LITIGATION

GRABLE'S QUIET REVOLUTION: THE REVIVAL OF SUBSTANTIAL FEDERAL QUESTION JURISDICTION

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Supreme Court observers uttered nary a peep on June 13, 2005 when the Court handed down its unanimous decision in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*[1] But *Grable*—the Supreme Court's first decision on the boundaries of substantial federal question (SFQ) jurisdiction since the 1986 case of *Merrell Dow Pharmaceuticals, Inc. v. Thompson*[2]—opened the door to the federal courthouse for claims that *Merrell Dow* implied was shut (or only cracked open). *Grable* should revitalize the debate on the proper scope of SFQ jurisdiction, a species of federal-question jurisdiction applicable in certain cases in which the plaintiff has not affirmatively alleged a federal cause of action, but nonetheless seeks relief that requires the resolution of substantial, disputed questions of federal law.

The SFQ doctrine is best understood against a historical backdrop. Some of the earliest Supreme Court decisions interpreting the scope of federal judicial power explain that the exercise of federal question jurisdiction is appropriate whenever interpretation of the Constitution or a federal statute is necessary for the correct decision of a case, even if the cause of action itself is not created by federal law. Moreover, the legislative history of the Judiciary Act of 1875, the precursor to 28 U.S.C. § 1331, confirms that Congress originally intended to extend original federal jurisdiction to those cases that turn on the construction of a federal statute law or the Constitution, and early Supreme Court cases interpreting the Act gave it this relatively expansive meaning. The trend toward a narrower interpretation of federal question jurisdiction—a trend beginning with Justice Holmes's opinion in *American Well Works Co. v. Layne & Bowler Co.*[3] and culminating with Justice Stevens's 5-4 opinion in *Merrell Dow*—represents a break with the early understanding of the statutory jurisdictional grant. Now, with *Grable*, the court appears to be returning to its roots.

In *Cohens v. Virginia*, Chief Justice Marshall stated that a case arises under the Constitution or federal law whenever the "correct decision depends on the construction of either."[4] *Cohens* further explained that:

> The jurisdiction of the Court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be apparent as to overrule the words which its framers have employed.[5]

The precise question presented in *Cohens* was whether the Supreme Court had appellate jurisdiction over a state court conviction where the defendant claimed protection of a federal lottery statute. Although the decision focused on appellate jurisdiction rather than on subject matter jurisdiction, the Court expounded on the province of federal courts more generally. The Court clarified that:

> [T]he jurisdiction of the Courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be exemption from that provision which expressly extends the judicial power of the Union to *all* cases arising under the constitution and laws?[6]

Cohens, in short, supports the view that the Constitution's grant of judicial power to cases arising under the laws of the United States was understood expansively by early jurists.

Martin v. Hunter's Lessee also reflects the expansive view of federal-question jurisdiction embraced by the early Supreme Court.[7] *Martin* was an action brought in Virginia state court to eject a tenant from land that had been devised to the plaintiff in the will of Lord Fairfax. While the plaintiff's cause of action was created by the state law of property and of wills and estates, his ability to recover on that cause of action required a determination of the validity of federal treaties and statutes. The Virginia Court of Appeals decided the case, which was then appealed to and reversed by the Supreme Court of the United States. On remand, the Virginia state court refused to recognize the Supreme Court's order on the ground that the Supreme Court lacked jurisdiction over the case. The Supreme Court rejected this view in *Martin*, holding both that Congress could not withhold from the Supreme Court any of the subject matter jurisdiction created by Article III of the Constitution, and that the Supreme Court necessarily had appellate jurisdiction to decide an appeal from a state court so long as the appeal fell within the Supreme Court's subject matter jurisdiction. In explaining this expansive view of federal jurisdiction, the *Martin* Court was concerned with the uniform interpretation of federal laws: "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states."[8]

While *Martin* technically involved the jurisdiction of the Supreme Court, the Supreme Court extended its broad view of subject matter jurisdiction to the lower federal courts in *Osborn v. Bank of the United States*.[9] The question presented in *Osborn* was whether the Bank of United States, a federal entity, had the right to sue Osborn, the state auditor of Ohio, in federal court.[10] The Court in *Osborn* concluded that federal jurisdiction existed for reasons that resonate still today with defendants. Said the Court: "[W]hen a question to which the judicial power of the Union is extended by the constitution, *forms an ingredient of the original cause*, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, *although other questions of fact or law may be involved in it*."[11] Thus *Osborn* is consistent with the understanding that federal-question jurisdiction extends to all cases necessitating a construction of federal law, including cases where the underlying legal right the plaintiff seeks to vindicate is actually created by state law:

> If it be sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided that facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the case.[12]

Although the First Congress was silent on the federal courts' original jurisdiction over cases "arising under" the Constitution,[13] the legislative history of the Judiciary Act of 1875 reveals Congress's intent to extend federal subject-matter jurisdiction to cases where a substantial federal question exists.[14] The Act bestowed upon any party to "any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States" the right to "remove said suit into the circuit court of the United States for the proper district."[15] The Senate debates confirm that Congress anticipated granting the lower federal courts the judicial powers intended by Article III:

> Mr. Carpenter. . .The Constitution says that certain judicial powers shall be conferred upon the United States. The Supreme Court of the United States in an opinion delivered by Judge Story—I do not recollect now in what celebrated case it was, whether Cohens *vs.* Virginia or some of those famous cases—said that it is the duty of the Congress of the United States to vest all the judicial power of the Union in some Federal Court, and if they may withhold a part of it they may withhold all of it and defeat the Constitution by refusing or simply omitting to carry its provisions into execution. . .This bill gives precisely the power which the Constitution confers—nothing more, nothing less. . .[I]t seems to me that when Congress ought to do what the Supreme Court said more than forty years ago it was the duty to do, vest the power which the Constitution confers in some court of original jurisdiction.[16]

Following the passage of the Judiciary Act of 1875, the Supreme Court continued to apply a broad interpretation of federal-question jurisdiction that reflected the view that the statute implemented jurisdiction to the full extent permitted in Article III of the Constitution. In *Railroad Co. v. Mississippi*, for example, the Court explained that the underlying dispute arose under the laws of the United States because the plaintiff claimed that a Congressional Act protected it from the very actions that the State was alleged to have undertaken.[17] Mississippi had sought a writ of mandamus in state court requiring the company to remove a stationary bridge it had erected across the Pearl River (on the line between Louisiana and Mississippi). The company removed the case to federal court on the ground that federal jurisdiction existed because a federal law authorized the company to build and maintain the bridge. The Court found that jurisdiction was proper because the suit "present[ed] a real and substantial dispute or controversy which depends altogether upon the construction and effect of an act of Congress."[18] This original view of federal-question jurisdiction generally persisted at least into the 1920s.[19]

The high-water mark of the "substantial federal question" doctrine, of course, was *Smith v. Kansas City Title & Trust Co.*, where the Court reaffirmed its pronouncement in *Osborn* that a case arises under federal law or the Constitution when "the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction."[20] In *Smith*, a shareholder sought to enjoin the company from investing corporate funds into farm loan bonds issued by Federal Land Banks or Joint-Stock Land Banks on the ground that the issuance of the bonds was "beyond the constitutional power of Congress" and thus invalid.[21] The Court held that the federal district court properly exercised federal jurisdiction because it was "apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn into question."[22]

The modern trend toward a narrower interpretation of federal-question jurisdiction represents a break with the early understanding of the statutory jurisdictional grant. Indeed, in the "substantial federal question" decision that immediately preceded *Merrell Dow*, Justice Brennan candidly recognized that the legislative history of the federal-question statute suggests that Congress "meant to confer the whole power which the Constitution conferred"; nonetheless, he noted that the Supreme Court in a string of more recent decisions

has held that "Article III arising under jurisdiction is broader than federal question jurisdiction under [28 U.S.C.] § 1331."[23]

Grable, however, takes us back to the future. As an initial matter, *Grable* held that the original debate over SFQ jurisdiction—between the view of Justice Holmes in *American Well Works* and the view of Justice Day in *Smith*—is permanently resolved in favor of the *Smith* approach. Writing for the Court in *American Well Works* and then dissenting in *Smith*, Justice Holmes had urged that SFQ jurisdiction be limited to cases in which federal law created the cause of action asserted in the complaint, and not be extended to cases in which a cause of action created by state law required the resolution of predicate federal questions. As the *Grable* Court stated, "*Merrell Dow*, then, did not toss out, but specifically retained the contextual enquiry that had been *Smith*'s hallmark for 60 years. At the end of *Merrell Dow*, Justice Holmes was still dissenting."[24]

Moreover, *Grable* cautions against such a narrow reading of *Merrell Dow*. The *Grable* Court recognized that there is "some broad language in *Merrell Dow* . . . that could support" a narrow approach to SFQ jurisdiction, including imposition of a private-right-of-action requirement or similar formal prerequisites.[25] "But," the Court stressed, "an opinion is to be read as a whole, and *Merrell Dow* cannot be read whole as overturning decades of precedent, as it would have done by effectively adopting the Holmes dissent in *Smith*" and limiting the SFQ doctrine to cases in which federal law either creates the causes of action asserted on the face of the complaint, or at least provides a cause of action analogous to that sought in the relevant state-law claim asserted by the plaintiff.[26] Said the Court:

> In the first place, *Merrell Dow* disclaimed the adoption of any bright-line rule, as when the Court reiterated that "in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." 478 U.S., at 810. The opinion included a lengthy footnote explaining that questions of jurisdiction over state-law claims require "careful judgments," *id.*, 478 U.S. at 814, about the "nature of the federal interest at stake," *id.*, 478 U.S. at 814, n. 12, (emphasis deleted). And as a final indication that it did not mean to make a federal right of action mandatory, it expressly approved the exercise of jurisdiction sustained in *Smith*, despite the want of any federal cause of action available to *Smith*'s shareholder plaintiff. 478 U.S., at 814, n. 12.[27]

Grable suggests a case-by-case approach to determining which federal interests are sufficiently concrete and important to merit the exercise of SFQ jurisdiction consistent with background federalism concerns in which considerations such the existence of a private federal right of action and similar considerations are relevant, but not dispositive. And while the *Grable* Court granted *certiorari* to resolve a split as to whether the existence of a private right of action is necessary in order for a particular federal law to serve as the basis for SFQ jurisdiction, other questions (which kinds of federal statutory and regulatory schemes are sufficient to create a substantial federal question, whether a case may be removed where a specific element of a specific state-law claim must turn on federal law for a substantial federal question to be presented, and others) remain to be addressed by the Court. Nonetheless, *Grable* (and its unanimous narrowing of *Merrell Dow*) suggests a new and more vigorous direction in jurisdictional doctrine.

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Footnotes

[1] 125 S. Ct. 2363 (2005).

[2] 478 U.S. 804 (1986).

[3] 241 U.S. 257 (1916).

[4] 19 U.S. (6 Wheat.) 264, 379 (1821).

[5] *Id.* at 379-80.

[6] *Id.* at 391-92 (emphasis in original).

[7] *See* 14 U.S. (1 Wheat.) 304 (U.S. 1816) (Story, J.).

[8] *Martin*, 14 U.S. at 348.

[9] *See* 22 U.S. (9 Wheat.) 738 (1824) (Marshall, C.J.).

[10] *See id.* at 816-817; *see also* United States v. Planter's Bank of Georgia, 22 U.S. (9 Wheat) 904, 905 (U.S. 1824) (upholding federal jurisdiction where Bank of United States brought a claim against a state bank, and stating that federal jurisdiction was "fully considered by the Court in the case of Osborne v. The Bank of the United States, and it is unnecessary to repeat the reasoning used in that case").

[11] *Id.* at 823 (emphasis added).

[12] *Osborn*, 22 U.S. 9 Wheat.. at 822.

[13] The first judiciary act anticipated only the Supreme Court's appellate jurisdiction of "arising under" cases. The act states that the Supreme Court shall have appellate jurisdiction over a final judgment from the highest court in a state "in which a decision in the suite could be had, where is drawn into question…the construction of any clause of the constitution…or statute…and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission." Law of September 24, 1789, ch. XX, § 25. Despite Congress's failure to make an express grant of original "arising under" jurisdiction in the lower federal courts in the first judiciary act, as described *supra*, the earliest Supreme Court decisions explained that the grant of this

jurisdiction was found within the text of the Constitution.

[14] "The statute's [28 U.S.C. § 1331] 'arising under' language tracks similar language in art. III, § 2 of the Constitution, which has been construed as permitted Congress to extend federal jurisdiction to any case of which federal law potentially 'forms an ingredient,' *see Osborn v. Bank of the United States*, 9 Wheat. 738, 823, 6 L.Ed. 204 (1824), and its limited legislative history suggests that the 44th Congress may have meant to 'confer the whole power which the Constitution conferred,' 2 CONG.REC 4986 (1874) (remarks of Sen. Carpenter)." *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 8 n.8 (U.S. 1983).

[15] Judiciary Act of 1875, ch. 137, §2, 18 Stat. 470 (1875) (current version at 28 U.S.C. § 1331).

[16] 2 CONG.REC. 4986-4987 (1874).

[17] *See* 102 U.S. 135, 139-140 (U.S. 1880) (Harlan, J.).

[18] *Id.* at 140.

[19] *See Ames v. Kansas,* 111 U.S. 449, 462 (U.S. 1884) (Waite, C.J.) (finding federal jurisdiction because "[t]he right set up by the company, and by the directors as well, will be defeated by one construction of these acts and sustained by the opposite construction."); *Hopkins v. Walker*, 244 U.S. 486, 489 (U.S. 1917) (Van Devanter, J.) (reversing the district court's dismissal of a claim for lack of jurisdiction because "it is plain that a controversy respecting the construction and effect of the [U.S.] mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of the district court."); *cf. Shulthis v. McDougal*, 225 U.S. 561 (U.S. 1912) (finding federal jurisdiction improper because in actions to quiet title, allegations of competing claims are not properly part of the complaint); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 508 (U.S. 1900) (federal jurisdiction denied in mining claim, since "in a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact").

[20] 255 U.S. 180, 199 (U.S. 1921) (Day, J.) (quoting *Osborn*, 9 Wheat. at 822).

[21] *See Smith*, 255 U.S. at 195.

[22] *Id.* at 201-202.

[23] *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 8 n.8 (U.S. 1983) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494 (U.S. 1983) (Burger, C.J.)).

[24] *Grable*, 125 S. Ct. 2363 (2005) at *19-20.

[25] *Grable* at *18.

[26] *Id.*

[27] *Id.* at *19.