On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction

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INTRODUCTION

The Supreme Court has been inconsistent as to whether to use categorical rules or ad hoc standards to resolve questions of federal jurisdiction. In recent years, the Supreme Court has confirmed the importance of standards in defining some boundaries of federal jurisdiction. In 2005, the Court in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing* reaffirmed that the federal question jurisdiction of the federal courts extends beyond causes of action ground in federal law to causes of action that sound in state law yet incorporate by reference substantial issues of federal law.[1] The Court explained that a bright-line rule could not resolve the question of whether federal question jurisdiction exists. Rather, the federal court must consider whether it can "entertain" the cause of action "without disturbing any congressionally approved balance of federal and state judicial responsibilities."[2] As Justice Thomas noted in an opinion concurring in the Court's judgment, this renders the precise boundaries of federal question jurisdiction "anything but clear."[3]

The Court's treatment of federal question "incorporation by reference" jurisdiction in *Grable* bears resemblance to the Court's recent treatment of another category of federal court jurisdiction—admiralty jurisdiction. In a series of decisions in the latter half of the twentieth century, the Court abandoned the straightforward "locality" test for admiralty jurisdiction, introducing in addition a "connection with maritime activity" test.[4] In the last of these cases, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, Justice Thomas, again concurring only in the Court's judgment, chastised the Court for eschewing what had theretofore been a simple "clear, bright-line" test

1. 545 U.S. 308, 313–14 (2005).
2. *Id.* at 314.
3. *Id.* at 321 (Thomas, J., concurring).
4. *See* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995); Sisson v. Ruby, 497 U.S. 358, 361–62 (1990); Foremost Ins. Co. v. Richardson, 457 U.S. 668, 669 (1982); Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972).

for admiralty jurisdiction[5] and in its place introducing "inherent vagueness."[6]

The Court's use of murky standards to define the outer boundaries of federal question and admiralty jurisdiction stands in stark contrast to its rigid reliance on rules to mark the edges of other federal jurisdiction. Consider, for example, the boundaries of another important jurisdiction enjoyed by federal courts—diversity jurisdiction. Here, as first-year law students learn, the rules are quite exacting: no diversity jurisdiction exists unless there is both (i) complete diversity of citizenship among the adverse parties[7] and (ii) a sufficient amount in controversy at issue.[8] The application of supplemental jurisdiction in diversity cases,[9] and the requirements for

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5. 513 U.S. at 549 (Thomas, J., concurring).

6. *Id.* at 549–52.

7. The statutory grant found now in 28 U.S.C. § 1332 has long been interpreted to require so-called "complete diversity"—that is, to require that no plaintiff hail from the same state as any defendant. *See, e.g.*, Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806). The determination of whether diversity is met requires one to determine the parties' citizenships; this is largely rule-based. Section 1332 provides rules to determine citizenship of various entities. *See, e.g.*, 28 U.S.C. § 1332(c)(1) (2006) (stating that a corporation is a citizen of the state of its incorporation and (if different) of the state of its principal place of business). Federal common law fills the interstices left open by the diversity statute; it also tends to take a rule-like form. For example, unincorporated entities are citizens of all states of which its members are citizens. Carden v. Arkoma Assocs., 494 U.S. 185, 192–96 (1990).

8. *See* 28 U.S.C. § 1332(a) (2006) (requiring the matter in controversy to exceed the sum or value of $75,000 in order to support jurisdiction).

9. *See* 28 U.S.C. § 1367(b) (2006) (indicating that, when the original "anchor" jurisdiction is based solely on diversity, the courts will not have supplemental jurisdiction under a certain list of exceptions). The application of § 1367(b)—which purports to limit the grant of supplemental jurisdiction where it would compromise the requirements of diversity jurisdiction—has been a source of controversy since its enactment. In particular, some maintain that, taken literally, § 1367(b) gives rise to some undesirable, unintended, and even bizarre results. *See, e.g.*, Thomas Arthur & Richard Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963, 966–72 (1991). Others argue that the provision should not be read literally, but instead with an eye to rational outcomes. *See, e.g.*, Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 957–59 (1991). The outcome of these debates is orthogonal to this Article, because they are debates not between rules and standards, but between two choices of rules.

A recent case that resolved some questions of § 1367(b)'s application provides an excellent example. In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, the Court considered the propriety of supplemental jurisdiction as to claims in two cases by plaintiffs not parties to federal diversity "anchor" claims. 545 U.S. 546, 549 (2005). While the anchor claims in *Exxon Mobil* themselves met all the requirements of § 1332, the other plaintiffs' claims—joined under Rule 20 of the Federal Rules of Civil Procedure (which governs ordinary joinder of claims by multiple plaintiffs) in one case and under Rule 23 (which governs class actions) in the other—did not meet § 1332's amount-in-controversy requirement. *Id.* The Court held that § 1367 provided supplemental jurisdiction in both settings, reasoning that, while the inclusion of a claim against a nondiverse

class actions based upon diversity,[10] are similarly rule-like. While there are some aspects of diversity jurisdiction that are more standard-like, they are limited in scope and generally lie at the jurisdictional fringes.[11] Indeed, the Court's 2010 opinion in *Hertz*

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party "contaminates" the entire case such that federal jurisdiction is destroyed, the same is not true of a claim that does not itself meet the amount-in-controversy requirement. *Id.* at 559–67.

While some have criticized the Court's holding as internally inconsistent, *see, e.g.*, *id.* at 585 n.5 (Ginsburg, J., dissenting); Joan Steinman, *Claims, Civil Actions, Congress & the Court: Limiting the Reasoning of Cases Construing Poorly Drawn Statutes*, 65 WASH. & LEE L. REV. 1593, 1596–98 (2008), that is beside the point here. It suffices to note that both parts of the Court's holding are reducible to rules. The "contamination theory" applies to the complete diversity requirement. That is a rule. It does not apply to the amount-in-controversy requirement. That, too, is a rule.

10. Though they have changed over time, the requirements for class actions based upon diversity reveal a continued preference for clear rules. Before the advent of § 1367, the Supreme Court held in *Supreme Tribe of Ben Hur v. Cauble* that only the citizenship of the named class representatives was relevant in determining whether § 1332(a)'s complete diversity requirement is met in a class action. 255 U.S. 356, 367 (1921). The Court also held in its 1973 decision in *Zahn v. International Paper Co.* that each member of a class—not just the named representatives—had to satisfy the amount-in-controversy requirement. 414 U.S. 291, 291 (1973). Many commentators are of the view that *Ben Hur* and *Zahn* are inconsistent, in that under *Ben Hur* only the named representative counts for determinations of citizenship, while under *Zahn* every class member counts for the amount-in-controversy requirement. *See, e.g.*, Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007, 1008 n.6 (1991); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 27 n.157 (1990). Be that as it may, it is clear that *Ben Hur* and *Zahn* both espouse rules. That said, § 1367's 1990 enactment threatened the vitality of *Ben Hur* and *Zahn*. *See, e.g.*, Arthur & Freer, *supra*, at 1008; Richard Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 485–86 (1991). In *Exxon Mobil*, the Supreme Court held that § 1367 overruled *Zahn*: under § 1367, diversity jurisdiction is proper regardless of whether class members' claims meet the amount-in-controversy requirement provided that the named representative's claim meets the requirement. 545 U.S. at 559–62. *Exxon Mobil*'s holding draws into question at least the reasoning, if not also the conclusion, of *Ben Hur*. *Ben Hur* directed that only the named class representatives count for complete diversity purposes, while *Exxon Mobil*'s mode of analysis seems to require that all class members be accounted for, whether under the primary anchor statute—§ 1332—or under the grant of supplemental jurisdiction. *See* 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3567 & n.45 (3d ed. 1998); James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CALIF. L. REV. 1423, 1457–58 nn.151–52 (2007). Once again, however, the identity of the victor in this debate does not impact the argument here: either the rule of *Ben Hur* continues (whatever the reasoning and justification) or else a different rule—that the citizenship of all class members matters and can defeat complete diversity—obtains. Either way, a rule prevails.

11. For example, the federal common law governing a person's "domicile" for purposes of the complete diversity requirement assumes more of a standard-like form. *See, e.g.*, Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir. 1974) (explaining how a change in domicile may be effected only by a combination of taking up residence in a new domicile with an intention to remain there). Also, the vague test for realignment of parties—notwithstanding the pleadings but according to their "actual sides" or real interests in the dispute—is aptly described as a standard. *See* City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941). Collusion to establish diversity jurisdiction is one test that has gone against the trend toward rules. The original Judiciary Act

Corp. v. Friend—where the Court resolved a debate among the circuits as to how to determine a corporation's principal place of business under the diversity statute—extolled the benefits of rules to define the boundaries of federal jurisdiction.[12]

To the extent that the Court has recognized situations in which federal courts may decline to exercise diversity jurisdiction, that recognition has come in the form of discretionary abstention doctrines.[13] In other words, the Court has recognized not that the limits of diversity jurisdiction are themselves murky, but only that the discretion of federal courts to decline to exercise diversity jurisdiction may sometimes be murky.

The other contours of federal subject matter jurisdiction are, in general, also largely rule-based.[14] Indeed, the same is true even of

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deprived the federal courts of jurisdiction over any action by an assignee to recover on a promissory note or other chose in action "unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made." Judiciary Act of 1789, § 11, 1 Stat. 78, 78 (1789). It applied without regard to whether the intent behind the assignment was to create diversity jurisdiction. *See, e.g.*, Sheldon v. Sill, 49 U.S. 441, 448–50 (1850). In contrast, the modern statute precludes jurisdiction only where "any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359 (2006). It thus requires courts to inquire, in standard-like fashion, into the intent of the litigants. The amount-in-controversy element also sometimes veers toward standard-like considerations. While the requirement is especially rule-like when monetary damages are at issue, federal common law directs that injunctive relief be evaluated by its fair market value. *See, e.g.*, *In re* Corestates Trust Fee Litig. (Byrd v. Corestates Bank, N.A.), 39 F.3d 61, 65 (3d Cir. 1994). This calls for some sort of estimation by the court based upon relevant evidence. As applied, then, standard-like considerations will inform whether or not the amount in controversy is met in such circumstances. Despite these variations, it is very safe to say that rules dominate the definitions and applications of diversity.

12. 130 S. Ct. 1181, 1193 (2010). The oral argument in the case also included discussions of the importance of jurisdictional rules. *See* Transcript of Oral Argument at 24–29, 42–43, *Hertz Corp.*, 130 S. Ct. 1181 (No. 08-1107) (debating the costs and benefits between using simple "bright line" rules for determining jurisdiction as opposed to "totality of circumstances" rules).

13. *Colorado River* abstention is one such example. *See infra* text accompanying note 72.

14. In keeping with its general tendency to define the outer boundaries of federal jurisdiction with rules, the Court has invoked rules in defining the boundaries of jurisdictional "carve-outs." For example, in *Ankenbrandt v. Richards*, the Court reaffirmed that "the domestic relations exception" to federal court jurisdiction "divests the federal courts of power to issue divorce, alimony, and child custody decrees." 504 U.S. 689, 703 (1992). The Court expressed the exception in rule-like terms, concluding that it extends "only" to cases involving "the issuance of a divorce, alimony, or child custody decree." *Id.* at 704. It was only Justice Blackmun's concurring opinion that argued that the Court had erred in not categorizing the domestic relations exception as "precedent at most for continued discretionary abstention rather than mandatory limits on federal jurisdiction." *Id.* at 707 (Blackmun, J., concurring). To be sure, the Court was open to the possibility that *Burford*-type abstention conceivably might apply "in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody." *Id.* at 705. But that point only affirms that it is *not* abstention that undergirds the fundamental exception that *does* extend to divorce, alimony, and child custody cases. The Court subsequently relied upon its analysis in *Ankenbrandt* to confirm and define the

other aspects of federal question jurisdiction: the well-pleaded complaint rule enunciates a bright-line rule.[15] *Grable* and *Grubart* are aberrations.

Commentators have long debated—albeit often without much reflection and only in the context of broader projects addressing other matters[16]—the virtues of fashioning jurisdictional boundaries in the form of rules as opposed to standards. Many commentators laud the time- and resource-saving aspects of jurisdictional rules, either in general[17] or in the context of specific jurisdictional provisions.[18] At the same time, others lament the lack of flexibility that rules afford, again either in general[19] or in the context of particular provisions.[20] They

probate exception to federal court jurisdiction. Again, the Court's expression of the exception was rule-like: "[T]he probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." Marshall v. Marshall, 547 U.S. 293, 311–12 (2006).

15. *See infra* Part IV.A.1.

16. *See infra* notes 26–28 and accompanying text.

17. *See* ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 317–21 (1950) (explaining that rules are preferable to standards for jurisdictional boundaries); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 169–71 (1991) (noting application of general considerations developed in broad analysis of the usefulness of legal rules in the setting of jurisdictional tests); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1225 (2004) ("[T]he rules regarding which court can and will adjudicate a dispute ought to be bright," but only in the broad context of discussion as to how balancing state and federal court interests should inform the choice of forum for various decisions); Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1672–73 (2008) (lamenting the overly standard-like nature of federal question jurisdiction); Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 145 (2006) ("[J]urisdictional doctrines are most in need of—and, until recently, most likely to follow—formal rules.").

18. *See* John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145, 193–202 (2006) (arguing against a standard-based test for federal question jurisdiction); David W. Robertson & Michael F. Sturley, *The Admiralty Extension Act Solution*, 34 J. MAR. L. & COM. 209, 212–23 (2003) (critiquing the Supreme Court's introduction of a standard-like boundary in admiralty jurisdiction). Other scholars address the propriety of standards in defining federal question jurisdiction, although they do not center their arguments on the rule-standard debate. *See* Douglas D. McFarland, *The True Compass: No Federal Question in a State Law Claim*, 55 U. KAN. L. REV. 1, 22–40 (2006) (arguing that the Court's accumulated analysis is problematic for many reasons, including usurping authority from Congress, running against precedent, and creating a vague guide); Rory Ryan, *It's Just Not Worth Searching for Welcome Mats with a Kaleidoscope and a Broken Compass*, 75 TENN. L. REV. 659, 670–83 (2008) (analyzing history and implementation issues and concluding that Congress should be the one to implement a bright-line rule for the second branch of "arising under" jurisdiction).

19. *See* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 993 n.127, 1001–05 (2009) (arguing that federal jurisdiction is less rigid in practice than courts tend to portray it); Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 15–20 (2011) (arguing that rules and standards both have their place in defining federal jurisdiction); Martha A. Field,

argue in favor of jurisdictional standards or for a mix of standards and rules.

Although it is not always stated explicitly, the argument in favor of standards along jurisdictional boundaries is at bottom a principal-agent story. The best way for the Supreme Court to know that all cases were resolved as it wished would be for the Court to resolve all cases. But the Court's resources are far too limited to come close to achieving that task. Indeed, the Court must be satisfied to allow lower courts to resolve the vast majority of cases. To the extent that the Court to some degree hopes that the lower courts will do its bidding, the Court, as the principal, views the lower courts as its agents.

Political science scholars have elucidated the interplay between the principal-agent relationship inherent in judicial hierarchy and the higher court's choice between announcing a rule or a standard. Tonja Jacobi and Emerson Tiller, and Jeffrey Lax, explain that higher courts use standards when they trust their lower court agents and rules when they are less trustful.[21] By constraining lower courts, rules assure a higher court that the lower court cannot vary far from its desired policy preferences (especially where the costs of monitoring are high and where the higher court does not review all lower court decisions).[22] A higher court uses standards, in contrast, to empower

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The Uncertain Nature of Federal Jurisdiction, 22 WM. & MARY L. REV. 683, 684–701 (1981) (noting the ubiquity of both rules and standards in defining federal jurisdiction and arguing that the apparent mishmash is justified by different policies favoring a state or federal forum in different circumstances).

20. *See* Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309, 320–42 (2007) (arguing in favor of a standard as part of the boundary of federal question jurisdiction); *cf.* Ann Woolhandler & Michael G. Collins, *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151, 2152 n.10, 2188 (2009) (without normative evaluation, suggesting that the test that Justice Holmes proposed to define federal question jurisdiction was intended to be more standard-like than later commentators believed). Older scholarship argues that the balancing of factors is appropriate for determining centrality for federal question jurisdiction. *See* William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 907–08 (1967); 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, 626–40 (1987); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 168–69 (1953). These works include less of the trappings of the current rule-standard debate.

21. *See* Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 333 (2007); Jeffrey R. Lax, *Political Constraints on Legal Doctrine: How Hierarchy Shapes the Law*, 74 J. POL. (forthcoming 2012) (manuscript at 15–21) (on file with author).

22. Jacobi & Tiller, *supra* note 21, at 334; Lax, *supra* note 21, at 20.

lower courts to execute policy preferences where the higher court believes the lower courts to be its faithful policy agents.[23]

The story in favor of the use of standards to define federal jurisdiction implicitly relies on the assumption that the Supreme Court (or Congress, if it enacts the standards) trusts one group of lower court agents—the lower federal courts—more than it does another group of lower court agents—the various state courts. The traditional understanding of the federal judiciary sees lower federal courts and state courts on an equal footing in the judicial hierarchy,[24] that is, as interchangeable agents. But there are reasons why the Supreme Court (or Congress) might have more confidence in the lower federal courts than in state courts, at least with respect to claims that arguably fall within federal jurisdiction. These include the belief that having federal courts decide more cases—or at least more important cases—will foster greater uniformity in decisionmaking; the belief that federal courts are more receptive to claims grounded in federal law; the belief that federal courts have greater expertise in federal legal matters; and the belief that federal courts are more likely to consider the overall coherence of federal law rather than simply the litigants in the case before the court.[25]

The foregoing considerations may make the Court (or Congress) prefer at least to give the federal courts a "right of first refusal" to hear cases that arguably fall within federal jurisdiction. The presence of a standard along a federal jurisdictional boundary imbues federal courts with considerable power to select the cases they wish to hear and to decline the cases they do not. In colloquial terms, a jurisdictional standard allows a federal court to "cherry-pick" the cases it wishes to hear. The justification for affording lower federal courts this power, to the detriment of the state courts, must be a greater trust of the federal courts—both to select and to decide cases appropriately.

Commentators who argue in favor of standards to define federal jurisdictional boundaries recognize the foregoing justifications.

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23. Jacobi & Tiller, *supra* note 21, at 333–42; Lax, *supra* note 21, at 20; *cf.* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 398 (2005) ("[P]art of what drives textualists toward rules in the first place is their skepticism about judges' ability to apply an underlying justification consistently from case to case.").

24. *See, e.g.*, Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.").

25. *See infra* notes 105–09 and accompanying text.

Yet they stop their analyses prematurely, failing to consider how these justifications differ from those for jurisdictional rules and the impact these differences should have on the decision to implement a standard or a rule to define jurisdiction. While they are open to a fusion of rules and standards, they do not consider exactly *how* those rules and standards should be deployed. Indeed, while commentators may generally recognize the value of certainty offered by rules, they in the end only pay lip service to that value to the extent that they do not recognize that the benefits and costs of rules and standards will *vary with the particular settings in which they are employed*.[26]

This Article corrects the shortcomings in the existing literature. First, the Article analyzes and defends the use of rules for jurisdictional boundaries as a general normative matter.[27] It makes

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26. Professor Martha Field is correct to explain that the reason for the proliferation of standards along jurisdictional boundaries is "a particular schizophrenia in the case discussions of the policies favoring state or federal forums." Field, *supra* note 19, at 684. But she does not explain how those policies might be channeled to generate an efficient deployment of rules and standards. Rather, she treats jurisdictional boundaries and instances of discretionary abstention interchangeably and offers no overarching theory for how rules and standards should be employed in jurisdictional calculi. Professor Richard Freer argues explicitly in favor of having a standard govern federal question centrality. *See* Freer, *supra* note 20, at 320–42. He is content to accept a rule as the jurisdictional boundary for another component of federal question jurisdiction: the "well-pleaded complaint" rule. Yet he offers no real justification for the propriety of a rule there, *see id.* at 320 ("I do not praise the well-pleaded complaint rule; but neither can I bury it. For better or worse, we are stuck with this rule."), but not for centrality. Further, Professor Freer argues that a standard as *some* part of the federal question jurisdictional boundary is a necessity; if it is not going to be in the well-pleaded complaint rule, then it must emerge in the centrality analysis. *Id.* at 320–42.

Professor Scott Dodson accepts my view that rules and standards can coexist, but he "question[s] whether the particular line [I] draw[]—between grants and abstention—is best." Dodson, *supra* note 19, at 56–57. Other than vaguely asserting that "the success of [my] approach depends upon the relative scope of the grants and abstention," *id.* at 56, Professor Dodson does not specify how jurisdictional rules and standards should be deployed.

27. Most commentators who have opined on the relative desirability of jurisdictional rules and standards have done so in passing. *See, e.g.*, CHAFEE, *supra* note 17, at 317–21 (explaining that rules are preferable to standards on jurisdictional boundaries in an effort to distinguish the limits of equitable jurisdiction, which is his primary focus); SCHAUER, *supra* note 17, at 169–71 (noting that the general considerations developed in a broad analysis of the usefulness of legal rules apply as well in the setting of jurisdictional tests); Bloom, *supra* note 19, at 993 n.127, 1001–05 (arguing that federal jurisdiction is less rigid in practice than courts tend to portray it, but also noting a desire to "avoid" the debate over the use of rules and standards); Friedman, *supra* note 17, at 1225 (opining that jurisdictional rules are preferable, but only in the broad context of discussion as to how balancing state and federal court interests should inform the choice of forum for various decisions); Mulligan, *supra* note 17, at 1672–73 (using lamentations over the overly standard-like nature of federal question jurisdiction to motivate a recommendation for a new way to conceive of that jurisdiction in terms of the balance between "the federal right a plaintiff asserts and congressional control over the subject matter jurisdiction of the federal courts, as expressed by the creation of a cause of action"); Sherry, *supra* note 17, at 145–46 (opining that jurisdictional rules are preferable, but only in the broader context of

this argument, moreover, without regard to the nature of the jurisdiction at issue.[28] A rule-based boundary offers efficiency gains: jurisdictional calculi will be more predictable, thus saving on private litigation costs as well as preserving scarce judicial resources. Also contributing to the conservation of public and private resources is the fact that federal appellate courts apply less exacting judicial review—and one less repetitive of the federal district courts' review—to abstention decisions than to decisions as to whether jurisdiction inheres.

Second, while the Article recognizes (as others have) the important role that standards can play in federal jurisdictional calculi, it does so by grounding jurisdictional standards in the policy considerations that necessarily justify them. On this basis, the Article shows that rules and standards may coexist, but with rules ensconced along actual jurisdictional boundaries and standards forming the basis for discretionary abstention.

Third, the Article demonstrates how, to the extent that a standard defines a jurisdictional boundary, it is possible to "migrate" that standard to an abstention phase, leaving a rule at the boundary in its wake. This migration allows one to reap the benefits of rule-based boundaries, but also to enjoy some of the benefits of standard-like discretion in the allocation of cases between federal and state courts. It makes it possible, in other words, to "have one's jurisdictional cake and eat it, too."

In addition, in the context of federal question jurisdiction, the migration of discretion from the jurisdictional boundary to abstention would correct an asymmetry that currently exists. Under current law, *Pullman* abstention allows federal courts to decline to hear federal question cases where resolution of a state law question in the case might obviate the need to confront a novel, difficult issue of federal constitutional law.[29] The migration of discretion would create a parallel abstention for *unimportant* matters of federal law; under current law, that standard constitutes a jurisdictional boundary.

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evaluating the case for affording district judges more discretion in light of their experience in managing cases); Woolhandler & Collins, *supra* note 20, at 2152 n.10, 2188 (noting in passing the debate over rules and standards while offering a historical examination of Justice Holmes's proposed test for federal question jurisdiction).

28. Many commentators who have focused on the propriety of rules and standards in jurisdiction confine their scope to particular areas of federal court jurisdiction, as opposed to the analysis here that transcends jurisdictional categories. *See* Freer, *supra* note 20 (federal question jurisdiction); Mulligan, *supra* note 17 (same); Preis, *supra* note 18 (same); Robertson & Sturley, *supra* note 18 (admiralty jurisdiction); Woolhandler & Collins, *supra* note 20 (same).

29. *See infra* note 71 and accompanying text.

The lessons here are of value to courts and legislatures that interpret and draft jurisdictional provisions. The analysis should inform how judges, who believe they have leeway in interpreting jurisdictional statutes, in fact interpret those statutes: they should interpret statutes that establish jurisdictional boundaries as rules, leaving standard-like analysis to a discretionary phase.[30] And, even if one believes that existing statutory grants are not capacious enough to accommodate such interpretations, the lessons here are of importance to legislatures that draft and revise jurisdictional statutes. Finally, the lessons are valuable to scholars of law[31]—as well as political

30. Some scholars contest whether existing canons of statutory interpretation validate federal court invocations of discretionary abstention. *Compare, e.g.*, F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 896–915 (2009) (arguing that the courts have erroneously usurped congressional power to define the jurisdictional limit for federal question jurisdiction, with the result being a manipulable and unclear jurisdictional boundary), *and* Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515, 1542–70 (2007) (arguing that constitutional considerations in fact constrain federal court freedom not to hear cases that fall within the federal question statute), *and* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 79–104 (1984) (arguing that neither implied delegation of authority from Congress to the federal courts nor equity justifies judicially crafted abstention doctrines), *with* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 546–74 (1985) (arguing that longstanding and robust understandings that discretion accompanies exercises of jurisdiction bolster interpretations of existing statutes that incorporate grants of discretion), *and* Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1944–48 (2008) (arguing that textualist judges' purportedly textualist interpretations of jurisdictional statutes, which tend to be rule-based, have been inconsistent). This debate is orthogonal to the project at hand. To the extent that these scholars focus on the proper interpretation of existing jurisdictional statutes, they do not address the broader normative question of where, assuming decisionmakers *wish* to vest district courts with some discretion over the jurisdictional question, discretion ought to be laid. Beyond proper interpretation, some scholars debate whether, as a general matter, it is normatively desirable for federal courts to have discretion to decline to exercise jurisdiction. *Compare, e.g.*, Shapiro, *supra*, at 546–56 (arguing that judicial discretion to abstain is normatively desirable), *with* Daniel J. Meltzer, Jurisdiction and Discretion *Revisited*, 79 NOTRE DAME L. REV. 1891, 1904–24 (2004) (questioning the appropriate breadth of Professor Shapiro's thesis). While these arguments relate to mine, they are nonetheless fundamentally different: the question I address here is not whether discretion has a place at the jurisdictional table, but rather where that place should be. Other scholars mistakenly do not see this distinction as important. *See* Meltzer, *supra*, at 1907–15 (questioning the propriety of abstention both in the context of *Pullman* abstention and at the boundary of federal question jurisdiction); Shapiro, *supra*, at 561–62 ("If . . . you believe that a certain amount of fuzziness around the edges is both tolerable and inevitable, your concern [over the distinction between construing a statute as not conferring jurisdiction as opposed to relying on discretion not to exercise existing jurisdiction] is bound to be less intense.").

31. *See* John F. Duffy, *Rules and Standards on the Forefront of Patentability*, 51 WM. & MARY L. REV. 609, 610–615 (2009) (rules and standards in intellectual property law); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590–97 (1988) (rules and standards in property law); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1158–59 (2003) (same); David A. Weisbach, *An Economic*

science and economics[32]—who theorize about when higher courts choose rules as opposed to standards, but have yet to consider how that choice ought to play out in the important context of federal jurisdiction.

Part I of this Article provides an overview of rules and standards as instrument choices. Part II turns to the question of how to distinguish rules from standards in the context of federal court jurisdiction.

Part III examines the question of how best to deploy rules and standards in defining federal jurisdiction. It argues that the subject matter jurisdictional boundaries of the federal district courts should be statutorily prescribed, and judicially interpreted, to be rule-based. The proper home for standard-like analysis is in the practice of abstention. I demonstrate that whatever choices a standard uses to direct cases on either side of a subject matter jurisdictional boundary can be duplicated using a rule to define the jurisdictional boundary and then supplementing that rule with discretionary abstention.

Part IV applies the lessons from Part III in two settings where standards now govern whether federal courts can hear cases—the boundaries of federal question jurisdiction and federal admiralty jurisdiction. It argues that rules, augmented with discretion to abstain where appropriate, should replace those standards, since the benefits of such a jurisdictional shift would outweigh any costs.

I. RULES AND STANDARDS AS LEGAL INSTRUMENTS

One of the most fundamental questions of instrument choice is the decision as to whether to fashion a legal test as a rule or a standard. In this Part, I explore the contours of those instruments, as well as their benefits and costs.

Dean Kathleen Sullivan's crisp definitions of "rules" and "standards" illuminate the differences between them:

> A legal directive is "rule"-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker

Analysis of Anti-Tax-Avoidance Doctrines, 4 AM. L. & ECON. REV. 88, 96–99 (2002) (rules and standards in tax law).

32. *See* Jacobi & Tiller, *supra* note 21 (explaining that higher courts use standards when they trust their lower court agents and rules when they are less trustful); Lax, *supra* note 21 (same); Hugo M. Mialon, Paul H. Rubin & Joel L. Schrag, *Judicial Hierarchies and the Rule-Individual Tradeoff*, 15 SUP. CT. ECON. REV. 3, 4–19 (2000) (arguing that higher courts, which are more concerned with broader applicability of holdings and cannot review all lower court holdings, are more likely to promulgate rules in order to constrain lower courts, which tend to be more concerned with the particular litigants appearing before them).

> to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. A rule captures the background principle or policy in a form that from then on operates independently.[33]

Categorical-style decisionmaking provides a paradigmatic example of a rule. A categorical test "defines bright-line boundaries and then classifies fact situations as falling on one side or the other."[34]

Standards lie in contrast to rules:

> A legal directive is "standard"-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards . . . giv[e] the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule—the more facts one may take into account, the more likely that some of them will be different the next time.[35]

So-called balancing tests often provide excellent examples of standards. As Dean Sullivan explains, "Balancing is standard-like in that it explicitly considers all relevant factors with an eye to the underlying purposes or background principles or policies at stake."[36]

As the foregoing general definitions suggest, while rules differ from standards, it is not always easy to classify a legal test as definitively a rule or a standard.[37] Indeed, very few (if any) legal terms are devoid of any controversy over meaning; almost every concept has some fuzziness at the margins.[38] Does this mean that there are in reality no rules? Without resolving the metaphysical question definitively, it suffices to note that for our purposes here, we seek only to determine whether a legal test is better identified as a rule or a standard. Accordingly, I limit application of the moniker "rule" to settings where the legal test is absolutely clear and devoid of any controversy.

Commentators have explicated, and debated, the relative merits and drawbacks of rules and standards. As a general matter, rules operate more predictably than do standards and provide more

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33. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (citations omitted).

34. *Id.* at 59.

35. *Id.* (citations omitted).

36. *Id.* at 60.

37. Put another way, the test for distinguishing rules from standards is not itself purely rule-like. For discussion of how academic attempts to distinguish clearly between rules and standards fall short, see Lax, *supra* note 21, at 10–11.

38. *See* H. L. A. HART, THE CONCEPT OF LAW 128–31 (Clarendon Press 2d ed. 1994) (1961) (explaining that all legal concepts have frontiers, that is, cases that raise questions that are "open-textured" under existing precedent).

uniform results. This distinction underlies the various benefits and drawbacks of rules and standards.

First, rules and standards can make competing claims to being efficient legal instruments. Rules are easier and less costly to apply; they thus conserve judicial and general legal resources. They are also more predictable in their application, which may facilitate efficient private bargaining in the shadow of the law.[39] Inefficiency inheres in rules, however, to the extent that they are inflexible[40] and more costly to develop[41] (although that cost may become more justified to the extent that frequent application of the test effectively amortizes that cost).[42]

Standards are efficient in exactly the ways that rules are not. Standards are flexible. Judges can apply standards with greater sensitivity to what each particular factual setting calls for. Thus, "[d]ue to their indeterminacy and flexibility, standards are arguably more efficient than rules when the best outcome cannot be easily foreseen."[43] Standards are also more readily adaptable to changes in societal circumstances and values and to changes in technology that may affect the best choice of legal instrument.[44] Finally, they are less expensive to promulgate.[45]

Standards are also inefficient in exactly the ways that rules are not. Standards are more difficult and costly to apply and less predictable in their application.[46] Indeed, the institutional structure of the judiciary may enhance a standard's lack of predictability. The Supreme Court tends to eschew a role as a court of error correction,

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39. *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960) (arguing that the law should be designed to overcome transaction costs).

40. As Dean Sullivan explains, a rule may not wind up being so efficient if courts constantly seek to find loopholes and to develop exceptions. *See* Sullivan, *supra* note 33, at 63 ("[D]ecisionmaking economies from the application of rules . . . will be offset if decisionmakers spend time inventing end-runs around them because they just cannot stand their over- or under-inclusiveness."). Once this happens, the so-called "rule" begins to look more like a standard anyway. *See id.* at 61 ("A rule may be corrupted by exceptions to the point where it resembles a standard . . . .").

41. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568–69 (1992).

42. *Id.* at 573; Russell B. Korobkin, *Behavior Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 33 (2000).

43. Jacobi & Tiller, *supra* note 21, at 328.

44. *See* Sullivan, *supra* note 33, at 66 ("Standards . . . are flexible and permit decisionmakers to adapt them to changing circumstances over time.").

45. *See* Kaplow, *supra* note 41, at 569.

46. *See* Jacobi & Tiller, *supra* note 21, at 328 ("Standards . . . offer little guidance as to expected behavior, thus generating some costs associated with uncertainty." (citation omitted)).

preferring instead a role devoted to resolving splits in authority in lower courts and deciding issues of national importance.[47] This tendency invites the Court to leave areas governed by standards unreviewed for extended periods of time,[48] which creates suboptimally high unpredictability.[49]

Second, rules and standards each offer competing claims to being liberty- and democracy-enhancing choices of legal instrument. By virtue of their clarity and "all-or-nothing" application, rules applied against government action are said to constrain government more effectively.[50] In contrast, by virtue of the discretion and balancing of factors inherent in standards, standards are said to enhance democratic deliberation and to achieve fairer results.[51]

Third, rules and standards provide different constraints on lower courts. When promulgated by a superior court, a rule constrains hierarchically lower courts to act in conformance with the rule.[52] Rules thus offer the benefit to a higher court of greater ability to ensure that lower courts follow its desired policy preferences (especially where the

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47. *See* Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 275–86 (2006) ("[The Supreme Court] attempts to position itself as a source of structure, guidance, and uniformity, not as a traditional court of appeals that reviews the correctness of lower court opinions."); *see also* LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 98 (1994) ("[T]he Supreme Court no longer has the capacity to sit as a court of error in routine cases."); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 731–37 (1984) (identifying "particular types of cases that the Court should hear [as part of its discretionary docket], in keeping with the concept of the Court as manager of the judicial system").

48. *See* Shapiro, *supra* note 47, at 287–92 (arguing that the Court is "likely to see any inconsistencies or odd trends" in the application of a legal standard "as the 'misapplication of a *properly stated rule* of law' " and to deny certiorari as a result (quoting SUP. CT. R. 10)).

49. *See* Frederick Schauer, *Is It Important To Be Important? Evaluating the Supreme Court's Case-Selection Process*, 119 YALE L.J. ONLINE 77, 77 (2009) (arguing that a shrinking Supreme Court docket and an increasing number of narrowly tailored opinions leave lower courts with inadequate guidance); Shapiro, *supra* note 47, at 292–96 (stating that the Supreme Court's failure to review standards leaves lower courts and litigants "without adequate guidance").

50. *See* Sullivan, *supra* note 33, at 63–66 (stating that rules bind the government to only using "its coercive powers in given circumstances").

51. *See id.* at 67–69 ("[S]tandards make visible and accountable the inevitable weighing process that rules obscure."); *see also* N. J. Schweitzer, Michael J. Saks & David Lovis-McMahon, *Is the Rule of Law a Law of Rules? Judgments of Rule of Law Violations* (Conference on Empirical Legal Studies, SSRN Working Paper No. 1,439,055, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1439055## (reporting results of experiments where individuals were forgiving of judges not following rules where doing so might have affected the fairness of the trial).

52. *Cf.* SCHAUER, *supra* note 17, at 159 (noting that rules help to allocate power among decisionmakers).

costs of monitoring are high and where the higher court does not review all decisions by the lower courts); in contrast, a higher court can use standards to empower lower courts to execute policy preferences where the higher court believes the lower courts to be its faithful policy agents.[53]

II. CATEGORIZING RULES AND STANDARDS IN FEDERAL JURISDICTION

In this Part, I elucidate rules and standards in the context of federal district court jurisdiction. I first unpack the constituent steps that inhere in a federal district court properly exercising subject matter jurisdiction. I then consider how to distinguish rule-based tests from standard-based tests in the jurisdictional context.

A. Unpacking Federal Jurisdictional Analysis

One might at first blush be tempted simply to view a unitary boundary between federal jurisdiction and the absence thereof. While this understanding properly identifies the boundary between "jurisdiction" and "no jurisdiction," it nevertheless oversimplifies matters. It is important to unpack the steps that inhere in having a federal district court exercise proper subject matter jurisdiction.

For there to be proper subject matter jurisdiction in federal court, three conditions must be met. First, the Constitution must authorize federal jurisdiction over the case.[54] Second, Congress must have granted statutory jurisdiction over the case.[55] And third, the federal court must in fact exercise that jurisdiction; that is, it must not abstain.[56]

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53. *See* Jacobi & Tiller, *supra* note 21, at 333–42 ("The higher court's optimal decision [between creating a rule or a standard] is dependent upon the mix of policy-aligned and -unaligned lower court judges . . . ."); Lax, *supra* note 21, at 15–30 (analyzing statistically the factors on which higher courts rely in deciding between a rule and a standard to achieve optimal lower court compliance); *see also* Nelson, *supra* note 23, at 398 ("[P]art of what drives textualists toward rules in the first place is their skepticism about judges' ability to apply an underlying justification consistently from case to case.").

54. *See, e.g.*, Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701–02 (1982).

55. *See, e.g.*, *id.* ("Subject-matter jurisdiction . . . is an Art[icle] III as well as a statutory requirement . . . ."); Freer, *supra* note 20, at 312 ("[T]he federal judicial power created in Article III is not self-executing, and Congress must vest it in the lower federal courts by statute.").

56. *See* Shapiro, *supra* note 30 (observing that, even when a statutory jurisdictional grant is facially mandatory, courts generally incorporate some measure of discretion in exercising the jurisdiction).

Although all three of these steps are necessary for federal jurisdiction to obtain, the third step differs in an important way from the first two steps. The question of whether the Constitution authorizes federal jurisdiction and the question of whether Congress has conferred jurisdiction work to define the outer limits of federal jurisdiction; that is, they determine whether federal jurisdiction exists or not. In contrast, a decision to abstain in a case does not mean that there is no federal jurisdiction over the case; it simply means that the court will not exercise federal jurisdiction that does exist.[57] This is confirmed by abstention having originated in the power of courts of equity to decline to issue relief in cases where the courts believed it to be inappropriate.[58] Over time, abstention has loosened from its equitable moorings so that it may be available in nonequity cases,[59] the Court's reliance on equity as a basis for abstention has waned[60] and waxed,[61] and commentators have questioned the continuing importance of equity in abstention calculus.[62] While the continued vitality of equity to abstention thus may be questioned, the notion, borrowed from equity, that abstention involves a court declining to exercise powers that it in fact has remains intact.

Questions of instrument choice arise at each of the three stages: the constitutional grant of jurisdiction, the congressional grant of jurisdiction, and the decision as to whether or not to abstain. As to constitutional jurisdiction, drafters of constitutional provisions and the courts that interpret them must decide whether a rule or standard should demarcate the boundaries of constitutional jurisdiction.

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57. *See, e.g.*, Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 129 S. Ct. 1862, 1867 (2009) (holding that discretionary remands to state court under § 1367(c) are not jurisdictional).

58. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 718 (1996) ("[W]e have . . . located the power to abstain in the historic discretion exercised by federal courts 'sitting in equity' . . . ."); 17A WRIGHT ET AL., *supra* note 10, § 4241 ("[T]he abstention doctrines have their origin in the discretion of equity judges . . . ."); Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097, 1108 (1985) ("[A]bstention doctrines are applications of . . . equitable rules.").

59. *See, e.g.*, Wells, *supra* note 58, at 1108–21 (discussing cases).

60. *See, e.g.*, *id.* (describing the evolution of the Court's reasoning away from abstention as grounded in equity and instead as grounded in inherent powers of the courts).

61. *See Quackenbush*, 517 U.S. at 718–21 (discussing how closely tying cases seeking injunctive relief to equity allows federal courts to dismiss such actions outright under abstention, whereas actions for damages can generally only be stayed, not dismissed).

62. *See, e.g.*, Richard H. Fallon, Jr., *Why and How to Teach Federal Courts Today*, 53 ST. LOUIS U. L.J. 693, 723–24 (2009) ("[T]he Court's assertion that abstention is proper only in the exercise of equitable jurisdiction is misleading, if not disingenuous . . . ."); Martha A. Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1086 n.66, 1139 n.177 (1974) (suggesting that "abandonment of the equity requirement" in the abstention doctrine may be appropriate).

Drafters of statutes and judges that interpret them face a similar question with respect to the boundaries of statutory jurisdiction. By way of example, the Court has interpreted the Constitution's grant of diversity jurisdiction to require mere "minimal" diversity.[63] On the other hand, it has interpreted Congress's statutory grant of diversity jurisdiction to require "complete" diversity.[64]

Finally, the question of abstention also falls both to legislators[65] and to judges, although most abstention doctrines are judicially crafted.[66] While Congress has occasionally provided for mandatory abstention,[67] and some judicially crafted abstentions are essentially mandatory,[68] the decision to abstain ordinarily lies in the discretion of the trial judge.

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63. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967).

64. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267–68 (1806).

65. *See, e.g.*, 28 U.S.C. § 1367(c) (2006) (guiding federal courts in declining to exercise supplemental jurisdiction).

66. Many abstention doctrines are named for the Supreme Court decisions that gave rise to them. *See, e.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (allowing abstention in exceptional circumstances in favor of pending parallel state court litigation "rest[ing] on considerations of wise judicial administration . . . and comprehensive disposition of litigation" (quoting Kerofest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952)); Younger v. Harris, 401 U.S. 37 (1971) (stating that abstention doctrine generally precludes federal courts from enjoining pending state court criminal prosecutions); La. Power & Light Co. v. City of Thibodeaux, 360 U.S. 25, 26–29 (1959) (requiring abstention in diversity cases where the legal issues are of "special nature" to the state); Burford v. Sun Oil Co., 319 U.S. 315, 332–34 (1943) (requiring abstention in favor of complex state administrative schemes); R.R. Comm'n v. Pullman Co., 312 U.S. 496, 497–502 (1941) (empowering a federal district court to decline to hear a case that raises a novel and difficult federal constitutional issue in favor of state court resolution of a state claim, where resolution of the state claim might obviate the need to resolve the federal constitutional issue). In addition, a circumstance where the federal district court declines to exercise its equity jurisdiction is, in reality, not a conclusion that subject matter jurisdiction is lacking, but rather a decision not to exercise jurisdiction that otherwise exists. *See* Colegrove v. Green, 328 U.S. 549, 565 n.2 (1946) ("Want of equity jurisdiction does not go to the power of a court in the same manner as want of jurisdiction over the subject matter."); CHAFEE, *supra* note 17, at 317–21 (explicating the distinction). Indeed, the various discretionary abstention doctrines described above grow out of, but are not limited to, cases sounding in equity. *See Quackenbush*, 517 U.S. at 716–23.

67. *See* 28 U.S.C. § 1334(c)(2) (2006) (directing that, with respect to the federal district courts' bankruptcy jurisdictions, upon motion of a party, "the district court shall abstain from hearing" a proceeding related to a bankruptcy case "if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction"); 28 U.S.C. § 1369(b) (2006) (directing that a district court "shall abstain" in any case where "the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens," and "the claims asserted will be governed primarily by the laws of that State"). Despite these provisions' mandatory language, the determination of the circumstances under which the provisions apply seems to include standard-like considerations.

68. The Supreme Court has suggested that, where its requisites are met, *Thibodeaux* abstention is mandatory. *See* Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968) (per curiam) (holding that "[s]ound judicial administration *requires*" abstention to resolve the

My focus in this Article is on the second and third determinants of jurisdiction. I argue that rules are more appropriate in establishing the boundaries of statutory jurisdiction, while the place for standards lies in deciding whether or not to abstain. To be sure, many of the arguments here about the propriety of using rules to define the boundaries of statutory jurisdiction readily translate to the context of the boundaries of constitutional jurisdiction. Still, having a standard define the outer boundary of constitutional jurisdiction is entirely consistent with having a rule define the outer boundary of statutory jurisdiction (provided that, as is usually the case, the statute does not confer jurisdiction to the Constitution's outer limit).[69]

B. Identifying Rules and Standards in the Context of Federal Jurisdiction

In order to evaluate the proper place for rules and standards in jurisdictional calculi, it is imperative to understand exactly what qualifies as a rule, as opposed to a standard, in this context. As discussed above, a standard, in general, is said to apply where the legal test is fact-based and policy-based, is conducted on a case-by-case basis, and invokes the court's discretion.[70] The jurisdictional device that quintessentially meets this definition is discretionary abstention: district courts—usually as a matter of federal common law—sometimes enjoy discretion to abstain from a case, even where the requirements of subject matter jurisdiction are met. For example, under *Pullman* abstention, the federal district court may decline to hear a case that raises a novel and difficult federal constitutional issue in favor of state court resolution of a state claim, where resolution of the state claim might obviate the need to resolve the federal constitutional issue.[71] Under *Colorado River* abstention, a district court may recognize exceptional circumstances warranting

"crucial" state law issue presented (emphasis added)); *Thibodeaux*, 360 U.S. at 28 ("[W]e have required District Courts, and not merely sanctioned an exercise of their discretionary power, to [abstain in some circumstances] . . . ."). Application of *Younger* abstention doctrine is also mandatory. *See Younger*, 401 U.S. at 41 ("[There is a] national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."); Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 540, 542–43 (1989) ("[A]bstention is . . . largely required under *Younger*."); Meltzer, *supra* note 30, at 1907 (describing *Younger* abstention as having "relatively determinate boundaries").

69. *See* Freer, *supra* note 20, at 312–14 (stating that "we expect constitutional authorization of subject matter jurisdiction to be broad" and statutory grants to be "narrow").

70. *See supra* text accompanying note 35.

71. *See* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1681–86 (2003) (discussing *Pullman* abstention).

abstention in favor of pending, parallel state court litigation "resting on considerations of wise judicial administration and comprehensive disposition of litigation."[72] Discretionary abstention is by definition not mandatory, and its application generally calls upon district courts to balance various policy factors.

If discretionary abstention is the paradigm of a standard-based test in the jurisdictional setting, then are mandatory applications of jurisdiction paradigms of rules? The answer is perhaps, but not necessarily. As I have discussed above, a directive may order a result, yet employ such an amorphous test for when that result is mandated that the directive may in fact more properly be termed a standard. Ultimately, the question of whether a purportedly mandatory jurisdictional directive is a rule or a standard will turn upon whether the legal test for application of the directive is more clearly a rule or a standard. A jurisdictional directive is properly categorized as a standard if, notwithstanding its purportedly mandatory application, a court applying it must consider policies and facts, proceed on a case-by-case basis, and ultimately employ substantial discretion. Otherwise, it is properly categorized as a rule.[73]

III. THE DESIRABILITY OF MIGRATING STANDARDS AWAY FROM JURISDICTIONAL BOUNDARIES

Rules dominate the boundaries of federal jurisdiction, while standards abound in the landscape of abstention. In this Part, I argue that such a structure is generally both normatively desirable and attainable. My argument proceeds in two steps.

Part III.A considers arguments in favor of rules and arguments in favor of standards in the law of federal jurisdiction. But it also undertakes another task: it evaluates those arguments to determine whether their strength requires vesting a rule or standard along a true jurisdictional boundary or in abstention, or whether the placement is irrelevant. Part III.A concludes that rules ought to

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72. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (quoting Kerofest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952)) (internal quotation marks omitted).

73. Thus, in explaining why the Supreme Court's appellate jurisdiction is discretionary—in our terms, a standard—Professor David Shapiro emphasizes:

> The point . . . is not to demonstrate that even words that appear sharp turn out, on close examination, to be fuzzy around the edges. We all know that. The point is that the Supreme Court has refused to answer some of these questions in gross but rather has adopted criteria that explicitly leave it with discretion to choose.

Shapiro, *supra* note 30, at 566.

constitute jurisdictional boundaries. The arguments for standards, in contrast, are equally satisfied whether the standards are incorporated in boundaries or in abstention. Accordingly, if it is possible, the normatively preferable arrangement is to have rules define jurisdictional boundaries and standards apply in abstention. Part III.B then demonstrates the feasibility of in fact migrating standards that presently inhabit jurisdictional boundaries to abstention.

A. The Costs and Benefits of Rules and Standards in Federal Jurisdiction

I begin by considering the two relevant offsetting benefits and drawbacks to rules and standards that I identified above: cost-efficiency and constraint or empowerment of lower courts by higher courts.[74]

1. Efficiency

In the context of jurisdictional boundaries, rules are more efficient than standards. Jurisdictional rules are more predictable than jurisdictional standards. The ambiguities in jurisdictional standards may result in litigants erroneously filing suit in (or seeking to remove cases to) federal court. They may also encourage those who prefer a state forum to challenge the choice of the federal forum. To paraphrase Justice Frankfurter, an ambiguous jurisdictional boundary "provok[es]" "litigation."[75]

The litigation provoked by jurisdictional standards will exact costs on litigants.[76] This is especially the case insofar as two levels of

74. *See supra* notes 39–49, 52–53 and accompanying text. The third factor—enhancement of democracy and liberty, *see supra* notes 50–51 and accompanying text—is not relevant in the context of jurisdiction. The choice between rules and standards as democracy enhancing does not seem to weigh heavily in either direction in the context of jurisdictional boundaries. The choice, after all, is not between court jurisdiction and the complete absence of any court's jurisdiction, but rather between court systems. *Cf.* Shapiro, *supra* note 30, at 561 n.114 (noting that, in arguing for "bright line" jurisdictional tests, "Professor Chafee was focusing on the circumstances in which judicial conduct should be regarded as a 'nullity' because the judge acted without jurisdiction." (citing CHAFEE, *supra* note 17, at 310–16)).

75. Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting); *see also* Hertz Corp. v. Friend, 130 S. Ct. 1181, 1193 (2010) ("Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits.").

76. *See Hertz Corp.*, 130 S. Ct. at 1193 ("Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims."); Field, *supra* note 19, at 683 ("[L]itigating at length over the proper forum in which to litigate is . . . expensive to the parties and to the public.");

full review of jurisdictional boundary issues are quite possible. While higher courts review district court decisions as to discretionary abstention only for abuse of discretion,[77] district court decisions regarding subject matter jurisdiction are reviewed de novo.[78] Accordingly, the district court and court of appeals both undertake full review of whether jurisdiction is proper.[79] This litigation imposes both monetary[80] and temporal costs on litigants.

Alternatively, the costs associated with such erroneous filings may dissuade litigants from taking advantage of a federal forum to which they would have been entitled.[81] Indeed, even a litigant whose choice of a federal forum is correct may face substantial litigation costs to vindicate that choice.[82]

Finally, a litigant may raise an assertion that a case in fact falls outside the federal courts' subject matter jurisdiction at any time, even after judgment and while a case is on appeal.[83] A belated decision that jurisdiction is lacking likely will render moot considerable time and expense on the part of litigants.

Litigation over the propriety of jurisdiction also imposes costs on the courts.[84] First, it taxes the limited resources of the federal judicial system (regardless of the ultimate outcome). Lack of certainty

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Friedman, *supra* note 17, at 1224 ("[T]he contradictory and unpredictable doctrinal structure imposes real, often severe, resource burdens on litigants.").

77. *E.g.*, Gibson v. Berryhill, 411 U.S. 564, 580 (1973) (district court decision on discretionary abstention reviewed for abuse of discretion).

78. *E.g.*, Wagner v. United States, 545 F.3d 298, 300 (5th Cir. 2008).

79. *See* Sherry, *supra* note 17, at 145 ("[D]e novo review at the appellate level . . . doubles the number of courts that must struggle with . . . difficult jurisdictional questions . . . ."). Supreme Court review is also possible (albeit unlikely, *see infra* note 110 and accompanying text).

80. *See* CHAFEE, *supra* note 17, at 312 (arguing that, when the boundary between judicial power and nullity is defined by standards in lieu of bright lines, "an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases").

81. *See Hertz Corp.*, 130 S. Ct. at 1193 (noting that, by increasing predictability, "[s]imple jurisdictional rules . . . benefit[] plaintiffs deciding whether to file suit in a state or federal court").

82. *See* Friedman, *supra* note 17, at 1224–25 (arguing that the "contradictory and unpredictable doctrinal structure [of federal jurisdictional standards] imposes real, often severe, resource burdens on litigants").

83. *See, e.g.*, FED. R. CIV. P. 12(h)(3) ("If the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action." (emphasis added)); Field, *supra* note 19, at 683–84 (noting that jurisdictional issues can be raised for the first time on appeal).

84. *See Hertz Corp.*, 130 S. Ct. at 1193 (discussing the judicial resources at stake in litigation over jurisdiction where "complex jurisdictional tests" are involved); Field, *supra* note 19, at 683 (noting that lengthy litigation over the proper forum in which to litigate is a "poor use of limited judicial resources").

will both invite more cases into federal court[85] and increase the time required to resolve jurisdictional issues in each case,[86] especially given that each federal court must satisfy itself that subject matter jurisdiction is proper.[87] In addition, "appellate courts, reviewing jurisdictional holdings de novo, have more opportunities to disagree with lower court holdings."[88] This "doubles the number of courts that must struggle with newly difficult jurisdictional questions."[89] Finally, scarce judicial resources may appear to have been wasted upon a belated decision that subject matter jurisdiction is absent.[90]

Second, standard-based boundaries may detract from the federal courts' legitimacy. To the extent that standard-based boundaries breed ambiguity and confusion, lower courts are likely to reach inconsistent conclusions.[91] In addition, de novo appellate court review "gives the courts of appeals more opportunities to second-guess district court decisions on questions that now seem to have no single right answer."[92] To make matters worse, insofar as it does not view itself as a court of error correction, the Supreme Court often may not enter the fray to resolve these divergences.[93] These disagreements may precipitate a reduction in the legitimacy of the law and the federal courts that promulgate it.[94]

Third, standard-based boundaries may generate friction between the federal court and state court systems. State courts may perceive an imprecise jurisdictional boundary as enabling federal courts to "cherry-pick" more interesting and momentous cases. This empowerment of the federal court system may make the state courts

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85. *See* Sherry, *supra* note 17, at 144–45; *supra* text accompanying note 75.

86. *See* Sherry, *supra* note 17, at 145.

87. *See Hertz Corp.*, 130 S. Ct. at 1193 ("Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it.").

88. Sherry, *supra* note 17, at 145.

89. *Id.* Supreme Court review is also possible.

90. *See supra* text accompanying note 83.

91. *See Hertz Corp.*, 130 S. Ct. at 1193 ("Simple jurisdictional rules . . . promote greater predictability."); Friedman, *supra* note 17, at 1224–25 (discussing lower courts' divergence over the proper interpretation of Supreme Court guidance on jurisdictional standards).

92. Sherry, *supra* note 17, at 145.

93. *See supra* text accompanying notes 47–49.

94. *Cf.* Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the* Harvard Law Review *and Other Great Books*, 100 HARV. L. REV. 887, 904 (1987) (noting that, when "[p]recedent can be found somewhere for almost any proposition[,] the value of any single precedent is diminished").

less willing partners in the administration and enforcement of the federal laws.[95]

Fourth, the bases on which standards are in some contexts said to offer efficiency benefits over rules apply less frequently, or not at all, in the context of federal jurisdiction. It would not seem that changes in technologies would often make flexibility in jurisdictional boundaries desirable.[96] While changing societal mores sometimes might justify variations in federal court jurisdiction,[97] it seems that either congressional enactments[98] or judicially crafted abstention doctrines can accommodate such changes. Finally, creating a jurisdictional rule does not entail costly information gathering that generating rules in other contexts might.[99] And, especially since courts are obligated to verify the existence of jurisdiction in every case,[100] the jurisdictional rule would be applied quite often, meaning that the costs of generation would be substantially amortized.

Rule-based boundaries thus enhance efficiency. Murky, standard-based boundaries detract from it.[101] As we shall see,

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95. *Cf.* Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1904–10 (2008) (discussing how various transjurisdictional procedural devices may enhance, or detract from, comity).

96. This is not the case for personal jurisdiction. Consider how the growing nationalization of trade and technological advances have ushered in new tests for the constitutionality of personal jurisdiction. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356 (1927) (stretching preexisting personal jurisdiction law, reasoning that "[m]otor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property"). Some argue that the Internet poses new problems for existing personal jurisdiction doctrines. *See, e.g.*, Alison W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction Over Virtually Present Defendants*, 64 U. MIAMI L. REV. 133, 150–61 (2009).

97. For example, the aftermath of the Civil War witnessed the birth of provisions allowing for original jurisdiction and removal to federal court of certain cases where a litigant's civil or voting rights are at issue. *See, e.g.*, 28 U.S.C. §§ 1343(a), 1344, 1443 (2006). It also saw the enactment of provisions that were designed to allow federal courts to assume jurisdiction over cases where showings of state court bias could be made. *See infra* note 115.

98. Consider, for example, the civil rights jurisdictional statutes discussed *supra* note 97.

99. *See, e.g.*, *supra* note 96 (discussing the difficulties posed by rules in the context of personal jurisdiction).

100. *See supra* note 87 and accompanying text.

101. One might ask whether efficiency would be served as well by a standard-based jurisdictional boundary and a rule-based abstention. The rule-based abstention would have to be truly rule-based: mandatory and clear in terms of when it applied and when it did not. If the rule-based abstention were uniformly beneath the discretion afforded by the standard along the boundary, then the function of the rule-based abstention would be largely equivalent to a true rule-based boundary: the standard along the boundary would be irrelevant since, according to the mandatory abstention rule, courts would necessarily abstain in all cases falling in that area. In contrast, if the rule cut across the region where the standard applied, then the standard-based boundary would continue to present problems, since the mandatory abstention would not eliminate from the courts' purview all cases where the standard might apply. *Cf. supra* text

migrating standards to abstentions will limit de novo review to applications of murky standards and thus reduce costs for litigants and courts.[102]

2. Constraining or Empowering Lower Courts

In general, one would expect higher courts to choose rules if they wish to constrain lower courts and standards if they wish to empower them.[103] The application of this logic in the context of federal court jurisdiction is more nuanced: a standard-like jurisdictional boundary empowers lower federal courts to hear more cases at the expense of the state courts.[104] It thus empowers lower federal courts even as it diminishes the power of the state courts. In contrast, rule-like boundaries empower state courts by restricting lower federal courts' freedom to define jurisdictional limits as they see fit.

But both the lower federal courts *and* the state courts are inferior to the U.S. Supreme Court. Thus, unlike the typical setting where the choice between a rule and a standard represents a choice between constraining and empowering lower courts as agents of the Supreme Court, the setting of jurisdiction is one where instead the choice is between *which* lower courts to empower.

Indeed, the paradigmatic stories in favor of a jurisdictional standard for federal question jurisdiction rest on just this understanding. Commentators offer various reasons as to why a federal forum might be preferable for some—or even all—types of cases and litigants. For some, the goal of federal question jurisdiction is the uniform interpretation and application of the federal laws.[105] For others, state judges' penchant to underenforce federal rights is an issue.[106] Furthermore, federal court expertise with federal law is often

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accompanying note 69 (describing how the standard-based nature of the constitutional jurisdictional limit could be mitigated by a rule-based statutory jurisdictional limit).

102. *See infra* notes 160–62.

103. *See supra* notes 52–53 and accompanying text.

104. *See supra* text accompanying note 95.

105. *See, e.g.*, AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 165–66 (1969) (discussing the importance of uniform interpretation of federal law); *id.*, at 488 app. C ("The purpose of federal question jurisdiction is to promote uniformity in the application of federal law."); Friedman, *supra* note 17, at 1241 (characterizing disuniformity stemming from state court resolution of a federal question as a "serious problem[]"). Note the irony, however, in that some disuniformity in the interpretation of federal jurisdiction is the cost of attaining uniformity in federal law by having federal courts resolve certain federal questions.

106. *See, e.g.*, YACKLE, *supra* note 47, at 98–99 ("[I]f an unsympathetic state court slants its factual findings against federal claims, appellate review provides inadequate protection."); Mishkin, *supra* note 20, at 172–73 (discussing concerns over state courts' treatment of evidence

given as a justification for having a federal forum for federal issues.[107] Next, it may be that federal courts interpreting federal law perform an important norm-generating function that their state counterparts cannot.[108] Finally, Professor Gil Seinfeld has recently argued that the reason federal courts are made available to litigants and their attorneys is due in part to the uniformity and quality of federal procedures.[109]

At first blush, one might think of two alternative structures that might address these concerns: one could rely on direct Supreme Court review of state court judgments, or one might endeavor to channel all cases "arising under" federal law to the lower federal courts. In the end, however, neither of these notions provides a viable solution. First, one cannot expect direct Supreme Court review of state court judgments to fulfill the goals of uniformity and fair hearings of

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adduced in support of a claim under federal law such that state court interpretation of that evidence becomes effectively binding on higher-level courts); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (criticizing contemporary Supreme Court assumptions that state and federal courts are equally competent venues for the enforcement of federal constitutional rights, because state courts are less likely than federal courts to vigorously enforce federal constitutional doctrine); Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 694 (1999) (discussing Supreme Court rejection of the argument that state court judges could be the primary enforcers of federal constitutional rights at the turn of the nineteenth century); *see also* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 281 (1996) ("Because state judges can be expected to be less independent of state political forces in a state than federal judges when both are residents of a state adversely affected by federal regulation, a state court may be an unsympathetic tribunal in a case where a federal right has been created in order to correct an interstate externality.").

107. *See, e.g.*, AM. LAW INST., *supra* note 105, at 164–65 (arguing that the federal courts have acquired substantial expertise in the interpretation and application of federal law); Cohen, *supra* note 20, at 892–93 (observing that federal courts are presumed to be more expert than state courts at interpreting federal law); Philip B. Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487 (1960) (noting the "principle" that federal courts are the primary experts on questions of federal law).

108. *See* Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 717–18 (1989) (arguing that in juxtaposition to the "general rule that federal courts should not act as primary norm-declarers in ordinary diversity controversies posing only state law questions" is "[t]he centrality of norm-declaration in federal question cases"); *cf.* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1495–1517, 1535–44 (1997) (describing problems with federal courts acting under *Erie* either to predict evolving state law or simply to decide the issue based upon a static conception of state law); Mialon et al., *supra* note 32, at 4 (arguing that appellate courts are more concerned with the broader applicability of holdings, while trial courts are more concerned with the particular litigants appearing before them).

109. *See* Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95 (2009).

federal claims on a broad basis; the Court's docket is simply too small.[110]

Second, it would be unrealistic to channel all cases raising federal issues to the lower federal courts.[111] There are simply too many cases.[112] And, if one chose instead only to channel the "federal portions" of cases to the lower federal courts as a way to conserve federal judicial resources, one runs inevitably into the problem of how to "decompose" hybrid cases that intertwine issues of federal and state law.[113]

Given all of that, the argument proceeds, it is appropriate to afford the lower federal courts greater freedom effectively to select the cases that they hear.[114] The various justifications for channeling cases to the lower federal courts all have in common the notion that the lower federal courts will be more faithful agents of the Supreme Court (and Congress in enacting the federal laws) than will the state courts. The argument thus accords with the notion that the federal question jurisdiction, and, by analogy, other jurisdictional settings where such concerns arise,[115] should be crafted so as to empower the faithful

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110. *See, e.g.*, Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 831 n.6 (1986) (Brennan, J., dissenting) (discussing personal experience of substantial docket limitations, making Supreme Court review of state court judgments unrealistic); HENRY J. FRIENDLY, FEDERAL JURISDICTION 102–03 (1973) (discussing the inadequacies of a potential procedure by which the Supreme Court would review state court judgments in federal civil rights cases).

111. *See* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 (1981) (arguing that federal and state courts must share responsibilities of hearing federal claims); Lonny S. Hoffman, *Intersections of State and Federal Power: State Judges, Federal Law, and the "Reliance Principle"*, 81 TUL. L. REV. 283, 286 (2006) (noting that, practically speaking, "state courts must be depended upon to adjudicate federal rights").

112. *See* Bator, *supra* note 111, at 621–22 (discussing views that federal court caseload would be unacceptably high were state courts not to hear federal claims); *see also* Ray Forrester, *The Nature of a "Federal Question"*, 16 TUL. L. REV. 362 (1942) (noting that statutory limits on federal question jurisdiction are needed to avoid overwhelming the federal courts).

113. *See* Nash, *supra* note 95, at 1883–90.

114. *See, e.g.*, Shapiro, *supra* note 30, at 568 (identifying matters of "judicial administration" as a valid basis for exercise of discretion).

115. One might argue a claim-based requirement, more than a party-based requirement, invites courts to understand and implement the policy considerations underlying the requirement. The problem with this argument is that policy considerations are not unique to claim-based requirements. Indeed, it is eminently possible to design a standard-based statute to fulfill the goal generally thought to be advanced by maintenance of diversity jurisdiction: the avoidance of bias by state courts against litigants hailing from out of state. *See* Nash, *supra* note 71, at 1729 n.223, and the authorities cited therein. Though rarely used, a post-Civil War statute allowed for removal of cases by an out-of-state litigant upon a showing of apprehended prejudice or local influence. *See* Prejudice or Local Influence Removal Act of 1867, ch. 196, 14 Stat. 558, 559; Act of March 3, 1887, as corrected by Act of Aug. 13, 1888, ch. 866, 25 Stat. 433, 435; for discussion, see James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 11 (1964) (describing the statute and its 1948 repeal); *see*

agents—the lower federal courts—to the detriment of the less faithful agents—the state courts.

The question remains whether that freedom needs to be vested at the jurisdictional boundary or could be vested as effectively (or at least substantially as effectively) in an abstention phase. If the former is the case, then the benefits of the standard would necessarily have to offset the efficiency costs of not having a rule in order to justify choosing the standard over the rule.

This Article argues that the latter is the case. Provided that courts can implement a standard of similar effect as part of an abstention phase and that the standard as part of that phase would vindicate the same goals as does the standard at the jurisdictional boundary, then the choice of placement would be irrelevant with respect to empowering the lower federal courts. Hence, everything turns on whether the standards in each setting would result in substantially the same allocation of cases between the state and federal courts (a point to which I turn below[116]). And, if the choice of placement is irrelevant, then one could, so to speak, have one's cake and eat it, too: one could ensconce a rule at the boundary to harvest the efficiency benefits there, while migrating the standard to abstention so as to be able to empower the federal courts as faithful agents of the federal jurisdiction.

Note, moreover, that such an arrangement might quell the skepticism that some have of the use of the standard at the jurisdictional boundary. Some take the position that the effort of having a standard is not worth the candle, whether because the effect is limited to a small number of cases,[117] because one questions the extent of the benefit derived from access to a federal forum,[118] or

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also David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 339–55 (1977) (advancing a proposal under which each federal district court, by court rule, can opt out of diversity jurisdiction upon a showing that factors justifying its continuation are not met in the district). Thus, to the extent that courts have turned to policy considerations more often in construing claim-based requirements, that is because they have chosen to do so, not because they must.

116. *See infra* text accompanying notes 167–72.

117. *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 321 (2005) (Thomas, J., concurring) ("[T]rying to sort out which cases fall within the smaller *Smith* category may not be worth the effort it entails."); Meltzer, *supra* note 30, at 1915 (noting that, "if the costs of a more complex approach are realized in a relatively small fraction of cases, so, too, are the benefits").

118. *See, e.g.*, Sherry, *supra* note 17, at 146 ("[T]he consequences of a 'mistaken' jurisdictional ruling are much less substantial than in other contexts: In most cases, the only issue is whether the claim on the merits will be litigated in state or federal court."). This felicitous limitation on the cost of having a claim heard in state as opposed to federal court

because one in any event estimates the efficiency costs of the standard to outweigh any resulting benefits.[119] But perhaps those who take these views would be more accepting of the standard if—as would be the case if it were moved from the jurisdictional boundary and replaced by a rule—its benefits were not offset by the costs of not having a rule on the boundary.[120]

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Table 1 highlights the major tradeoffs that accompany the choice among four possible jurisdictional structures. For each regime, the table summarizes the ease with which one can determine whether federal jurisdiction inheres; the predictability of the jurisdictional outcome; the scope of district court discretion to select which cases the federal court should hear; and the risk that a tardy subject matter jurisdictional defect will undermine jurisdiction at a late stage of trial or even on appeal. The bottom two rows then estimate the likely litigation costs devoted to subject matter jurisdiction at both the district court and appellate court levels. (These cost estimates take into account both the likelihood of litigation over the issue and, to the extent there is likely to be litigation, how protracted that litigation is likely to be.) Note that the appellate standard of review influences both the likelihood of appeal and the scope of the trial court's discretion.

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results from choice-of-law rules that require either court to apply the same law. *Erie* and its progeny require federal courts hearing state law claims to apply the state law that a court of the state in which the federal court sits would apply. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). And the Supremacy Clause obligates state courts hearing federal law claims to apply governing federal law. U.S. CONST., art. VI, cl. 2. To be sure, there are various reasons to question the extent to which, in practice, courts from the state and federal systems will reach the same outcomes. *See, e.g.*, Clark, *supra* note 108, at 1495–1517, 1535–44 (describing problems with federal courts acting under *Erie* either to predict evolving state law or simply to decide issues based upon static conception of state law); Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1154 (1999) ("State courts will sometimes go to great lengths to find a conflict in federal court decisions so that they may decide the federal question as they wish."). Still, the essential point remains that the choice of law will be the same in either forum, which at least serves to limit discrepancies in outcomes. This is not the case in many other jurisdictional settings. *See infra* text accompanying notes 200–03.

119. *See, e.g.*, Robertson & Sturley, *supra* note 18 (critiquing on the basis of inefficiency the Supreme Court's introduction of a standard-like jurisdictional boundary in admiralty).

120. For example, while Professor Larry Yackle lauds the policy goal of "channel[ing] cases presenting substantial questions of federal law to the federal forum, while screening out others that should go to state court," YACKLE, *supra* note 47, at 91, he also wants to implement the goal using "jurisdictional rules that can easily be applied at the outset of litigation," *id.*

TABLE 1: COMPARISON OF FEATURES OF JURISDICTIONAL REGIMES

	(I) Rule along boundary	**(II) Standard along boundary**	**(III) (i) Rule along boundary, with (ii) discretionary abstention**	**(IV) (i) Rule along boundary, with (ii) abstention subject to review de novo**
Standard of appellate review	De novo	De novo	De novo for (i) and abuse of discretion for (ii)	All de novo
Ease of application	Very easy	Very difficult	Very easy	Fairly easy
Predictability of outcome	Very predictable	Very unpredictable	Fairly predictable	Quite predictable
Scope of lower court discretion to select cases	Low	High	Extremely high	Very high
Is failure to meet some aspect of jurisdiction waivable?	No	No	Failure to request abstention is waivable	Failure to request abstention is waivable
Likely district court litigation costs over subject matter jurisdiction	Low	High	Moderate to Medium	Moderate to Medium
Likely appellate court litigation costs over subject matter jurisdiction	Low	High	Low	Medium

Regime I envisions a simple bright-line jurisdictional boundary defined by a rule. A rule is very easy to apply and its applications are predictable. This will tend to reduce the resources—both judicial and private—devoted to identifying the contours of the boundary. At the same time, a rule is a blunt instrument with which to select cases. It is likely that a rule will direct some cases to federal court without policy justification, while sending other cases to state court that would preferably have been heard in a federal forum. On appeal, the court of appeals will review trial court applications of jurisdictional rules de novo. On the one hand, the promise of de novo review may encourage those who lost at the trial level to appeal; on the other hand, the ease with which a rule is applied should make it less likely that the trial court erred in its ruling and thus less likely that litigants will appeal the decision (or make it clearer when the trial court has erred, thus making appeals relatively straightforward and less expensive). Further, de novo review reinforces trial courts' limited ability to select cases for federal court on a case-by-case basis. Finally, defining jurisdiction by a lone rule raises the possibility that a jurisdictional defect—which is not waivable—may upend federal proceedings well into trial or even on appeal.

Regime II also envisions a singular jurisdictional boundary, but defined by a standard instead of a rule. Now case selection into federal court is quite good. The tradeoff, however, is that the standard is

difficult to apply and unpredictable, which will tend to increase litigation costs. Because the standard is used to define the jurisdictional boundary, its application constitutes a legal question; as such, its application is reviewed de novo, just as is Regime I's jurisdictional rule. Unlike Regime I, however, the relative unpredictability of the standard's application is likely to combine with de novo review to *increase* the incentive to appeal and thus again drive litigation costs higher. The reliance on a standard affords lower courts substantial discretion to select (and reject) cases. That discretion is not unbridled, however; it is constrained by the prospect of de novo review by the court of appeals. Finally, as under Regime I, making jurisdiction turn solely on which side of the jurisdictional boundary a case lies raises the possibility of a jurisdictional defect rendering judicial proceedings—even a whole trial—a nullity.

One obtains Regime III from Regime II by migrating the standard that used to identify the jurisdictional boundary to a discretionary abstention, leaving in its stead a rule to define the jurisdictional boundary. Courts will have little trouble applying the rule (as under Regime I), and applications of discretionary abstention are also not difficult. Although discretionary abstention obscures a bit of the predictability of the rule, outcomes still are likely to be fairly predictable overall. The rule portion of Regime III will keep trial court litigation costs down (as under Regime I), but the district court's discretionary power to abstain should invite more litigation than under Regime I. A similar increase is not likely at the level of the court of appeals because of the "abuse of discretion" standard under which district court's abstention decisions are judged. The discretionary power the district courts enjoy to abstain—barely constrained by "abuse of discretion" review by the court of appeals—vests the district courts with vast discretion to select which cases the federal court will hear. Finally, a failure to request that the district court abstain from jurisdiction is waivable.

Regime IV differs from Regime III only in that the power of the district court to abstain is not purely discretionary; instead, it is subject to affirmative legal constraints, and the decision to abstain is subject to de novo review by the court of appeals. There is likely to be little overall effect on trial court litigation costs. Two effects cut in opposite directions: adding de novo review of abstention is likely to make outcomes under Regime IV moderately more predictable than under Regime III (since the abstention is more constrained), but it also makes Regime IV moderately more difficult to apply than Regime III. However, given additional appellate scrutiny on abstention, the appellate costs directed at subject matter jurisdiction under Regime

IV will be higher than under Regime III. Finally, district court freedom to select the cases that the federal court will hear will be more constrained than under Regime III.

To the extent that one's goals are (to the extent possible) to maximize ease of application and predictability of outcomes, to minimize litigation costs, and to optimize district court freedom to select cases the federal court will hear, Table 1 makes clear that Regimes III and IV are normatively preferable to Regimes I and II. While Regime I's rule-based boundary is easy to apply and to predict and keeps litigation costs down, it does a poor job at allowing district courts to select appropriate cases for the federal court to hear. And, while Regime II's standard-based boundary does well on that score, it fairs poorly on the other scores.

In contrast, Regimes III and IV retain most of the benefits of Regime I while also affording district courts great discretion to select cases. Regime III maximizes that discretion; Regime IV reins it in a little by subjecting it to closer appellate court review, with a concomitant increase in litigation costs. It seems, then, that one should choose between Regimes III and IV based upon the optimal level of district court freedom to select cases. If one trusts the district courts to select the right cases without the need for substantial appellate court supervision, then Regime III is normatively preferable. On the other hand, if one doubts the ability of district courts to select cases well, then Regime IV may be worth the increased litigation.

B. Migrating Standard-Like Considerations to an Abstention Stage

The last Section expounded the benefits of migrating standard-like considerations from a jurisdictional boundary to an abstention stage. In this Section, I demonstrate the feasibility of such migrations.

Let us focus initially on the jurisdictional boundary itself, which may be rule-like or standard-like. The use of a rule to define that outer boundary is depicted in Figure 1A: the rule has effect along the clear demarcation between the darkened area below the line (where there is jurisdiction) and the white area (where there is not). This correspondence exists precisely because there is a rule governing the jurisdictional boundary and no abstention; in other situations, this will not be the case, as we shall see. In contrast, the use of a standard is represented in Figure 1B. There, the demarcation between jurisdiction and lack of jurisdiction—and cases that the court will hear and not hear—is less clearly and predictably delineated, as reflected in the slow transition from black to white.

FIGURE 1A: RULE-BASED JURISDICTIONAL BOUNDARY

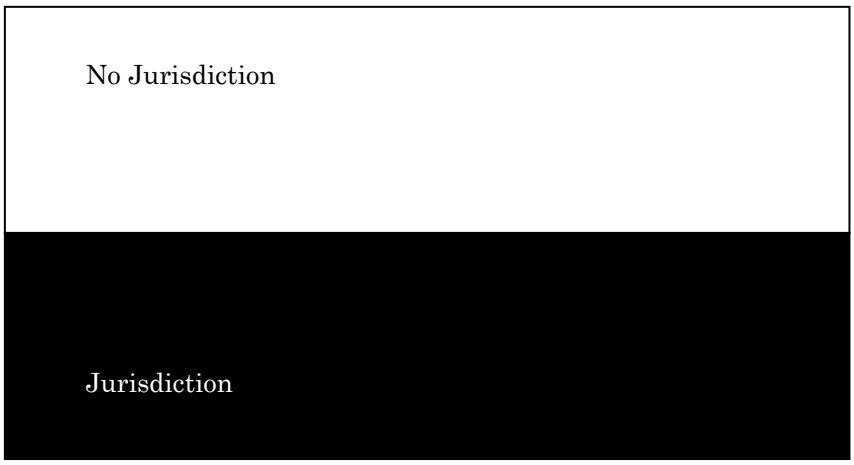
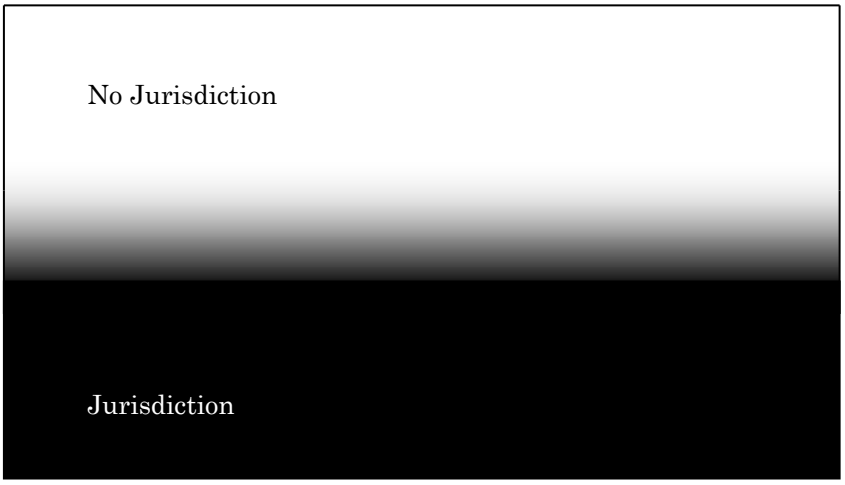


FIGURE 1B: STANDARD-BASED JURISDICTIONAL BOUNDARY



Missing from the discussion up to this point—and from Figures 1A and 1B—is the possibility of abstention. Let us consider the ordinary situation where abstention is discretionary—meaning that its use is determined using a standard rather than a rule. Figure 2 could represent diversity jurisdiction, incorporating *Colorado River* abstention. Note that the transitionally shaded area in the lower right

represents the possibility of abstention. The area lies at the lower right and shades in a direction orthogonal to the jurisdictional rule, because the abstention in question has nothing to do with—that is, relies upon analytically distinct factors from—the jurisdictional boundary: the application of *Colorado River* abstention has nothing to do with the extent to which the amount-in-controversy requirement is exceeded or with the satisfaction of the complete diversity requirement.[121]

FIGURE 2: DIVERSITY JURISDICTION, AS MODIFIED BY *COLORADO RIVER* ABSTENTION

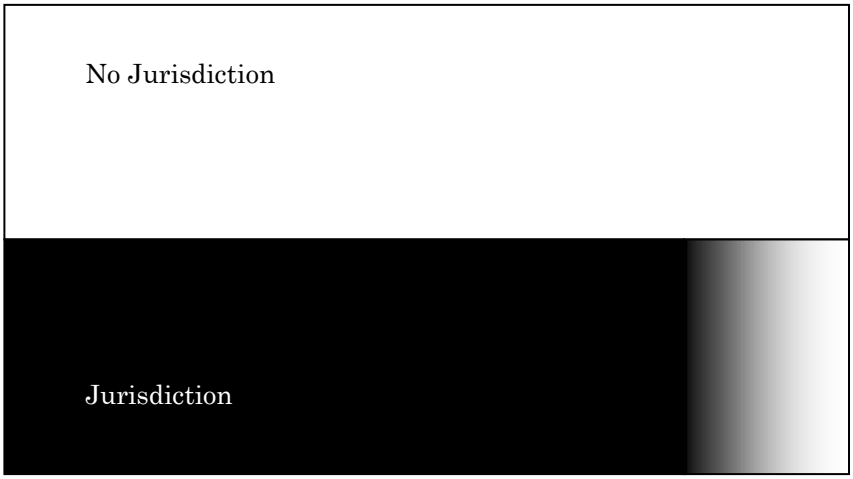


Figure 3 presents a stylized depiction of federal question jurisdiction (treating the boundary as purely standard-like), incorporating *Pullman* abstention. Here, the abstention is depicted at the bottom of the diagram—and the shading proceeds in the reverse direction from the shading of the standard-like jurisdictional boundary. This is because the test for *Pullman* abstention is in some sense exactly the opposite of the standard of substantiality for federal question jurisdiction. The absence of a substantial federal question in a claim sounding in state law eliminates federal question jurisdiction. On the other hand, *Pullman* abstention applies where the federal

121. *See supra* text accompanying note 72.

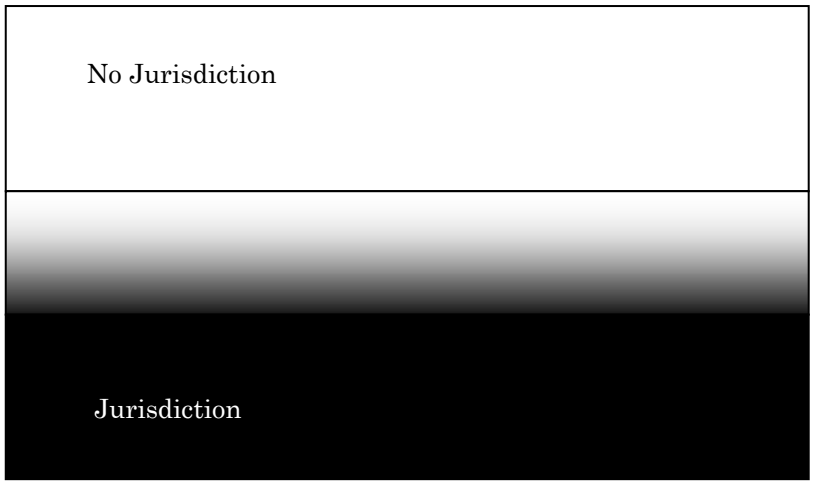
question is of great moment—it must be constitutional, novel, and difficult.[122]

FIGURE 3: FEDERAL QUESTION JURISDICTION, AS MODIFIED BY *PULLMAN* ABSTENTION

Let us remain with the ordinary situation where abstention is discretionary—meaning that its use is determined using a standard rather than a rule. We may quickly observe that the situation depicted in Figure 1B—where the jurisdictional boundary is a standard—may be substantially replicated, to the extent that the metric is the ultimate question of whether the federal court will hear the case, by having a rule determine the jurisdictional boundary and by then giving the federal court discretion to abstain from exercising that jurisdiction. The two settings will be substantially similar if the courts' discretionary standard for abstention in the second setting closely resembles the standard used to define the jurisdictional boundary in the first setting. The second setting is depicted in Figure 4, which, as expected, bears a strong resemblance to Figure 1B.

122. *See supra* text accompanying note 71.

FIGURE 4: RULE-BASED BOUNDARY WITH DISCRETIONARY ABSTENTION MIMICKING OLD STANDARD-BASED BOUNDARY



I explain below in Part IV what the transition from Figure 1B to Figure 4 depicts in the contexts of federal question and federal admiralty jurisdiction.

IV. RESHAPING FEDERAL QUESTION AND FEDERAL ADMIRALTY JURISDICTION

The previous Part explained that migrating a standard to a discretionary abstention will substantially retain whatever benefits were offered by the standard along the jurisdictional boundary. This will allow, moreover, one to reap additional benefits from the rule that is left along the actual jurisdictional boundary as a result of the migration. In this Part, I apply this logic to two areas of federal jurisdiction that today prominently feature standards along their jurisdictional boundaries—federal question jurisdiction and federal admiralty jurisdiction.

A. Federal Question Jurisdiction

Perhaps no area of federal jurisdiction has received more attention, or criticism, for its standard-like aspects than has federal question jurisdiction. I first elucidate the rules and standards that define the current boundary of the jurisdiction. I then argue in favor of the migration of the standards to discretionary abstentions.

1. The Boundary as Currently Defined

Under the language of the current federal question statute, 28 U.S.C. § 1331, federal courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[123] The question with which courts have had to grapple is exactly when, under the federal question statute—since the Court has interpreted the nearly identically worded statutory grant more narrowly than its constitutional parallel[124]—a case "aris[es] under" federal law. The courts have elucidated three components to determining whether a claim arises under federal law: whether a federal issue is properly raised under the plaintiff's "well-pleaded" complaint; whether the federal issue is sufficiently substantial; and whether the federal issue is "central" to the claim.[125] As we shall see, the well-pleaded complaint aspect is a rule—the "well-pleaded complaint rule." The substantiality requirement has some features of a rule and others of a standard. Finally, the centrality requirement is most standard-like.

Well-pleaded complaint rule. One fundamental aspect of federal question jurisdiction is the "well-pleaded complaint rule." Under it, the plaintiff's complaint must raise an issue of federal law for federal court jurisdiction to arise; the mere fact that the plaintiff anticipates that the defendant may raise a defense grounded in federal law—or, indeed, even if the defendant in fact does so—is insufficient for jurisdictional purposes.[126]

"To state the obvious," as Professor Freer has put it, "the well-pleaded complaint rule is a *rule*."[127] Courts have applied the well-pleaded complaint rule with rule-like precision. For example, the

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123. 28 U.S.C. § 1331 (2006).

124. The Constitution authorizes Congress to confer upon the federal courts the power to hear "all cases, in Law and Equity, arising under th[e] Constitution, the Laws of the United States, and Treaties." U.S. CONST. art. III, § 2, cl. 1. This constitutional grant has been interpreted broadly to extend whenever federal law potentially "forms an ingredient" of the case. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824).

125. *See* WRIGHT ET AL., *supra* note 10, § 3562 (summarizing the "three restrictions on the phrase 'arising under' in the statutory context" that the Supreme Court has imposed over time).

126. *See, e.g.*, Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152–53 (1908).

127. Freer, *supra* note 20, at 318. It has been argued that the well-pleaded complaint rule arises out of an understanding that state courts might be hostile to federal claims raised in complaints, but are much less likely to be hostile to federal defenses. *See* G. Merle Bergmann, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17, 30–31, 37–38 (1947). Even if that is accurate, the fact remains that the well-pleaded complaint rule is a prophylactic *rule* that does not decide on a case-by-case basis whether in fact a state court will be hostile to a federal claim.

Court has not allowed declaratory judgment actions to vitiate the rule.[128] To be sure, the Court uses policy-based arguments to reach its conclusions, but the conclusions it reaches are bright-line rules: the well-pleaded complaint rule as applied in declaratory judgment actions does not operate on a case-by-case basis, but is absolute.[129]

Substantiality of the federal claim. A second fundamental aspect of statutory "arising under" jurisdiction is whether the federal claim that is raised is insubstantial.[130] If it is, then jurisdiction is lacking; if not, then there is jurisdiction.[131]

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128. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671–72 (1950) ("The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified."); *see also* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 18–19 (1983) (extending the holding of *Skelly Oil* to actions brought under state declaratory judgment laws in order to avoid rendering the federal Act "a dead letter"). Professor John Oakley suggests that the holding in *Franchise Tax Board* "is perhaps no more than a rule of abstention." John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 76 TEX. L. REV. 1829, 1836 (1998). To the extent it is, the holding is still a rule, albeit a rule of mandatory abstention that does not lie at the jurisdictional boundary.

129. While many commentators praise the well-pleaded complaint rule, *see, e.g.*, Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1783 (1998), there are those who criticize the well-pleaded complaint rule as too restrictive, *see, e.g.*, Cohen, *supra* note 20, at 894 (though recognizing some advantages of the rule, arguing that, "[l]ike any rule of thumb . . . it operates blindly to preclude original federal jurisdiction in cases where, as a matter of sound policy, the parties ought to be permitted to choose a federal forum"). Most of them, however, simply want the existing rule replaced by another rule (albeit a broader one). For example, many commentators endorse the idea of "federal defense removal"—that is, the removal to federal court by a defendant who raises a federally based defense to a state law claim. *See, e.g.*, YACKLE, *supra* note 47, at 117 (proposing statutory implementation of federal defense removal); AM. LAW INST., *supra* note 105, at 188–94 (to similar effect); *cf.* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 719 (1986) (identifying as historical error the Court's decision not to allow federal defense removal, but not suggesting that the Court now reverse course). A few commentators would go further: they suggest jurisdiction be allowed on the *potential* for a federal issue. *See, e.g.*, Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 315 (1988) ("[A] defendant should be able to remove a case to federal court by alleging that the outcome of the case likely will turn on a federal issue."); Doernberg, *supra* note 20, at 658 ("[P]laintiffs ought to be permitted to anticipate federal defenses and to base jurisdiction upon them. Plaintiffs should also be permitted to anticipate defenses that may call for federal replies . . . ."). These tests seem more standard-like. *But see id.* (suggesting that expansion of federal jurisdiction would be cabined, perhaps in rule-like fashion, by the notion that "[a] defendant . . . should be permitted to renounce the use of the defense alleged to present the federal question," at which point "[t]he federal action could then be dismissed, to be recommenced in the state court, where the defendant should be estopped from raising the federal defense").

130. *See generally* Hagans v. Lavine, 415 U.S. 528, 536–37 (1974).

131. *See id.*

Thus phrased dichotomously, the substantiality requirement sounds in the language of a rule. The phrasing masks, however, the important question of how clear it is to distinguish a substantial federal claim from an insubstantial one. The fuzzier the line between substantial and insubstantial claims and the more balancing of interests required to tell them apart, the more the substantiality requirement begins to resemble a standard.

Ultimately, it seems that the definition of "substantial" is clear enough (even if fuzzy at the margins) to situate the requirement as closer to a rule than to a standard. A claim does not arise under federal law only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy."[132] The test for substantiality "is a rigorous one and if there is any foundation of plausibility to the claim, federal jurisdiction exists."[133] The phrasing sounds quite rule-like; there is no suggestion of considering facts on a case-by-case basis or of balancing policies.

The most standard-like aspect of the substantiality requirement is the requirement that a court "must dismiss for lack of jurisdiction if the claim is clearly foreclosed by prior decisions of the Supreme Court."[134] The controlling nature of precedent turns on the application of stare decisis, a doctrine that generally comports itself more as a standard than as a rule.[135]

Centrality of the federal issue. A third hurdle to federal question jurisdiction is the requirement that a federal issue be central to the litigated claim. Justice Holmes suggested nearly a hundred years ago that the court determine this question according to the sovereign that gives rise to the claim: "A suit arises under the law that creates the cause of action."[136] Holmes's formulation is clearly a rule: federal causes of action beget suits "arising under" federal law, while state causes of action do not.[137] Justice Holmes's statement is not,

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132. Oneida Indian Nation of N.Y. State v. Oneida Cnty., 414 U.S. 661, 666 (1974).

133. WRIGHT ET AL., *supra* note 10, § 3564 (footnote omitted).

134. *Id.* (footnote omitted).

135. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996) ("[W]e have always treated *stare decisis* as a 'principal of policy,' Helvering v. Hallock, 309 U.S. 106, 119 (1940), and not as an 'inexorable command,' Payne v. Tennessee, 501 U.S. 808, 828 (1991).").

136. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).

137. *See* Freer, *supra* note 20, at 321 ("The Holmes test asks the same sort of question [as the well-pleaded complaint rule]: did federal law create the claim being asserted?"); *cf.* Woolhandler & Collins, *supra* note 20, at 2188 (distinguishing the current rule-based understanding of Justice Holmes's approach from what Justice Holmes intended and arguing that Justice Holmes himself may have preferred a more complicated test for federal jurisdiction

however, the law. Indeed, as compared to actual case law, it is both overinclusive and underinclusive: almost since the inception of the general federal question statute in 1875, the Court has held that a federal claim grounded upon a federal statute need not beget federal subject matter jurisdiction.[138] With much more frequency,[139] the Court has recognized federal question jurisdiction over a case even though the underlying cause of action sounds in state law.[140]

Not only is there variation from Holmes's rule-like formulation, but the language that the Court has used to describe when a case in fact falls within federal question jurisdiction is quite standard-like. In the 1936 case of *Gully v. First National Bank in Meridian*, Justice Cardozo wrote for the Court that, in determining whether there is federal question jurisdiction, "[w]hat is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations."[141] Nearly fifty years later, the Court in *Franchise Tax Board v. Construction Laborers Vacation Trust* quoted this language[142] and added its gloss that the Court should interpret the extent of federal question jurisdiction "with an eye to practicality and necessity."[143] Even in its 1986 decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*—a case that on its face seemed to relegate to oblivion the notion that federal courts will ever welcome state causes of action—the Court nonetheless went to great pains to confirm the standard-like nature of the centrality requirement.[144] Though the Court rejected federal question jurisdiction in the case, the Court noted that, "[f]ar from creating some kind of automatic test, *Franchise Tax Board* . . . candidly recognized the need for careful

than "the easily applied rule it is thought to embody"). *But see* Field, *supra* note 19, at 687–88 ("[E]ven [Justice Holmes's] rule provides little certainty because of the great flexibility that exists in determining whether a federal cause of action exists."); *id.* at 690–91 (explicating the point).

138. *See* Shoshone Mining Co. v. Rutter, 177 U.S. 505, 506, 508 (1900) (holding no federal jurisdiction since the outcome was governed by a federal statute that mandated a decision in accordance with "local customs or rules of miners in the several mining districts" to the extent that those customs and rules were not inconsistent with federal law).

139. *See* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9 (1983) ("[I]t is well settled that Justice Holmes's test is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction.").

140. *See, e.g.*, Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 201 (1921) (upholding "arising under" jurisdiction when a bank holder invoked a state law to challenge a bank's investment in bonds that were issued in accordance with an allegedly unconstitutional law).

141. 299 U.S. 109, 117 (1936).

142. 463 U.S. 1, 20 (1983) (quoting *Gully*, 299 U.S. at 117).

143. *See id.*

144. 478 U.S. 804, 814 (1986).

judgments about the exercise of federal judicial power in an area of uncertain jurisdiction."[145] Further, in a footnote, the Court cited academic works—including Professor Shapiro's work on "Jurisdiction and Discretion"—for the proposition that the Court's § 1331 decisions "can best be understood as an evaluation of the *nature* of the federal interest at stake."[146] The Court proceeded to explain that the different conclusions it had reached about the scope of federal question jurisdiction "can be seen as manifestations of the differences in the nature of the federal issues at stake."[147] And the dissent, authored by Justice Brennan on behalf of three other Justices, also noted that "[t]he continuing vitality of [a case establishing the standard-like analysis] is beyond challenge."[148]

The Court's latest exposition of the centrality requirement, in *Grable*,[149] confirms—indeed, it may even elevate—the requirement's standard-like nature. Emphasizing the standard-like nature of the inquiry, the Court explained that there is no

> "single, precise, all-embracing" test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties. . . . Instead, the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.[150]

Whether a product of consistent jurisprudence or evolution over time,[151] the centrality test for federal question jurisdiction is

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145. *Id.*

146. *Id.* at 814 n.12.

147. *Id.*

148. *Id.* at 820 (Brennan, J., dissenting).

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

150. *Id.* at 314 (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 821 (1988) (Stevens, J., concurring)).

151. One can debate to what degree each case in the *Smith* line contributes to the standard-like nature of the jurisdictional boundary. Justice Thomas concurred in *Grable* because the Court's opinion "faithfully applie[d] our precedents interpreting 28 U.S.C. § 1331." 545 U.S. at 320 (Thomas, J., concurring) (citing, as examples of that precedent, *Smith* and *Merrell Dow*). According to Justice Thomas, *Smith* itself injected standard-like destabilization into the contours of federal question jurisdiction. *See id.* at 321. Indeed, by 1957, Justice Frankfurter already saw the presence of a federal issue in a state law action as a "litigation-provoking problem." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting). On the other hand, one can see *Smith* to allow for federal jurisdiction only when a federal issue is truly determinative of the litigation and thus lies at the true heart of the litigation. While not a precise rule, one might think that this test does not vest much discretion in the lower courts and might be applied with some predictability. *Cf.* AM. LAW INST., *supra* note 105, at 179 ("The existing doctrines as to when a case raises a federal question are neither analytical nor entirely logical, but a considerable body of case law has been built up on this subject that is reasonably well understood by courts and litigants and that works well in practice."). In contrast, the later cases—especially *Merrell Dow* and *Grable*—can be seen to reshape the jurisdictional boundary

substantially standard-like. As Professor John Oakley explains, when it comes to state law cases that arise under federal law by virtue of an incorporated federal issue, "The Supreme Court has been more successful in defending the existence of this category than in defining its scope."[152]

2. Revising the Jurisdiction

Current law thus understands the centrality test and at least part of the substantiality test to be standard-like. It would be desirable to migrate these standards away from the jurisdictional boundary to discretionary abstentions, leaving a reconstructed rule-based boundary. This would reshape federal question jurisdiction as follows, with respect to centrality and substantiality (with the well-pleaded complaint rule remaining in place).

The rule that governs the boundary for centrality should sweep within federal jurisdiction all cases that *could* have come within federal jurisdiction under the standard. This means replacing the current standard-like test for centrality with a rule that recognizes federal jurisdiction in any case where a claim included or implicated a federal issue, *regardless of whether that issue was central to the claim being advanced*. Thus, there would be federal jurisdiction to hear a

much more into a standard. *See* Sherry, *supra* note 17, at 115 ("[*Grable*'s] revisionist history not only expands federal jurisdiction in ways not contemplated by *Merrell Dow*, but also . . . fails to guide lower courts as to the contours of this unpredictable expansion."); *cf.* WRIGHT ET AL., *supra* note 10, § 3562 ("*Grable* brings considerable clarity to what had been quite muddled. . . . [A] hard-and-fast rule is supplanted by a sensitive standard."). These cases introduce a multifactor balancing test, including amorphous factors such as congressional intent regarding the division of labor between the state and federal courts. Thus, a leading treatise opines that, "[w]hile these decisions were by no means fully internally consistent, it was not until the *Merrell Dow* decision in 1986 that the Court's doctrine degenerated into a significant state of uncertainty." 15 MARTIN H. REDISH ET AL., MOORE'S FEDERAL PRACTICE § 103.31[2] (3d ed. 2011) (footnote omitted). It also describes *Grable*'s test as an "interest-balancing approach" that "is difficult to apply in specific cases, raising the danger of unpredictability and wasted judicial resources in resolving individual cases." *Id.* § 103.31[4][e]. *See also* Hoffman, *supra* note 111, at 298–301 (noting that *Grable* moves beyond *Smith* by introducing two prongs that can be expected to pull in different directions); McFarland, *supra* note 18, at 33–41 (describing how *Grable* has moved further away from a rule and thus contributed to lower court confusion); Preis, *supra* note 18, at 158–66 (presenting empirical evidence of confounding effects of *Grable* on lower courts); Ryan, *supra* note 18, at 677–80 (same); Sherry, *supra* note 17, at 140 ("The *Grable* test for embedded federal questions is a quintessential open-ended 'consider everything' standard offering neither guidance nor constraints.").

152. Oakley, *supra* note 128, at 1839; *cf.* Ryan, *supra* note 18, at 670–71 (noting that, despite predictions by some that the standard would over time evolve toward a rule, it has not; "[e]ighty-five years of assurances is enough; we should learn our lesson").

case even where the federal issue merely lurks in the background.[153] Noncentral federal claims would fall within federal jurisdiction; however, a form of centrality would survive as an abstention: the federal courts would enjoy discretion to decline to hear cases where the federal claims are not central. On this basis, one would presume that the federal courts would still hear cases like *Grable*[154] but not those like *Shoshone Mining Co. v. Rutter,*[155] albeit not on jurisdictional grounds.

As a result of this shift, the boundary for centrality would not only become rule-based, but it would also move closer to (if not become coextensive with, at least on this dimension) the constitutional limit of federal question jurisdiction. However, in tandem with this expansion and sharpening of the statutory jurisdictional limit, federal district courts would acquire discretion *not to exercise* jurisdiction. The standard for abstention would inherit the factors courts now consider in deciding whether a federal question is central under the *Smith-Grable* line. Indeed, there is precedent, under the old 1875 jurisdictional statute, for Congress to establish such a structure.[156]

The "substantiality" test is also somewhat standard-like,[157] especially with respect to whether existing precedent renders what

153. In this sense, though both are rule-like, the federal jurisdictional boundary would be broader than the Holmes test would advocate.

154. 545 U.S. 308.

155. 177 U.S. 505, 508 (1900) (finding no federal jurisdiction since outcome was governed by federal statute that mandated decision in accordance with "local customs or rules of miners in the several mining districts" to the extent that those customs and rules were not inconsistent with federal law).

156. *See* Judiciary Act of 1875, ch. 137, § 5, 18 Stat. 470, 472 (1875) (codified as amended at 28 U.S.C. §1331 (2006)). Professors James Chadbourn and A. Leo Levin argue that the Supreme Court erroneously viewed substantiality as a jurisdictional requirement for federal question jurisdiction under the 1875 Act; instead, they argue, cases with an insubstantial federal question should have been ruled subject to federal court jurisdiction but dismissed. *See* James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 649–65 (1942); *see also* Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399, 1433–38 (1983) (arguing that the Supreme Court's finding of a substantiality requirement is rooted in the 1875 Act and not in the Constitution). *But see* Ray Forrester, *Federal Question Jurisdiction and Section 5*, 18 TUL. L. REV. 263, 276–80 (1943) (arguing that section 5 was intended simply to codify the courts' obligation to confirm the existence of subject matter jurisdiction and to act appropriately where it is found lacking). Professor Edward Hartnett has argued that § 1441(c) in fact affords discretion to district courts to remand individual claims from removed cases. Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099, 1181 (1995).

157. *See supra* text accompanying notes 132–35.

theretofore had been a substantial question of law insubstantial.[158] A similar migration should be effected with respect to this standard. Afterward, federal courts would have jurisdiction to hear claims that controlling precedent rendered utterly meritless, but could still abstain from doing so.[159]

3. Evaluation

The migrations of centrality and substantiality to abstention would offer several benefits and impose few costs. First, these migrations would free courts, and litigants, from costly and complicated inquiries into whether jurisdictional boundaries are met. Federal district courts could apply jurisdictional boundary rules with greater ease. Although higher courts will still apply de novo review to decisions regarding the presence or absence of federal jurisdiction, those decisions would be much clearer. Perhaps as a consequence, appeals would become less frequent.

Second, the fact that centrality and substantiality would no longer be part of the jurisdictional boundary but instead arise only as factors for abstention will mean that a litigant may waive these issues if not raised in a timely manner. This should greatly reduce the prospect of the issues arising at a later stage and threatening to render moot considerable proceedings.

Third, appellate courts would no longer review district courts' substantiality and centrality determinations de novo,[160] but rather

158. *See supra* text accompanying notes 134–35.

159. *See* Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 817 (1986) ("We do not believe the question whether a particular claim arises under federal law depends on the novelty of the federal issue.").

160. There is one category of cases where district court jurisdictional decisions are not reviewed de novo on appeal; indeed, there is no appeal: in a case removed to federal court, the current interpretation of the relevant statutes precludes appellate review altogether of a remand order based upon lack of subject matter jurisdiction. *See* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 345–46 (1976) ("[O]nly remand orders issued under § 1477(c) and invoking the grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under § 1447(d)."). *But see* Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 129 S. Ct. 1862, 1866 n.* (2009) (indicating perhaps some willingness to reexamine *Thermtron*). Migrating the standard to abstention would presumably make remand orders based upon such discretionary abstention reviewable by the courts of appeals. *See Carlsbad*, 129 S. Ct. at 1867 (holding that discretionary remands under § 1367(c) are not jurisdictional and, accordingly, are reviewable under the *Thermtron* rule). To this extent, the migration might actually *increase* the federal appellate courts' dockets.

under an abuse of discretion standard.[161] This should relieve appellate courts of the costly enterprise of having to decide whether those rulings were definitively "right" or "wrong" and from having to develop a coherent jurisprudence with respect to a standard. That, in turn, would discourage litigants from appealing such rulings, which would decrease the judicial and private resources devoted to litigating jurisdictional matters.[162] One might argue that the Supreme Court might fail to provide adequate guidance to the lower federal courts with respect to application of the discretionary standard. However, erroneous applications of standards—whether they lie along jurisdictional boundaries or otherwise—generally fail to earn spots on the Court's docket.[163] Moreover, the Court's guidance in the area has been quite murky,[164] even though to date standards have in fact been located on the presumably more important jurisdictional boundary. Thus, the shift in the scrutiny to which appellate courts will subject trial courts' rulings should not practically leave the district courts with substantially less guidance than they have today.

Fourth, the migrations should leave intact the power of the federal courts to determine what cases a federal forum will hear. The incorporation of centrality and substantiality into abstention should vindicate whatever the justification is for empowering federal district courts at the expense of state courts—whether it be a belief that federal judges are at some level more competent or reliable than their state court counterparts, a belief that federal district judges will more likely take federal legal issues seriously, a belief in the increased

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161. *E.g.*, Gibson v. Berryhill, 411 U.S. 564, 580 (1973) (stating that district court decisions on discretionary abstention are reviewed for abuse of discretion). *But see infra* notes 169–70 and accompanying text.

162. Judge Posner expresses skepticism that empowering district courts with discretion to abstain from jurisdiction would bolster prospects for implementing federal defense removal. He explains that "it would not be a complete solution to the problem of the frivolous federal defense to allow removal on the basis of a federal question first raised by way of defense but give to the district court discretion to remand the case back to the state court," since "the defendant may be delighted," in light of the costs and delays, "to see the plaintiff's case thrown out of federal court when the court discovers that the federal defense is frivolous." POSNER, *supra* note 106, at 302–03. He contrasts such an outcome with the outcome, under existing law, where a plaintiff who "gets thrown out of federal court because his claim is frivolous" has wasted his own time and money. *Id.* However, even if Judge Posner is correct that relying on discretion is not enough to render federal defense removal jurisdiction viable, that is not inconsistent with my argument in favor of migration, which would say only that, to the extent one wanted to implement federal defense removal jurisdiction, it is better to do so by empowering district courts with discretion to decline jurisdiction than by requiring them to determine as a matter of law whether a defense meets the requirement for "arising under" federal law under the existing test.

163. *See supra* notes 47–49 and accompanying text.

164. *See supra* notes 151–52 and accompanying text.

desirability of uniformity with respect to more substantial questions of federal law, a belief in the importance of federal court norm declaration in federal question cases, a belief in the value of the quality and uniformity of federal court procedures, or a belief otherwise.

Migrating substantiality and centrality from the jurisdictional boundary should have little effect on friction between federal and state courts.[165] There conceivably might be more "cherry-picking" of cases by federal courts—or at least such a perception might arise among state court judges.[166] At the same time, one could argue that the increased transparency in the selection of cases for hearing in federal court—a federal court would in effect clearly announce that it would exercise jurisdiction because the important federal issues in the case warrant a federal forum—might actually improve federal-state relations. In the end, even if there is a cost here, the benefits would seem to outweigh it.

The migration of standards to abstention would provide an added bonus in the context of federal question jurisdiction: the rectification of an existing jurisdictional asymmetry. Under current law, *Pullman* abstention empowers (but does not require) courts to decline to hear cases that raise important, pressing, complicated, and novel federal constitutional issues where resolution of a state law issue by the state courts might obviate the need to confront the constitutional issue. Along somewhat parallel lines, federal question jurisdiction rejects cases sounding in state law that incorporate federal questions that are not central to resolution of the cases. This parallel is reflected in the mirror-imaged shading at the top and bottom of Figure 3. Yet the parallel is not complete in an important way: *Pullman* abstention does not speak to the courts' jurisdictional power, but only to their ability to abstain from exercising existing power. In contrast, the "centrality" question is very much a part (under current law) of the courts' power. The migration of substantiality to abstention makes the symmetry complete: federal courts might abstain where the federal question is either so unimportant as not to warrant federal court resolution *or* so unimportant as to make one prefer that the federal courts be able to defer resolution of the issue for another day.

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165. *See supra* text accompanying note 95.

166. *Cf.* Meltzer, *supra* note 30, at 1915–24 (discussing how reliance on discretion may tend to undermine federal courts' legitimacy).

In the end, then, it seems that having a rule-based jurisdictional boundary with discretion to abstain from jurisdiction—as depicted in Figure 4—is normatively preferable to retaining standards along jurisdictional boundaries—as depicted in Figure 1B. But one might question whether the apparent similarity in case allocation between Figures 1B and 4 is misleading. Perhaps, in actuality, after the migration, the federal court will in fact hear a different set of cases than it currently hears. As an initial matter, it is not clear why this should be the case; after all, the standard for discretion should ideally be the same as the standard that used to inhabit the jurisdictional boundary. At the very least, then, any distinction between the two settings—and therefore between the cases that are heard in federal court—should not be completely, and randomly, different.

Still, perhaps district courts will be disinclined to exercise their discretion to abstain. One might be concerned about overly disempowering the state courts or about opening the floodgates of federal court litigation. The argument that there are simply too many federal question cases for the federal courts to handle[167] is somewhat responsive to this point. The point presumably also might be addressed by appellate court decisions admonishing the district courts to feel free to exercise discretion.[168] Also, appellate courts might bifurcate review of district court abstention decisions as they do in the context of some other abstentions[169]: review of the legal antecedent for the exercise of abstention—for example, the presence of an insubstantial federal question—would be reviewed de novo, while the decision to abstain would be reviewed solely for abuse of discretion.[170] Next, to the extent that one was concerned that parties might fail to ask courts to abstain (and thus waive the argument), one could (i) allow courts to consider abstention sua sponte[171] and (ii) allow a

167. *See supra* note 112 and accompanying text.

168. The Court has issued such admonitions with respect to lower courts' use of certification. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 77–80 (1997); Bellotti v. Baird, 428 U.S. 132, 150–51 (1976).

169. *See, e.g.*, Chez Sez III Corp. v. Twp. of Union, 945 F.2d 628, 631 (3d Cir. 1991) (describing how an appellate court reviews de novo a district court's legal determination that *Pullman* abstention might be appropriate and then reviews the district court's decision whether to abstain for abuse of discretion).

170. Note that the use of this option would result in the loss of some of the benefit of reduced appellate court time and resources devoted to jurisdictional issues. *See supra* text accompanying notes 160–62.

171. *Cf.* Nash, *supra* note 71, at 1692 (arguing that federal courts may invoke certification sua sponte).

litigant to raise arguments in favor of abstention after the time a case is filed in or removed to federal court.[172]

Some might argue that the opposite result might inhere, with too few cases remaining in federal court. Once again, if that problem were indeed to arise, it could at least be constrained by allowing appellate court de novo review of the legal prerequisites for abstention.

B. Federal Admiralty Jurisdiction

1. The Boundary as Currently Defined

Section 1333 of title 28 provides the federal district court with exclusive jurisdiction over admiralty matters.[173] For many years, the Supreme Court understood admiralty jurisdiction to turn on the locality of the wrong: wrongs fell within the admiralty jurisdiction only if they occurred on navigable waters.[174] The so-called "locality" test was a clear rule demarcating the outer limits of federal admiralty jurisdiction.[175]

In 1948, Congress enacted the Extension of Admiralty Jurisdiction Act,[176] which extends admiralty jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."[177] The addition of this provision engrafted a second test—also substantially a rule—onto the existing locality test. The added jurisdiction rendered the admiralty jurisdictional boundary, if anything, even more rule-like: "The purpose of [this extension] was to end concern over the sometimes confusing line

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172. *Cf.* Judiciary Act of 1875, ch. 137, § 5, 18 Stat. 470, 472 (1875) (allowing litigants to seek dismissal or remand "at any time after such suit has been brought or removed"). The longer the period during which litigants are permitted to ask the court to abstain, however, the less the efficiency benefits gained by migrating the standard to the abstention phase.

173. 28 U.S.C. § 1333 (2006).

174. *See, e.g.*, The Plymouth, 70 U.S. 20, 34–35 (1866) (stating that the true meaning of the locality rule is "that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction").

175. *See* Robertson & Sturley, *supra* note 18, at 210–12 (discussing the quick and easy application of the locality rule in maritime law before *Executive Jet*). *But see* Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 259–60 (1972) (identifying judicial exceptions to the rule created "in the interests of justice").

176. Extension of Admiralty Jurisdiction Act, ch. 526, 62 Stat. 496 (1948) (codified as amended at 46 U.S.C. § 30101 (2006)).

177. 46 U.S.C. § 30101.

between land and water, by investing admiralty with jurisdiction over 'all cases' where the injury was caused by a ship or other vessel on navigable water, even if such injury occurred on land."[178]

The rule-like nature of the boundary began to erode with the Court's 1972 unanimous decision in *Executive Jet Aviation, Inc. v. City of Cleveland*.[179] There, the Court confronted the question of whether § 1333 admiralty jurisdiction[180] applied to a case arising out of an airplane crash into Lake Erie. Although the locality test would have allowed for jurisdiction, the Court concluded that admiralty jurisdiction did not apply, allowing admiralty jurisdiction only where "the wrong bear[s] a significant relationship to traditional maritime activity."[181]

The "maritime connection" test draws standard-like components into the admiralty jurisdictional boundary: the determination of what constitutes a "substantial relationship" and what constitutes "traditional maritime activity" is not (as we shall see) readily definable. Still, had the Court confined the holding of *Executive Jet* to cases involving airplane accidents, the scope of the standard's influence on the jurisdictional border would have been quite confined. However, the Court opted not to limit the scope of *Executive Jet*. In *Foremost Insurance Co. v. Richardson*, though they splintered on the outcome,[182] both the five-Justice majority and the four-Justice dissent agreed that the case must satisfy *Executive Jet*'s maritime connection test (along with the locality test) for jurisdiction to be proper.[183]

The standard-like nature of the maritime connection test became apparent in *Sisson v. Ruby*.[184] There, the Court confronted the difficult tasks that the maritime connection test calls for, both in defining the relevant activity and in determining whether that activity bears a "substantial relationship to a traditional maritime

178. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 532 (1995).

179. 409 U.S. at 262.

180. In *Executive Jet* and the other cases discussed in the text, the Court considered the proper test for jurisdiction under § 1333 and did not expressly decide whether the Extension of Admiralty Jurisdiction Act ("EAJA") would provide jurisdiction. *See Jerome B. Grubart*, 513 U.S. at 543 n.5. For an argument that jurisdiction in these cases could and should have been determined under the EAJA and more generally that reliance on the EAJA would obviate the need to expand § 1333 jurisdiction, see Robertson & Sturley, *supra* note 18, at 237–43.

181. 409 U.S. at 268.

182. 457 U.S. 668, 674–75 (1982); *id.* at 679–80 (Powell, J., dissenting).

183. *See* Sisson v. Ruby, 497 U.S. 358, 364 n.2 (1990) (noting the unanimity of the Court in *Foremost* on this point).

184. *See id.* at 363–64 (applying the *Foremost* test to a fire on a vessel docked at a marina).

activity." First, the Court considered how generally to frame the "activity" at issue (in order then to determine whether that activity bore a substantial relationship to traditional maritime activity).[185] The Court's elucidation lacks the clear-cut language that one would expect of a rule: "Our cases have made clear that the relevant 'activity' is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose."[186]

The Court's treatment of the test's second question—whether the activity in question bore a substantial relationship to a traditional maritime activity—is also quite standard-like.[187] For example, the Court rejected the clarifying and rule-like notion that, "at least in the context of noncommercial activity, only navigation can be characterized as substantially related to traditional maritime activity."[188]

Concurring, Justice Scalia, joined by Justice White, assailed the majority for converting what had been a clear jurisdictional boundary into "the sort of vague boundary that is to be avoided in the area of subject matter jurisdiction wherever possible."[189]

The Court adhered to the maritime connection test, and also further revealed the standard-like nature of that inquiry, in its most recent case on admiralty jurisdiction, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co*.[190] The Court explained that the first part of the maritime connection test—which it described as "whether the incident was of a sort with the potential to disrupt maritime commerce"[191]—requires "a description of the incident at an intermediate level of possible generality."[192]

With respect to the second part of the maritime connection inquiry, the Court explained that a court should "ask whether a tortfeasor's activity, commercial or noncommercial, on navigable

185. *Id.* at 364–65.

186. *Id.* at 364.

187. Also indicative of the standard-like nature of the inquiry is the Court's own observation that, in the relatively few years between *Executive Jet* and *Sisson*, the federal courts of appeals had adopted widely varied tests. *See id.* at 365 n.4 (discussing the various circuit approaches and how they had evolved since *Executive Jet* and *Foremost*).

188. *Id.* at 366.

189. *Id.* at 375 (Scalia, J., concurring).

190. 513 U.S. 527, 534–38 (1995). In contrast, the Court's treatment of the locality test emphasizes the rule-like nature of that inquiry. *See id.* at 534 ("The location test is, of course, readily satisfied."); *id.* at 535–38 (rejecting arguments that would have complicated, and rendered less rule-like, the locality test).

191. *Id.* at 538.

192. *Id.*

waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand."[193] The Court explained that it would not be appropriate under the maritime connection inquiry to describe a tortfeasor's activity at a "high level of generality"—which would have allowed the Court to apply the test in a more rule-like fashion—since "to suggest that such hypergeneralization ought to be the rule would convert *Sisson* into a vehicle for eliminating admiralty jurisdiction."[194] In so ruling, the Court acknowledged that "there is inevitably some play in the joints in selecting the right level of generality."[195]

A dissent by Justice Thomas, joined by Justice Scalia, exposes and assails the characterization of incident and activity called for by the maritime connection test as standard-like.[196] More generally, like Justice Scalia's concurrence in *Sisson*, the dissent laments the absence of a clear rule along admiralty jurisdiction's boundary.[197]

2. Revising the Jurisdiction

The migration of the existing standards along the maritime jurisdictional boundary would restore what was the traditional bright-line rule for jurisdiction: a wrong should fall within § 1333's reach if it occurs on navigable waters. Thus, statutory admiralty jurisdiction would extend to all cases meeting the locality test, that is, to all cases where the alleged wrongs occurred on navigable waters.[198] To the extent that it is thought a worthy ground for federal courts to decline to exercise jurisdiction, the maritime connection test—along with all its subparts—could be retained as grounds for discretionary abstention. Thus, the Court could concomitantly give the district courts discretion to abstain to exercise jurisdiction in accordance with

193. *Id.* at 539–40.

194. *Id.* at 542.

195. *Id.*

196. *See id.* at 553–54 (Thomas, J., dissenting) ("[T]he 'play in the joints' and 'imprecision' that the Court finds 'inevitable' easily could be avoided by returning to the test that prevailed before *Foremost*.").

197. *See id.* at 549 (noting that the "clear, bright-line rule, which the Court applied until recently, ensures that judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction"); *id.* at 555 ("This Court pursues clarity and efficiency in other areas of federal subject-matter jurisdiction, and it should demand no less in admiralty and maritime law.").

198. *See supra* text accompanying note 174.

the factors identified in *Executive Jet*, *Foremost*, *Sisson*, and *Grubart*.[199]

3. Evaluation

One would presume that the clearer cases would come out the same way under this revised admiralty jurisdiction as they would under the current admiralty jurisdictional structure. Thus, for example, federal courts would likely decline—and justifiably so—jurisdiction over tort actions arising out of the crash of an airplane into navigable waters, as in *Executive Jet*. At the same time, it is conceivable that the exercise of federal jurisdiction in cases with facts that raised clearer, yet not definitive, maritime connections might become less predictable. Indeed, different district courts faced with similar facts might exercise their discretion differently. But that is the nature of the power of discretionary abstention. In the end, any costs resulting from differential treatment should be more than offset by the savings in resources created by reducing the incentive to litigate over such issues and by the benefits of ensconcing a clear legal rule along the actual jurisdictional boundary.

CONCLUSION

This Article has considered the roles of rules and standards as parts of the calculus of determining when federal courts have or lack subject matter jurisdiction. It has shown, as a normative matter, that rules are preferable to standards along the boundary of federal court jurisdiction. Rule-based boundaries offer numerous efficiency benefits. Moreover, whatever benefits standards offer may be harvested as well if the standards are located in discretionary abstention. Indeed, the Article demonstrates how existing standard-like tests located on the boundary can be migrated to discretionary abstentions.

It is important to recognize the limits of the Article's arguments. A major reason that a rule-based boundary for federal court jurisdiction works well is the reliable availability of another

199. *See supra* text accompanying notes 179–95. I do not argue that the existing statutes are properly interpreted as described in the text. Thus, Justice Marshall's retort to Justice Scalia's *Sisson* concurrence—that "the demand for tidy rules can go too far, and when that demand entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction, it *has* gone too far," 497 U.S. 358, 364 n.2 (1990)—may be correct as a matter of statutory interpretation. My only point is that one can have a rule and have abstention tend to the notion that cases come to federal court only as consistent with the purposes of the relevant jurisdiction.

forum—state court—where procedures will almost always be adequate and the substantive law applied will be largely identical. It is thus not surprising that the highly discretionary doctrine of "forum non conveniens" (albeit a doctrine of abstention) operates where a domestic court is presented with a case where there might not be another forum available—or where, even though another forum is technically available, the case would not be handled fairly there.[200] Along similar lines, more standard-based choice-of-law tests make outcomes rest more upon the court system where litigation occurs. That, in turn, makes jurisdictional questions that may render particular courts available (or not) critical to parties.[201] In contrast, in the context of the U.S. federal system, choice-of-law doctrines make the substantive law essentially the same in either state or federal court.[202] To the extent that in the marginal case the choice between state and federal court may matter,[203] empowering the federal court with discretion to abstain should address the matter adequately.

200. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254–55 (1981).

201. *Cf.* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1151 (2000) (arguing in favor of more rule-based choice-of-law approaches).

202. *See supra* note 118.

203. *See supra* note 118.