 319.

¹⁴⁰ Tarleton, *supra* note 6, at 1400 (“The difficulty with the two-part test stated in *Grable* arises from the fact that it separates the analysis of the significance of the federal issue in dispute from the analysis of congressional intent with respect to the scope of federal question jurisdiction.”).

Airlines Co. Specifically, it examines the reasoning the court used in its application of the second prong.

Amid fierce winter weather conditions, driving snow, and strong tailwinds; Southwest Airlines Flight 1248 attempted to land at Midway Airport in Chicago on the evening of December 8, 2005.¹⁴¹ According to the NTSB, the plane—which held over 100 passengers—touched down about 800 feet past where it needed to in order to execute a safe landing.¹⁴² After touching down with only 4,500 feet of slippery concrete landing strip in front of it, the Boeing 737-700 ran out of runway and plowed through a jet-engine blast barrier and a perimeter fence, skidding to a halt in the busy intersection of 55th and Central Avenue during the evening rush hour.¹⁴³ Joshua Woods—a six-year old Indiana boy who was with his family in one of the cars on the street—was killed on impact, and ten other people were injured.¹⁴⁴

The consolidated complaints from the injured parties alleged various acts of negligence, including: the negligent operation of Flight 1248 in violation of Federal Aviation regulations, the negligent operation of Midway Airport, including certain air traffic control functions, and the defective design and manufacture of the aircraft.¹⁴⁵ The ensuing tort suits filed in Illinois state court were removed to federal district court by the defendants (Southwest, Boeing, and the City of Chicago).¹⁴⁶ The district court denied the plaintiffs’ request to remand the case to state court and granted an interlocutory appeal on the federal question jurisdiction issue.¹⁴⁷

The plaintiffs attempted to establish violations of federal aviation laws as the standard of care for the duty element in their tort suits.¹⁴⁸ The defendants argued that the “aviation safety issues implicated by

¹⁴¹ *Fighting the Wind*, CHI. TRIB., Dec. 12, 2005, at 3.

¹⁴² Mark J. Konkol, *Jet Needed 800 More Feet to Land: Thrust Reversers Were Deployed 18 Seconds Late*, CHI. SUN-TIMES, Dec. 16, 2005, at 6.

¹⁴³ *Id.*

¹⁴⁴ *Fighting the Wind*, *supra* note 141, at 3.

¹⁴⁵ Brief of Defendant-Appellee the Boeing Company, *supra* note 11, at *5-8.

¹⁴⁶ *Bennett, v. Sw. Airlines Co.*, 484 F.3d 907, 908 (7th Cir. 2007).

¹⁴⁷ *Id.*

¹⁴⁸ See Brief of Defendant-Appellee the Boeing Company, *supra* note 11, at

*32.

plaintiffs' allegations are inherently federal."¹⁴⁹ In support of this argument, the defendants cited both Supreme Court case law and the legislative history of the Federal Aviation Administration ("FAA").¹⁵⁰

For example, as early as 1944, in a concurring opinion in *Northwest Airlines, Inc. v. Minnesota*,¹⁵¹ Justice Jackson succinctly described the then-developing aviation regulatory scheme in the following way:

Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.¹⁵²

In creating the FAA in 1958, Congress explained the inherent federal nature of aviation rules in this manner:

[A]viation is unique among transportation industries in its relation to the Federal Government – it is the only one whose operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by the States or local authorities. Thus, the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.¹⁵³

The defendants also identified numerous federal rules that would require interpretation, which were implicated by the plaintiffs' claims

¹⁴⁹ *Id.* at *9.

¹⁵⁰ *Id.* at *9-10.

¹⁵¹ 322 U.S. 292 (1944).

¹⁵² *Id.* at 303.

¹⁵³ See Brief of Defendant-Appellee the Boeing Company, *supra* note 11, at *26 (quoting S. REP. NO. 1811, 85TH CONG. (1958), at 5).

including: “acceptable landing procedures, airport operation, and runway design,”¹⁵⁴ as well as snow removal and runway safety areas.¹⁵⁵

Despite the myriad of federal regulations undoubtedly at work that blustery evening, the Seventh Circuit held that the case did not “arise under” federal law for the purpose of establishing federal question jurisdiction.¹⁵⁶ Chief Judge Easterbrook, in a short opinion, first emphasized that the *Grable* test controlled federal question jurisdiction in these hybrid claims.¹⁵⁷ The test the court applied was whether the claim (1) “necessarily raise[ed] a stated federal issue, actually disputed and substantial [(2)] which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”¹⁵⁸ Even though the Seventh Circuit initially expressed some disapproval of the *Grable* holding,¹⁵⁹ the court still applied its Modern Test.

In applying the Modern Test, the Seventh Circuit first examined whether there was a “stated federal issue, actually disputed and substantial.”¹⁶⁰ Here, the defendants argued that the suits belonged in federal court because of the presence of federal aviation regulations in the state court claims.¹⁶¹ They argued that the case required a federal forum because commercial air travel demanded uniform regulations.¹⁶² The Seventh Circuit disagreed.¹⁶³ The court pointed out that no federal issue was “actually disputed” in the case.¹⁶⁴ Specifically, the court

¹⁵⁴ *Id.* at *32.

¹⁵⁵ *Id.* at *33.

¹⁵⁶ *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 912 (7th Cir. 2007).

¹⁵⁷ *Id.* at 909.

¹⁵⁸ *Id.* (quoting *Grable*, 545 U.S. at 314).

¹⁵⁹ *Id.* at 909 (The Seventh Circuit states, “[B]y holding out the possibility (realized in *Grable*) that a contested federal *issue* in a state-law suit may allow jurisdiction under § 1331 the Court has greatly complicated the analysis.”).

¹⁶⁰ *Id.* at 909.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 909-10.

¹⁶⁴ *Id.* at 909.

stated that “[t]he meaning of federal statutes and regulations may play little or no role”¹⁶⁵

Next, the court reviewed the evolution of the interpretation of § 1331.¹⁶⁶ The court explored the holdings of cases beginning with *American Well Works* up to and including *Grable* with particular emphasis on the Supreme Court’s ruling in *Empire Healthchoice Assurance, Inc. v. McVeigh*.¹⁶⁷ In *Empire*,¹⁶⁸ the Court granted certiorari to settle a dispute between an insurance carrier and the estate of a beneficiary.¹⁶⁹ The beneficiary received comprehensive health insurance as a result of federal employment.¹⁷⁰ The beneficiary of the insurance died from injuries sustained in a car accident.¹⁷¹ Although the government insurance carrier paid for medical treatment, the estate also sued the negligent-driver and driver settled out of court; thus, the estate received two payments for the same accident.¹⁷² Upon conclusion of this civil action in state court against the driver who caused the accident, the insurance company sued the beneficiary’s estate in federal court because the company’s contracts with the government required it to try to collect reimbursement from the estate.¹⁷³ When the estate filed a motion to dismiss for lack of subject matter jurisdiction, the plaintiff-insurance company argued that the federal court had jurisdiction based on the presence of federal law in the reimbursement claim.¹⁷⁴ The Court denied subject matter jurisdiction on these grounds.¹⁷⁵

The Seventh Circuit distinguished *Grable* from *Bennett* in the same way that the Supreme Court distinguished *Grable* from *Empire*; the Seventh Circuit concluded that *Bennett* was a fact-bound inquiry

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 909-11.

¹⁶⁷ *Id.* at 909-11.

¹⁶⁸ *Empire Healthchoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121 (2006).

¹⁶⁹ *Id.* at 2127.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 2130.

¹⁷⁵ *Id.* at 2137.

and not an inquiry into the meaning of federal law.¹⁷⁶ It stated that this is “the sort of situation that is governed by context-sensitive doctrines such as the law of negligence.”¹⁷⁷ In other words, the federal aviation regulations at work on December 8, 2005 were merely incidental to the state law claims within the framework of the action brought before the court.¹⁷⁸

The Seventh Circuit then applied the second prong of *Grable*'s Modern Test: whether “a federal forum may entertain [the suit] without disturbing any congressionally approved balance of federal and state judicial responsibilities.”¹⁷⁹ This prong assessed the potential impact a grant of federal question jurisdiction would have on the federal caseload.¹⁸⁰ The Seventh Circuit reasoned:

The Supreme Court thought it significant in *Grable* that only a few quiet-title actions would present federal issues. That enabled the Court to conclude that its decision would not move a whole category of litigation to federal court or upset a balance struck by Congress. Things are otherwise with air-crash litigation: defendants' position, if accepted, would move a whole category of suits to federal court.¹⁸¹

Whereas the *Grable* Court determined that only a few quiet-title cases would create federal issues, the Seventh Circuit believed air-crash litigation could overwhelm the federal courts.¹⁸² Here the court's reasoning is unclear; it does not specify whether the “category of suits” refers to air-crash litigation or some broader category of tort suit.¹⁸³ Since the court completes the paragraph with a discussion of

¹⁷⁶ *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 910 (7th Cir. 2007).

¹⁷⁷ *Id.* at 912.

¹⁷⁸ *Id.* at 912.

¹⁷⁹ *Id.* at 909.

¹⁸⁰ *Id.* at 911.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

Congress's intent in enacting a federal statute dealing with large numbers of fatalities in air crashes, there is some implication that the court was solely focused on large numbers of air-crash cases seeping into federal court.¹⁸⁴

Finally, the court concluded its opinion with a response to the defendants' argument that federal question jurisdiction is suitable because commercial aviation requires a uniform application and interpretation of rules.¹⁸⁵ Relative to the rest of the opinion, the court responded with a lengthy narrative on the particular hazards associated with the layout of the scene of the accident, Chicago's Midway Airport.¹⁸⁶ Again, because of the court's specific focus on the airport-airline aspect of the case, it fails to fully articulate its reasoning and provide future litigants with an understanding of its approach to the Modern Test.¹⁸⁷ This is due in part to the problematic nature of the second prong.

IV. THE DIFFICULTIES ASSOCIATED WITH THE MODERN TEST

This section discusses the problems with considering caseload factors in the adjudication of federal question jurisdiction. It also proposes an alternative analysis the Seventh Circuit could have used that would have reached the same result. Finally, the section gives an opinion on the meaning of *Bennett* to practitioners involved in litigation in the Seventh Circuit.

¹⁸⁴ *Id.* (“And it would upset a conscious legislative choice—not one made in § 1331, perhaps, but surely the one made when 28 U.S.C. § 1369 was enacted in 2002. That statute permits suit in federal court when a single air crash (or other disaster) leads to at least 75 fatalities and minimal diversity is present”).

¹⁸⁵ *Id.* at 911-12.

¹⁸⁶ *Id.*

¹⁸⁷ *See generally id.*

A. *The Caseload Factor*

The *Bennett* court applied the Modern Test established by the Supreme Court in *Grable*.¹⁸⁸ The Seventh Circuit made a two-prong inquiry.¹⁸⁹ In the first prong, the court analyzed whether there was a disputed and substantial stated federal issue.¹⁹⁰ This prong is the natural extension of the traditional inquiry as developed by the Supreme Court in *Gully* and *Franchise Tax Board*, where the Supreme Court held that a substantial federal issue must be in dispute to grant federal question jurisdiction.¹⁹¹ In contrast, the addition of the second prong departed from past Supreme Court precedent and used caseload factors to assess the suit.¹⁹² The Supreme Court described this “possible veto” as follows: “the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts”¹⁹³

No doubt the increased federal caseload over the last 100 years is compelling. In 1904, the total number of filings in federal district court was 33,376 as compared to 89,112 in 1960.¹⁹⁴ This increase represents a compound annual growth rate of 1.8 percent.¹⁹⁵ However, in the period between 1960 and 1983, cases filed in district court tripled as “compared with a less than 30 percent increase in the preceding quarter-century.”¹⁹⁶ This increase represents a compound annual

¹⁸⁸ 484 F.3d at 909.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Gully v. First Nat’l Bank in Meridian*, 299 U.S. 109, 114 (1936); *Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for S. California*, 463 U.S. 1, 12 (1983).

¹⁹² *See generally Bennett*, 484 F.3d at 911.

¹⁹³ *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 313 (2005).

¹⁹⁴ Hon. Richard A. Posner, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 54 (Harvard University Press 1996) (1985).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 59.

growth rate of 5.6 percent.¹⁹⁷ During this same period, 1960 to 1983, pure civil case filings jumped from 48,886 to 210,503 in district court, a more than 330 percent increase, while court of appeals filings increased 789 percent.¹⁹⁸

More recently, federal appeals have increased substantially from 29,580 in 1983 to 49,625 in 1995—a 4.3 percent compound annual growth rate, while district courts' caseloads remained relatively unchanged in the same time frame.¹⁹⁹ At the same time, from 1962 to 1995 the “ratio of cases terminated without court action to those terminated with some court action has fallen steadily.”²⁰⁰ As Judge Posner writes, “[t]he implication is that the district courts' workload is growing faster than the raw caseload.”²⁰¹

Despite evidence of the bloated federal docket, the second prong of the *Grable* test is not the correct remedy. The *Bennett* decision illustrates this contention. The second prong's consideration of caseload factors in the federal question decision creates a paradox in the federal judiciary.²⁰² Courts traditionally granted federal question jurisdiction to the most important or “substantive” cases or issues,²⁰³ but now issues that impact the largest number of people—arguably the most important cases—will be denied jurisdiction because of the courts' reluctance to move large classes of cases onto the federal docket.²⁰⁴ Thus, cases or issues that occur relatively infrequently

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 64.

²⁰⁰ *Id.* at 66.

²⁰¹ *Id.*

²⁰² See generally Redish, *supra* note 1, at 1785-88; Alleva, *supra* note 40, at 1557; Tarleton, *supra* note 6, at 1410.

²⁰³ While ‘important’ is a subjective term, it is well-documented that Congress created the inferior federal courts because certain cases required a heightened level of scrutiny. A specialized judiciary capable of a uniform application of the federal laws was necessary because a system that specializes in federal law is more likely to “divine Congress’ intent in enacting legislation.” Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 826-27 (1986).

²⁰⁴ See generally Redish, *supra* note 1, at 1785-88; Alleva, *supra* note 40, at 1557; Tarleton, *supra* note 6, at 1410.

receive jurisdictional preference over cases that occur more often.²⁰⁵ Instead the courts should grant federal question jurisdiction based on substance alone, without subjecting cases to scrutiny based on their impact on the federal docket.

Administrative burdens should not be a factor in access to the federal courts.²⁰⁶ This premise is not new. In 1932, appeals court Judge John J. Parker of the Fourth Circuit argued that:

One of the first duties of government, however, is to provide tribunals for administering justice to its citizens; and, if I am correct in thinking that a citizen is entitled to have his disputes adjudicated in a tribunal of the sovereignty to which he owes allegiance, it is unthinkable that that sovereignty should shirk its responsibility and abdicate its proper functions because of a comparatively insignificant matter of expense.²⁰⁷

In his influential work on federal question jurisdiction, Professor Paul J. Mishkin maintained that “[t]he general approach favoring restricted access to the federal courts should not operate to justify the imposition of an unwieldy limitation unrelated to the purposes of federal question jurisdiction.”²⁰⁸ More recently, Professor Martin H. Redish declared that:

The federal courts do not exist for the purpose of clearing their dockets. They exist to unify the federal system, to interpret and enforce federal law, and to prevent interstate prejudices and allegiances from balkanizing the nation. If the commitment of significant resources is required to accomplish this goal, then so be

²⁰⁵ *Id.*

²⁰⁶ See Redish, *supra* note 1, at 1786.

²⁰⁷ Hon. John J. Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A. J. 433, 438 (1932).

²⁰⁸ Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 182 (1953).

it. Although considerations of docket control and financial limitations cannot be completely ignored, they should not receive primary emphasis. The federal government cannot shirk its responsibility to assure that the federal courts perform their designated role any more than it can ignore its other essential obligations.
209

Further evidence of the flaw of the second prong of the Modern Test is in the arbitrary result reached by the Seventh Circuit when it considered caseload factors.²¹⁰ The court claims to be concerned with the risks of moving a whole class of cases into federal court, yet it has no guidance on the precise quantity of cases that would overwhelm the system.²¹¹ Clearly, a numerical test is out of the question and some level of discretion is necessary, but the lack of guidance is troubling; at what point does the administrative burden become too much?

This dilemma seems particularly difficult for the Seventh Circuit because it cannot even decide whether the facts in *Bennett* are isolated or are likely to occur so often that the resulting litigation would be an administrative burden for the federal courts.²¹² For example, in *Bennett* the court expressed concern over the deluge of cases that would result from an affirmative grant of federal question jurisdiction in “air-crash” litigation.²¹³ Four paragraphs later, however, the court admitted that the “particulars of flight 1248’s landing may never recur.”²¹⁴ Here, the Seventh Circuit could just as easily have argued that the *infrequency* of airline crashes would not upset the balance of work between the state and federal courts. Then, the court would have only needed to prove that the construction, interpretation, or resolution of federal aviation statutes was the single point at issue in the case, thus satisfying the “substantial” prong of the Modern Test.

²⁰⁹ Redish, *supra* note 1, at 1786.

²¹⁰ *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 911, 912 (7th Cir. 2007).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 911.

²¹⁴ *Id.* at 912.

Because of the arbitrary and potentially unjust consequences of the consideration of caseload factors in the adjudication of federal question jurisdiction, *Grable*'s second prong should be jettisoned in favor of a return to the reasoning applied in *Gully* and *Franchise Tax Board*. Still, a wholesale rejection of the 2005 Supreme Court decision by the Seventh Circuit was unlikely despite evidence that Seventh Circuit may have wanted ignore it.²¹⁵ The Seventh Circuit admitted that it was burdened by a thorny Supreme Court decision.²¹⁶ Referring to *Grable*, it stated that "by holding out the possibility . . . that a contested federal issue in a state-law suit may allow jurisdiction under § 1331 the Court has greatly complicated the analysis."²¹⁷ While the Seventh Circuit may not have been able to ignore *Grable*, a slightly different application of the second prong could have still achieved the same result of remanding the case to state court.

B. An Alternative Application of the Second Prong

According to the Seventh Circuit in *Bennett*, the second prong of the *Grable* test is satisfied by not disturbing "any congressionally approved balance of federal and state judicial responsibilities."²¹⁸ However, in the *Grable* decision the Supreme Court does not clarify where to find this "approval" from Congress.²¹⁹ Given the vagueness of the second prong, it is unclear if the test calls for an inquiry into the balance between the state and federal courts announced in § 1331 or the balance imagined by Congress when it enacted the particular federal legislation at issue.²²⁰

²¹⁵ *Id.* at 909.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*; see generally *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-20 (2005).

²²⁰ See Tarleton, *supra* note 6, at 1404-1405

The second prong, requiring that an exercise of jurisdiction comports with Congress's intended 'division of labor between state and federal courts,' is styled as an examination of what Congress intended to be the general parameters of federal question

The *Bennett* court chose the latter reasoning.²²¹ In analyzing the division of labor between the federal and state courts established by Congress, the Seventh Circuit chose to focus on the particular congressional intent surrounding aviation regulations, specifically a 2002 federal statute, 28 U.S.C. § 1369, which “permits suit in federal court when a single air crash (or other disaster) leads to at least 75 fatalities and minimal diversity is present.”²²² The court determined that this statute would be “meaningless” if aviation accidents with under 75 fatalities were removed to federal court.²²³

As opposed to the court’s fears of being swamped with litigation surrounding plane crashes, which arguably do not occur with the frequency the court asserts, a more likely explanation is that the court was afraid of the broader implications of granting federal question jurisdiction in *Bennett*.²²⁴ It may have been more concerned with an onslaught of tort cases in federal court because of a federal issue embedded in the claim. In their opening brief to the Seventh Circuit, the plaintiffs described the risk in the following manner:

The result will be that every negligence *per se* case, where negligence is based upon a violation of a federal statute and/or regulation, will become removable; every case connected in any way to the airline industry will ‘arise under’ federal law simply because federal

jurisdiction, which should be found in § 1331. Yet the Court accepts that this second half of the inquiry can proceed from an analysis of the substantive statute embedded in the plaintiff’s claim. A more honest articulation of the federal question test would admit that Congress has, by no means, created a bright line demarcating the ‘sound division of labor between state and federal courts governing the application of § 1331’ and that jurisdictional decisions in particular cases must follow from the nature of the particular federal interest at stake.

²²¹ *Bennett*, 484 F.3d at 911.

²²² *Id.*

²²³ *Id.*

²²⁴ See generally *Elmira Teachers’ Ass’n v. Elmira City Sch. Dist.*, 2006 WL 240552, at *6 (W.D.N.Y. 2006).

regulations may be relevant to establishing some element of a state-law cause of action.²²⁵

In contrast to the Seventh Circuit, courts in other circuits have more precisely characterized the risks implicated by the second part of the *Grable* test. For example, in *Elmira Teachers' Association v. Elmira City School District*,²²⁶ the defendants argued that an interpretation of the Internal Revenue Code was necessary to reach a determination of a plaintiff's state law claims.²²⁷ In remanding the case to state court, the *Elmira* court held that "[t]his lawsuit, simply put, is a state breach of contract and negligence case in which [the Internal Revenue Code], like the federal labeling statute at issue in *Merrell Dow*, merely provides the standard of care."²²⁸ Furthermore, the court held that "allowing this state negligence and breach of contract case to remain before the Court would be tantamount to opening the floodgates for removal of similar litigation."²²⁹

Indeed other circuits also made the proper distinction between the risk of opening up the floodgates for litigation of the same type of claim²³⁰ (i.e. tort or breach of contract) unlike the Seventh Circuit that discussed the risk of overwhelming litigation from *Bennett's* particular facts.²³¹ In two separate cases in district courts in Missouri with similar facts surrounding train accidents, the judges refused to grant federal question jurisdiction despite the relevance of federal law in creating a duty under the state negligence law.²³² Both cases rely on the same reasoning as it relates to the second part of the *Grable* test, stating that

²²⁵ Opening Brief of Plaintiff-Appellants, *supra* note 16, at *41.

²²⁶ 2006 WL 240552 (W.D.N.Y.).

²²⁷ *Id.* at *3.

²²⁸ *Id.* at *6.

²²⁹ *Id.*

²³⁰ See *Peters v. Union Pac. R.R. Co.*, 455 F. Supp. 2d 998, 1004-5 (W.D.Mo., 2006) and *Gillenwater v. Burlington N. and Santa Fe Ry. Co.*, 481 F. Supp. 2d 998, 1004 (E.D.Mo., 2007).

²³¹ *Bennett*, 484 F.3d at 911.

²³² See *Peters*, 455 F. Supp. 2d at 1004-5 and *Gillenwater*, 481 F. Supp. 2d at 1004.

While bringing railroad crossing cases into the federal court system would have a small impact on the division of labor between the state and federal court system, the same argument that Defendants rely on to justify federal question jurisdiction here is applicable to virtually every case where violation of a federal regulation is raised as evidence to determine the appropriate standard of care in a state tort action. . . . To find federal question jurisdiction under these circumstances would open the floodgates to the garden variety torts that the United States Supreme Court, in *Merrell Dow*, specifically said should not be in federal court.²³³

In other words, it is not necessarily the type of cases that the courts above have an issue with, but rather the route they took into federal court. This delineation makes the second prong somewhat more palatable. The Seventh Circuit would have been wise to note this distinction as the court did in *Wisconsin v. Abbott Laboratories*.²³⁴ Here again, the defendants argued that the state court suit required some interpretation of federal law; in this case the court needed to interpret the meaning of the federal Medicare statute²³⁵ to determine if Wisconsin citizens had overpaid for prescription drugs.²³⁶ In applying the second prong of the *Grable* test, the court distinguished its case from *Grable*,

By contrast, the present case is one of many that have been filed by states across the country concerning pharmaceutical companies' alleged fraud in price-setting. Shifting all of these cases (not to mention other

²³³ *Gillenwater*, 481 F. Supp. 2d 998 at 1005 (quoting *Peters*, 455 F. Supp.2d 998 at 1005.).

²³⁴ 390 F. Supp. 2d 815, 823 (W.D.Wis., 2005).

²³⁵ 42 U.S.C. §§ 1395-1395qq (2000).

²³⁶ *Abbott*, F. Supp. 2d at 820.

state-law claims grounded in alleged violations of federal law) into federal court would work a significant disruption in the division of labor between federal and state courts.²³⁷

Here the court at least mentions the broader risk beyond the facts of the particular case.²³⁸ The Seventh Circuit could have utilized this reasoning and still remanded the case to state court. But rather than discuss the problems associated with bringing every tort case with an embedded federal issue into federal court, the Seventh Circuit went one step further to focus on the particular problems associated air-crash litigation.

C. *The Meaning of Bennett to Practitioners*

The reference to another statute, 28 U.S.C. § 1369,²³⁹ in the Seventh Circuit's attempt to discern the congressional intent in enacting airline regulations is an important indicator of the court's narrow interpretation of the second prong of the Modern Test.²⁴⁰ The Seventh Circuit reasoned that since Congress created legislation specifically authorizing certain air crash suits in federal court, it necessarily means that any other suits resulting from crashes, which do not qualify under the statute, cannot be filed in federal court.²⁴¹ The Seventh Circuit's analysis in *Bennett* seems more akin to the test established by *Merrell Dow*.²⁴² In *Merrell Dow*, the Supreme Court used the lack of a private right of action in the FDCA to support its denial of federal question jurisdiction.²⁴³ However, the requirement of

²³⁷ *Id.* at 823.

²³⁸ *Id.*

²³⁹ 28 U.S.C. § 1369 (2000).

²⁴⁰ *See Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 911 (7th Cir. 2007).

²⁴¹ *Id.*

²⁴² *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 812 (1986).

²⁴³ *Id.*

express statutory authorization for federal question jurisdiction was specifically rejected by the Supreme Court in *Grable*.²⁴⁴

Given the other circuits' application of the Modern Test, the Seventh Circuit may have been correct to deny federal question jurisdiction and remand the case to state court. However, the emphasis on the 2002 statute above shows litigants in the Seventh Circuit the great lengths the court will go to ensure a narrow reading of the Modern Test as set forth by the Supreme Court in *Grable*.²⁴⁵ Even though a relatively broad plain meaning interpretation of the "arising under" constitutional and statutory directive is possible, federal question jurisdiction in the Seventh Circuit will be very narrowly construed. Practitioners need to recognize that the clear presence of federal laws in the duty element of the plaintiff's tort claim is not enough to clear the outer marker of federal question jurisdiction.²⁴⁶

CONCLUSION

In *Bennett*, the Seventh Circuit was asked to rule on the contours of federal question jurisdiction. In its analysis, it offered a recitation of the evolution of the boundaries of federal question jurisdiction where federal issues are embedded in state law claims.²⁴⁷ This history, especially in the Supreme Court, has been characterized by change. Much of the first 100 years of federal question jurisdiction governed by the statutory grant of § 1331 was more broadly defined than the recent interpretation represented by the Modern Test announced in *Grable*. The trend on the national level appears to be moving towards more restrictions on the types of cases that gain access to the federal courts. In particular, the recent introduction of caseload factors into the

²⁴⁴ See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312-313 (2005).

²⁴⁵ See *Bennett*, 484 F.3d at 911.

²⁴⁶ From the *Bennett* case, the factors included: acceptable landing procedures, airport operation, runway design, snow removal, and runway safety areas. Brief of Defendant-Appellee the Boeing Company, *supra* note 11, at *32.

²⁴⁷ *Bennett*, 484 F.3d at 909-11.

jurisdictional calculus raises some question as to whether these restrictions may have gone too far.

In its application of the Modern Test in *Bennett*, the Seventh Circuit followed this national trend. Despite the presence of multiple federal laws in the duty element of the tort claims, the court decided that since no single law resolved the dispute, the case was more suited to Illinois state court. The court's analysis illustrates the great lengths the Seventh Circuit will go to eliminate cases from its docket. The result in this case will force practitioners to thoroughly assess their pleadings prior to petitioning the court for federal jurisdiction. But the larger impact of this narrow brand of federal jurisdiction remains to be seen.