

# AN INCOMPLETE DISCUSSION OF “ARISING UNDER” JURISDICTION

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## INTRODUCTION

Dan Meltzer’s “luminous scholarship,” to quote from the dedication to the recently published seventh edition of the Hart and Wechsler book on the federal judicial system, has “enriched our field.”<sup>1</sup> And so I am privileged to participate in this symposium honoring that work, which covers almost four decades and which ended much too soon.

Dan’s goal in his scholarship was not to deconstruct but to elevate. Doctrine and function, as he saw them, were not mutually exclusive or completely independent concepts. Each had an important role: the former to provide legitimacy, coherence, stability, and predictability in the law; the latter to ensure that the law serves the practical needs of a complex and powerful federal judicial system. But neither should be considered apart from the other. A major aim of his scholarship, then, was to bring those two concepts into closer alignment.

There are many illustrations. Perhaps my favorite is an article he coauthored with his friend and colleague, Richard Fallon, that focused on the availability of remedies for constitutional violations.<sup>2</sup> In that classic article, the effort to bring doctrine and function into closer alignment is beautifully captured in the following passage:

Within our constitutional tradition . . . the *Marbury* dictum [that there must be a remedy for every right] reflects just one of two principles supporting

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\* William Nelson Cromwell Professor of Law, Emeritus, Harvard Law School. My thanks to Richard Fallon and John Manning for their very helpful suggestions and for their invaluable friendship and support.

1 RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, at iii (7th ed. 2015) [hereinafter HART & WECHSLER VII]. Richard Fallon, John Manning, and I wrote the dedication. Dan, whose work on the edition had been completed, died in May 2015, two months before the book’s publication.

2 Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

remedies for constitutional violations. Another principle, whose focus is more structural, demands a system of constitutional remedies adequate to keep government generally within the bounds of law. Both principles sometimes permit accommodation of competing interests, but in different ways. The *Marbury* principle that calls for individually effective remediation can sometimes be outweighed; the principle requiring an overall system of remedies that is effective in maintaining a regime of lawful government is more unyielding in its own terms, but can tolerate the denial of particular remedies, and sometimes of individual redress.<sup>3</sup>

My purpose in this brief Essay is to expand on this theme as it played out in Dan's role as collaborator, friendly critic, and keen analyst, and to do so by exploring a problem that in some ways lies at the heart of our elaborate system of judicial federalism, even though (perhaps because it does not arise that often) it has received somewhat less attention than it deserves. That problem addresses the nature of federal judicial authority—and especially the appellate jurisdiction of the Supreme Court—when a federal issue is embedded in, or when its determination may affect the resolution of, a question of state law. The story as told here begins with, and radiates out from, a seventy-year-old decision of the Supreme Court, *Standard Oil Co. of California v. Johnson*.<sup>4</sup> I want to focus on its consideration over the years by Dan and me, and on its effect on our thinking about related issues. This story, I think, tells something not only about the fascination of the field we both enjoyed so much, but also about both the delights of a long collaboration on a respected book and the joys of collegueship and dialogue. While the narrative deals only with what ended up in print, beneath the surface lie many wonderful conversations about this and related problems.

Telling the story requires some background and warrants a concluding effort to bring my own thinking up to date.

## I. THE STORY

Since the *Standard Oil* decision plays a central role, it deserves a summary at the outset.

California law imposed a tax, measured by gallonage sold, on the distribution of motor fuel. The law provided an exemption from tax for “any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government.”<sup>5</sup> *Standard Oil* sold gasoline to U.S. post exchanges in the state, and, after paying the tax, brought a state court action to recover the payment on the grounds that (1) such sales came within the quoted exemption as a matter of state law, and (2) if not, the state law would impose a burden on instrumentalities of the United States in violation of the Federal Constitution.<sup>6</sup> Both contentions were rejected by the

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3 *Id.* at 1778–79.

4 316 U.S. 481 (1942).

5 *Id.* at 482 (quoting California Motor Vehicle Fuel License Tax Act, 1923 Cal. Stat. 571, 574).

6 *Id.*

state courts, and the Supreme Court granted an appeal under the statute then in effect authorizing appeal as of right when the (federal) constitutionality of a state statute was challenged and upheld by the highest court of the state.<sup>7</sup>

In an opinion for a unanimous Court, Justice Black did not reach the second ground on which the challenge was based. In interpreting the state’s law, Justice Black said, the state court “did not rely upon the law of California” but rather “upon its determination concerning the relationship between post exchanges and the Government of the United States,” and that relationship “is controlled by federal law.”<sup>8</sup> The opinion then went on to consider the correctness of this “federal question” on which the state court’s interpretation of state law was said to rest, and concluded that it was incorrect: “[P]ost exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions.”<sup>9</sup>

In his last paragraph, Justice Black wrote that the Court did not need to reach the constitutional issue because it had no way of knowing how the state court would have construed the state statute “if it had decided the issue of legal status of post exchanges in accordance with this opinion.”<sup>10</sup> Accordingly, the judgment was reversed and remanded “for further proceedings not inconsistent with this opinion.”<sup>11</sup> Shepardizing this decision reveals no subsequent judicial proceedings in the litigation.<sup>12</sup>

The Supreme Court’s ruling on the “state law” issue in *Standard Oil* has continued to generate controversy. The decision might be viewed as at odds with the rule of *Murdock v. City of Memphis*<sup>13</sup>—a rule I believe to be one of the two essential pillars of American judicial federalism,<sup>14</sup> and indeed one required by our constitutional structure.<sup>15</sup> Under that rule, the Supreme Court has no authority to review a decision of a state court on a question of

7 See 28 U.S.C. § 344(a) (1940); *Standard Oil*, 316 U.S. at 483. Present law would permit review only on writ of certiorari. See 28 U.S.C. § 1257 (2012).

8 *Standard Oil*, 316 U.S. at 483.

9 *Id.* at 483, 485.

10 *Id.* at 485.

11 *Id.*

12 A Shepardizing search on Lexis Advance of the *Standard Oil* case’s citation, 316 U.S. 481, conducted on March 23, 2016, yielded no subsequent judicial proceedings in the litigation.

13 87 U.S. (20 Wall.) 590 (1875).

14 The other is exemplified by *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), which upheld the authority of the Supreme Court to reverse the judgment of a state court on the basis that it rested on an incorrect decision of a question of federal law. See *id.* at 380–82.

15 Especially since the Court’s decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). For an excellent discussion, see Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 499–506 (1954). I should note, though, that not everyone agrees with me on the constitutional question. See, e.g., 2 WILLIAM WINSLOW CROSSEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 711–817 (1953). The *Murdock* decision itself did not reach the constitutional issue; rather the Court’s decision rested on its interpretation of the governing statutory provision—the 1867 amend-

state law—at least if that decision does not erect an improper barrier to the Court’s consideration of a federal question.<sup>16</sup> Surely, the California Supreme Court’s interpretation of its own law did not stand in the way of U.S. Supreme Court consideration of the petitioner’s constitutional claim; instead, it precipitated that claim. Should it make any difference that in deciding that state law question, the state supreme court chose to invoke federal decisions in helping it to define the terms of the state statute?

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Not surprisingly, the Hart and Wechsler book gave prominence to the *Standard Oil* decision in the 1953 first edition, and continued to do so in four succeeding editions. Although Dan joined the book for preparation of the third edition, he did not acquire custody of the chapter on Supreme Court review of state court decisions (Chapter V) until the fourth, published in 1996. To understand his contribution to the problem posed by *Standard Oil* (and related problems), as well as the relationship between his thoughts on these problems and mine, we need to consider the earlier editions, and two related law review articles that appeared during that time.

In the first edition,<sup>17</sup> the only one coauthored by Hart and Wechsler themselves (and only by them), *Standard Oil* appeared in Chapter V, Section 2 (“The Relation Between State and Federal Law”) as a principal case,<sup>18</sup> followed by a Note of some three and one-half pages entitled “Note on State Incorporation by Reference of Federal Law.”<sup>19</sup> In this Note, the authors<sup>20</sup> referred to or described a number of other cases, asked how they related to each other and to the *Standard Oil* decision, and asked whether the Supreme Court would have jurisdiction to review a state court decision applying the state rules of civil procedure if the state had chosen to conform those rules to the federal rules. They also asked whether there was authority to review a state court decision applying the state’s income tax law if the determination of the tax was keyed to the determination of the taxpayer’s federal income tax, and, finally, they noted a statement by Justice Holmes that the Court had authority to review a state court ruling that “purport[ed] to deal only with local law,” if it had “for its premise or necessary concomitant a cognizable mistake [of federal law].”<sup>21</sup>

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ment, 14 Stat. 385–87 (1867), to § 25 of the Judiciary Act of 1789, 1 Stat. 73, 85 (1789). See *Murdock*, 87 U.S. (20 Wall.) at 614.

16 For in-depth consideration of the adequate and independent state ground doctrine, see HART & WECHSLER VII, *supra* note 1, at 488–546.

17 HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953) [hereinafter HART & WECHSLER I].

18 *Id.* at 435, 447–49.

19 *Id.* at 450–53.

20 Unlike succeeding editions, the authors of this edition did not disclose which of them had primary responsibility for particular chapters.

21 HART & WECHSLER I, *supra* note 17, at 453 (quoting *Schlemmer v. Buffalo, Rochester & Pittsburgh Ry. Co.*, 205 U.S. 1, 11 (1907)).

Two cases of continuing interest that the reader was asked to contrast with each other and with *Standard Oil* were *Minnesota v. National Tea Co.*<sup>22</sup> and *State Tax Commission v. Van Cott.*<sup>23</sup> In *National Tea*, the Court was confronted with a state court decision that had upheld a taxpayer’s challenge to imposition of a state tax. Concluding that there was “considerable uncertainty” as to whether and to what extent the state court had rested its decision on the state or the Federal Constitution, the Court vacated the judgment and remanded for clarification.<sup>24</sup> In *Van Cott*, the state court, in determining that certain wages paid by the federal government were immune from taxation under state law, appeared to rely on a U.S. Supreme Court decision declaring certain wages to be constitutionally immune from state taxation.<sup>25</sup> The Supreme Court granted certiorari, noted that the decision relied on by the state court had just been overruled, and vacated and remanded so that the case could be reconsidered “apart from any question of [Federal] Constitutional immunity.”<sup>26</sup>

Of particular interest here, the authors (perhaps motivated by a desire to leave the task to students) made no effort in this Note to unpack the range of cases they discussed, or to suggest—even through the use of their famous rhetorical questions<sup>27</sup>—a possible synthesis.

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During the twenty-year hiatus between publication of the first and second editions of Hart and Wechsler—towards the end of which the book teetered on the edge of obsolescence—at least one important article addressed the specific problem posed by *Standard Oil* and similar cases: Ronald Greene’s *Hybrid State Law in the Federal Courts.*<sup>28</sup> In this article, Greene focused on the appellate jurisdiction of the Supreme Court in these “hybrid” cases, giving a nod only in the last few pages to what he described as “this nightmarishly confused jurisdictional tangle” that existed in determining the scope of the original jurisdiction of the federal district courts.<sup>29</sup> He approached the appellate jurisdiction problem by breaking it down into three categories. The first, “Accommodation to Federally Imposed Duties,”<sup>30</sup>

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22 309 U.S. 551 (1940).

23 306 U.S. 511 (1939).

24 See *Nat’l Tea*, 309 U.S. at 555. On remand, the state court made explicit its conclusion that the tax violated the state constitution. *Nat’l Tea Co. v. State*, 294 N.W. 230 (Minn. 1940).

25 See *Van Cott v. State Tax Comm’n*, 79 P.2d 6, 14 (Utah 1938).

26 *Van Cott*, 306 U.S. at 515. On remand, the state court adhered to its prior interpretation of state law. *Van Cott v. State Tax Comm’n*, 96 P.2d 740, 741 (Utah 1939).

27 An apocryphal story about Henry Hart has him looking out the window of his office on a sunny, cloudless day and saying to a visitor, “It is clear, is it not?”

28 See generally Ronald J. Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289 (1969).

29 See *id.* at 322.

30 See *id.* at 296.

centered on cases in which the state had chosen to use federal law as a basis for providing a state remedy that was neither preempted nor required by federal law.<sup>31</sup> In his view, Supreme Court review of the state's interpretation of its law was justified by a federal interest only when there was a discernible need to coordinate the state and federal systems on the issue in question.<sup>32</sup> This test would clearly exclude a state's reliance, in interpreting its own procedural rules, on the federal interpretation of substantially identical federal procedural rules.

Greene's second category embraced cases in which the state had decided to interpret its own law on the basis of its understanding of a limit imposed by federal law—as in *Van Cott*; in such a case, he argued that at least if the state's reliance on the federal limitation is clear, federal review is authorized.<sup>33</sup> And Greene's final category—one he described as “Mandatory Incorporation of Federal Standards”<sup>34</sup>—consisted of cases in which federal law compels the state to afford a state law remedy.<sup>35</sup> His prime example was *Ward v. Board of County Commissioners*,<sup>36</sup> one of the stars in the federal courts firmament.<sup>37</sup> My own understanding of that case is that it requires the state to afford a federal remedy, though it allows certain state law defenses to be asserted. But in any event, assuming that Greene's characterization is more accurate, the availability of Supreme Court review seems so clear that the case can hardly be considered part of the problem.

In his last section on appellate jurisdiction, using *Standard Oil* as a whipping boy, Greene raised the question whether all hybrid state law cases fall within Supreme Court appellate jurisdiction and concluded that to classify them as doing so would run afoul of the *Murdock* rule.<sup>38</sup> After mischaracterizing the Supreme Court's decision in *Standard Oil* as holding that sales to U.S. Army post exchanges were “entitled to an exemption under California law,”<sup>39</sup> Greene argued that federal review should be unavailable because any use of federal law by the state court “was solely for the convenience of the state and was not necessary to coordinate coextensive obligations under state and federal law.”<sup>40</sup>

In his conclusion, Greene summarized his proposed test as authorizing appellate jurisdiction “if and only if federal law of its own force is either actu-

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31 See *id.* at 297–301.

32 And, he concluded, the need would also extend to a case in which there was a similar interest in coordination in the context of federal law made applicable to a private agreement. See *id.* at 305–09.

33 See *id.* at 309–15.

34 *Id.* at 315.

35 See *id.* at 315–19.

36 253 U.S. 17 (1920).

37 See *id.* at 24–25 (holding that due process required the state to provide a meaningful remedy for the return of taxes coercively collected in violation of federal law).

38 See Greene, *supra* note 28, at 319–22.

39 *Id.* at 320–21.

40 *Id.* at 321.

ally or potentially regulative of the conduct which gave rise to the suit.”<sup>41</sup> I find this test puzzling for two related reasons. First, it seems hard to square with some of Greene’s earlier discussion. And second, since the question whether the post exchange in *Standard Oil* was itself a federal instrumentality might ultimately be critical in determining the constitutionality of imposing a tax on sales made to it, I don’t understand why the case doesn’t meet the requirements of the test.

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Three newcomers joined Herbert Wechsler in the (1973) second edition of Hart and Wechsler,<sup>42</sup> and Paul Mishkin took charge of Chapter V.<sup>43</sup> *Standard Oil* remained as a principal case. The following Note—with a few words added to the title so that it read “Note on State Incorporation of or Reference to Federal Law”<sup>44</sup>—was similar to that in the first edition but was expanded to cover some new cases and the Greene article. (The Note described Greene’s test as “incisive” and asked the reader to evaluate Greene’s application of the test to private agreements.<sup>45</sup>)

One recent case of particular interest reported in the Note was *California v. Byers*.<sup>46</sup> In that case, the state supreme court had interpreted its own statute—requiring a driver involved in an accident to stop and identify himself—not to permit use of the information in a subsequent criminal prosecution, as (the court thought) such use would violate the Fifth Amendment.<sup>47</sup> The Supreme Court, without discussing its jurisdiction, granted certiorari, reversed, and remanded, holding that the state court erred in believing that the subsequent use would violate the U.S. Constitution.<sup>48</sup> “Was the court’s jurisdiction to decide the self-incrimination question clear?” the Note asked.<sup>49</sup>

As with its predecessor in the first edition, this Note made little or no effort to break down the problem analytically, or to offer any synthesis. But in the later chapter on the original federal-question jurisdiction of the district courts (then Chapter VII), Mishkin (also in charge of the relevant section of that chapter<sup>50</sup>), made a new connection between *Standard Oil* and the

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41 *Id.* at 326.

42 *See generally* PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973) [hereinafter HART & WECHSLER II].

43 *See id.* at xvii.

44 *Id.* at 485.

45 *Id.* at 489.

46 402 U.S. 424 (1971).

47 *See id.* at 425–26.

48 *See id.* at 434.

49 HART & WECHSLER II, *supra* note 42, at 488.

50 *See id.* at xvii.

iconic case *Smith v. Kansas City Title & Trust Co.*<sup>51</sup> Mishkin asked whether the Supreme Court would have had appellate jurisdiction if the action had been brought in the state courts and the plaintiff had obtained the relief sought, and then asked, “Is this question the same as that in *Standard Oil*?”<sup>52</sup>

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Before the appearance of the third edition of Hart and Wechsler, I published an article entitled *Jurisdiction and Discretion*.<sup>53</sup> As the title suggests, my thesis was that the notion of principled discretion was inherent in grants of subject-matter jurisdiction, unless the grant itself carried with it a mandate to limit or eliminate that discretion (or to expand it).<sup>54</sup> I argued that the existence of such discretion was not only well-established but also normatively desirable, and that it could be found both in the discretion not to accept jurisdiction when it admittedly existed, and in the discretion to determine the scope of jurisdiction itself.<sup>55</sup> In the former category, I included such topics as equitable discretion,<sup>56</sup> other forms of abstention,<sup>57</sup> and the doctrines of forum non conveniens<sup>58</sup> and exhaustion of remedies.<sup>59</sup> In the latter category, I surveyed the original and appellate jurisdiction of the Supreme Court as well as the original jurisdiction of the federal district courts.<sup>60</sup>

With respect to the appellate jurisdiction of the Supreme Court, after discussion of the certiorari power, the tradition of dismissing appeals “for lack of a substantial federal question,”<sup>61</sup> and the Court’s history of declining to decide many questions certified to it by a lower federal court, I turned to the “hybrid” cases that are the subject of this Essay.<sup>62</sup> Decisions that seemed inconsistent could, I argued, be reconciled if the nature of the Court’s discretion was taken into account. Thus, *Standard Oil* was consistent with a case like *Miller’s Executors v. Swann*,<sup>63</sup> in which the Court had rejected its appellate jurisdiction to consider a question of federal law embedded in the state law question of a railroad’s power to convey certain property. In my view:

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51 255 U.S. 180 (1921) (upholding district court federal-question jurisdiction to entertain a suit brought under state law by a bank shareholder to enjoin the bank from investing in certain federal bonds on the grounds that (a) the bonds had been issued pursuant to an unconstitutional federal statute, and (b) they therefore were not a “lawful investment” under the governing state law).

52 HART & WECHSLER II, *supra* note 42, at 886.

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

54 *See id.* at 545.

55 *See id.* at 546–47.

56 *See id.* at 548–49.

57 *See id.* at 550–52.

58 *See id.* at 555–57.

59 *See id.* at 557–59.

60 *See id.* at 560–70.

61 *Id.* at 566.

62 *See id.* at 566–70.

63 150 U.S. 132 (1893).

[T]he Court . . . has recognized an implicit power to choose whether to regard the case as one "arising under" federal law. This power to choose is not unlimited or unprincipled; rather, the strength of the federal interest guides the Court's choice. In *Standard Oil*, federal money was at risk and the federal interest in immunity from taxation arguably did not stop at the border established by the Constitution itself; thus it was appropriate for the Supreme Court to correct a state court misunderstanding that inadvertently may have pushed the state too close to that border. In *Miller's Executors*, on the other hand, neither the federal fisc nor a federal program was at stake, and there was little basis for federal concern with a state decision holding that the railroad lacked power to convey as a matter of state law.<sup>64</sup>

In a section addressing the original jurisdiction of the federal district courts, I made a similar argument with respect to cases like *Smith*.<sup>65</sup> At another point, I commented in a footnote that the discretion I observed and supported existed at all judicial levels, though it may well be broader at the level of our highest court.<sup>66</sup>

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Dan joined as a coauthor in the third edition of Hart and Wechsler,<sup>67</sup> but the responsibility for Chapter V fell to Paul Bator.<sup>68</sup> In that chapter, *Standard Oil* remained a principal case, and the following Note, with the same title, was significantly updated but, in general, similar to its predecessor. My article, and the standard proposed in it, was cited without comment.<sup>69</sup>

In the fourth edition,<sup>70</sup> Dan's assignment, covering four chapters and a major portion of a fifth, included Chapter V.<sup>71</sup> Dan decided to substitute *Van Cott* for *Standard Oil* as a principal case, and then dealt with *Standard Oil* in the following Note, which retained its old title but was thoroughly reformulated.<sup>72</sup> It began with a numbered "Paragraph"<sup>73</sup> entitled "Compelled Incorporation of Federal Law," in which Dan drew an analogy between (a) the state court's decision interpreting state law on the basis of its understand-

64 Shapiro, *supra* note 53, at 565 (footnote omitted).

65 See *id.* at 569–70. For a brief statement of the holding of *Smith*, see *supra* note 51 and accompanying text.

66 Shapiro, *supra* note 53, at 578 n.214.

67 PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, at xvii (3d ed. 1988) [hereinafter HART & WECHSLER III].

68 See *id.* at xxiii.

69 See *id.* at 561.

70 RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. 1996) [hereinafter HART & WECHSLER IV].

71 See *id.* at vii.

72 See *id.* at 546–52.

73 The book has always referred to the numbered sections of its notes as "Paragraphs," even though they generally consist of more than one paragraph and are sometimes themselves subdivided into lettered subparagraphs.

ing of the limits imposed by federal law, and (b) a state court decision that federal law itself directly imposed the limit on the state.<sup>74</sup> If the latter case was clearly appropriate for Supreme Court review, he asked, shouldn't the former also be reviewable—even if on remand the state court might decide to reach the same result without regard to federal law?<sup>75</sup> After making this point, the Note went on in Paragraph (2) to discuss the result on remand in *Van Cott*, and in Paragraph (3) to discuss other, similar examples of “Compelled Incorporation of Federal Law,”<sup>76</sup> including *California v. Byers*.<sup>77</sup>

Then, in Paragraph (4), Dan turned to what he called “Gratuitous Incorporation of Federal Law,” illustrated by such examples as a state’s decision to follow the Federal Rules of Civil Procedure and their interpretation by the federal courts, and asked forcefully whether these cases were different from his first category in that “federal law applies *only* because the state chose to incorporate it.”<sup>78</sup> There followed a Paragraph entitled “Gratuitous Incorporation of Federal Duties,” exemplified by a state’s decision to afford a private remedy for violation of a federal statute for which there was no federal private remedy, but which neither prohibited nor required the state to afford such a remedy.<sup>79</sup> He asked probing questions about the value of federal review given the fact that the state was free either to deny a remedy altogether or to base the same remedy entirely on state law. In the last of these questions, he asked whether review might be justified by a desire to achieve uniformity in the interpretation of federal law.<sup>80</sup> (My own thought, in response, was that this desire made practical sense, at least in a case in which the state may have interpreted the federal law to reach too far in regulating or prohibiting conduct and thus had created a danger that the federal law would be “over-enforced.” Admittedly, though, this reasoning assumed that the state would not choose to provide a remedy for such conduct in the absence of federal law.<sup>81</sup>)

Dan then turned to the *Standard Oil* case, which he evidently viewed as not falling readily into any of his previous categories, and in asking the reader what purpose was served by federal review, pressed the question further by asking whether the federal nature of the question considered by the Court was “a kind of brooding omnipresence in the sky,” and if not, just what provision of federal law was at stake.<sup>82</sup> In response to my argument that there was a federal interest in saving federal money even if the expenditure was not barred by the Constitution, he asked: “But what [interest] gives the

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74 See HART & WECHSLER IV, *supra* note 70, at 546.

75 *Id.*

76 *Id.* at 546.

77 See *supra* notes 46–49 and accompanying text.

78 HART & WECHSLER IV, *supra* note 70, at 548.

79 See *id.*

80 See *id.* at 548–49.

81 See *id.* at 550 & n.6 (citing my thoughts); see also Shapiro, *supra* note 53, at 565.

82 HART & WECHSLER IV, *supra* note 70, at 549–50.

Supreme Court authority to strike down state actions that come close to, but admittedly have not transgressed, constitutional borders?”<sup>83</sup>

In a final, brief Paragraph entitled “Questions about State Incorporation of Federal Law,” Dan asked a series of tough questions in search of a principled basis for concluding that “some but not all cases of gratuitous incorporation” fall within the Supreme Court’s appellate authority.<sup>84</sup> And in a fascinating parting shot, after noting that what was an appeal as of right in *Standard Oil* would now be reviewable only if the Court, in its discretion, decided to grant a writ of certiorari,<sup>85</sup> Dan asked whether it might be simpler to “provide that jurisdiction under § 1257 extends to *every* case of state incorporation of federal law, compelled or gratuitous—leaving it to the Court’s case-by-case discretion whether to grant certiorari?”<sup>86</sup>

Though I take issue with some of the points made, I find it hard to overstate Dan’s contribution in this brief Note—despite its being only one small section of a substantial chapter that itself was only one of several chapters for which Dan was responsible, in a book designed in significant part not to resolve issues but to provoke thought. The Note, I believe, made at least four valuable contributions to the conversation about the “embedded federal question” as it relates to the Supreme Court’s appellate jurisdiction. First, it unpacked the problem analytically more successfully than ever before. The appearance of headings for each numbered “Paragraph”—a practice not in general use in earlier editions and one that Dan successfully persuaded his collaborators to adopt in the fourth edition and thereafter—helped in that effort. Moreover, the practice forced each of us in our own work on the book to think through our analyses much more carefully (and aided all users of the book in the process).

Second, with respect to the *Standard Oil* case itself, Dan asked a question that had been virtually ignored until then: In the absence of a relevant federal statute, exactly what “federal law” was the Court talking about? Whatever the answer to Dan’s question, it needed to be considered.

Third—a matter again related to *Standard Oil* but one having broader implications—Dan forcefully challenged my claim that there was a federal interest in resolution of the state law question apart from the constitutionality of the state’s exercise of its taxing power. On what basis could there be a federal interest in preventing the state from collecting revenue that it was lawfully entitled to collect? The question is reminiscent of one I used to ask

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83 *Id.* at 550. In partial defense of my argument, the Supreme Court did not “strike down” the state action, but rather remanded for reconsideration in light of the Court’s decision. See *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942).

84 HART & WECHSLER IV, *supra* note 70, at 550.

85 In 1988, Congress virtually eliminated appeals as of right, and eliminated them entirely in cases coming from state courts. See 102 Stat. 662 (1988) (amending 28 U.S.C. § 1257).

86 HART & WECHSLER IV, *supra* note 70, at 551. I am not sure whether or not, in using the word “provide,” Dan felt that a statutory amendment was required to achieve this result.

my students when talking of Justice Brennan's reference, in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,<sup>87</sup> to a "federal policy favoring jury decisions of disputed fact questions."<sup>88</sup> Since the plain implication of his opinion was that this policy extended beyond the reach of the jury trial guarantee in the Seventh Amendment,<sup>89</sup> I pressed the question what the source of the policy could be (aside from the personal preferences of the Justices themselves). More broadly, Dan's question invoked the ongoing debate about whether federal constitutional and statutory law can or should have a "penumbral" effect beyond its boundaries.

Finally, and in some ways most interesting, Dan's last comment in this Note brought the Court's certiorari power—broadened in 1988 to cover almost all of its appellate jurisdiction—to bear on the problem. No one seemed to have noticed before that *Standard Oil*, and some of the other relevant cases, had come before the Court not as a result of the exercise of its discretion but as a matter of the appellant's right of appeal. Given the later statutory grant to the Court of absolute discretion to determine whether or not to review a federal question determined by a state court, Dan wondered why the Court should not have authority to consider *any* embedded federal question that may have affected the outcome, leaving the determination in particular instances to the Court's natural self-interest in limiting its plenary docket to cases that matter.<sup>90</sup>

What is especially notable about these contributions is how closely they fit into what I see as Dan's broader vision of his goal as a scholar. Doctrine and function each have independent value, but the more they can be brought into alignment, the better.

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The role of the remaining editions of Hart and Wechsler in this story—as it relates to the Supreme Court's appellate jurisdiction—is a small one, most of which can be summarized in a footnote.<sup>91</sup> But Dan's role in the

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87 *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538 (1958).

88 *Id.*

89 U.S. CONST. amend. VII.

90 I am reminded of a cartoon in which one Supreme Court Justice leans over to another during an oral argument and says, "Her landlord kicked her cat! How did this thing ever get out of Small Claims Court?" Everett Opie, *NEW YORKER*, Sept. 30, 1967.

91 In the fifth edition, Dan remained in charge of Chapter V, and the treatment of the embedded state law question was quite similar to that in HART & WECHSLER IV, *supra* note 70, except that (1) a new opening Paragraph put the certiorari point at the beginning of the discussion, and (2) the Note took account of the Court's decision in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 817 (1986) (holding, in a federal court action brought under state tort law to obtain relief on the basis of the violation of a federal statute, that the federal district court lacked original federal-question jurisdiction, but stating, in dictum, that the Supreme Court would have appellate jurisdiction to review a state court decision in such a case). See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, at viii, 518–23 (5th ed. 2003) [hereinafter HART & WECHSLER V]. In the sixth edition, John Man-

conversation also includes a later article of his in which he critiqued my approach—an article he titled *Jurisdiction and Discretion Revisited*.<sup>92</sup> In this critique, Dan agreed with my general thesis, endorsed my reliance on the existence of judicial expertise in matters jurisdictional, and ended his appraisal with the statement that as between imperfect alternatives, “I think Shapiro’s argument that a robust judicial role [in dealing with issues of subject-matter jurisdiction] is to be preferred remains entirely convincing.”<sup>93</sup> Indeed, Dan’s analysis was so thoughtful that he was able to find more depth and insight in my article than I had been aware of—a result, I believe, of Dan’s own analytical strength.

But the bed was not all so rosy. Several of the examples that in my view involved a sound exercise of judicial discretion were criticized, and on the topic of this Essay—the embedded federal question—Dan’s criticism focused not on the appellate jurisdiction of the Supreme Court but on the original jurisdiction of the federal district courts. On this issue, he was concerned that I had over-indulged in the tendency of academics to favor complexity and had evinced an excessive faith in the wisdom of judges to make sound choices. Noting the extraordinarily high rate of reversal by federal appellate courts of district court determinations of jurisdiction in such cases,<sup>94</sup> he concluded that even though a more inflexible rule would probably lead to some unfortunate results, a test based on the extent of the federal interest and other factors was probably not worth the heavy costs in predictability and

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ning replaced Dan in authoring Chapter V, while Dan moved on to other responsibilities. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, at viii (6th ed. 2009) [hereinafter HART & WECHSLER VI]. As part of the increased interest in the Court’s treatment of ambiguous state court opinions, precipitated by the Court’s decision in *Michigan v. Long*, 463 U.S. 1032 (1983), the more specific problem of the embedded state question was relegated to a single numbered Paragraph at the end of a Note entitled “Note on Ambiguous State Decisions and Techniques for Clarifying Them.” HART & WECHSLER VI, *supra*, at 474–80. Several cases were cited and discussed, as well as the articles by Greene and me, but *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942), was not mentioned. Treatment in the recently published seventh edition was essentially the same, except for the additional citation in a footnote of several cases, including one (*Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984)) that, in reviewing an embedded federal question, cited *Standard Oil* for the proposition that the Court had appellate jurisdiction to review a state decision construing a state statute broadly in the belief that federal law supported such a construction. *Three Affiliated Tribes*, 467 U.S. at 152 (“[T]he state court may construe state law broadly in the belief that federal law poses no barrier to the exercise of state authority.”); *see also* HART & WECHSLER VII, *supra* note 1, at 503–09 & 509 n.6.

92 Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891 (2004).

93 *Id.* at 1924.

94 *See id.* at 1913 (citing Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction Over State Law Claims Post-Merrell Dow*, 115 HARV. L. REV. 2272, 2280 (2002) (reporting that since 1994, there had been sixty-nine appellate decisions reviewing a judgment on jurisdiction in such cases, of which forty-five had resulted in reversal).

efficiency. Instead, the Holmes test<sup>95</sup>—that original federal-question jurisdiction should turn on the existence of a federally created cause of action—would be preferable.

Since this article appeared, the Supreme Court, in the *Grable* decision,<sup>96</sup> has opted for a more flexible approach than Dan advocated, but the Court made clear, both in the *Grable* opinion and in later opinions, that most cases in which a federal element was an aspect of a state law issue would not “squeeze[ ] into the slim category *Grable* exemplifies.”<sup>97</sup> Though the Court has consistently adhered to its rejection of the Holmes test, I must concede that the results and rationales of *Grable* and the decisions that followed it, while falling somewhere between Dan’s views and mine, came closer to his.

Dan took account of the impact of *Grable* and the subsequent cases on his own thesis in later editions of Hart and Wechsler. In Chapter VIII (on the original federal-question jurisdiction of the district courts), Dan referred to Justice Thomas’s concurrence in *Grable* (submitting to precedent but, after citing Dan’s comments in an earlier version of Chapter VIII, expressing a willingness to consider adoption of the Holmes test)<sup>98</sup> and noted his own continuing concern that the costs of a more flexible rule might outweigh the benefits. But he acknowledged that *Grable* and its successors “could lead to a more consistent understanding” of the scope of district court authority in such cases.<sup>99</sup>

Once again, Dan’s work embodies his abiding concern that doctrine and function be made as harmonious as possible, as well as his recognition that even those who agree on this goal can reasonably disagree on how to get there.

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95 This test stems from Justice Holmes’s opinion for the Court in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (“A suit arises under the law that creates the cause of action.”), and was iterated in his dissent in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 214–15 (1921) (Holmes, J., dissenting) (“But it seems to me that a suit cannot be said to arise under any other law than that which creates the cause of action.”).

96 *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005) (noting national interest in providing a federal forum for federal tax litigation is sufficiently substantial to support the exercise of federal-question jurisdiction over the quiet title action in state court).

97 *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006); see also *Gunn v. Minton*, 133 S. Ct. 1059 (2013). In *Gunn*, the Court, in holding that a federal district court lacked jurisdiction over an action that involved a question of federal patent law embedded in a state tort action for malpractice, *id.* at 1065, stated that the action failed to meet a four-prong test: that the federal question is necessarily in dispute, that it is actually disputed, that it is substantial (i.e., important to the federal system *as a whole*), and that it is capable of resolution without disruption of the federal-state balance embodied in the relevant federal law. See *id.* at 1065–69.

98 *Grable*, 545 U.S. at 321–22 (Thomas, J., concurring) (citing HART & WECHSLER V, *supra* note 91, at 885–86).

99 See, e.g., HART & WECHSLER VI, *supra* note 91, at 799–800. The Preface to the sixth edition notes Dan’s responsibility for this chapter. See *id.* at viii.

## II. SOME FURTHER THOUGHTS

Twenty years have passed since I last wrote on this topic. In that time, there have been several important decisions, and considerable scholarship, most especially Dan’s insightful analyses and critiques. As a result, my own thoughts have changed in several respects. And I have also felt the need to do a better job of explaining and defending those positions I still adhere to. So I am pleased to have an opportunity to do that, or as some academics would prefer to say: “What I really meant was . . . .”

First, enlightened by Dan’s thoughts on the question, I believe that the extent of the “arising under” appellate jurisdiction of the Supreme Court under Article III<sup>100</sup> is very broad—broad enough to embrace *any* issue of federal law that may have been decisive in the determination of a question of state law by a state court. In this view, which may have been implicit in my earlier article but was certainly not clearly stated, I disagree with Ronald Greene.<sup>101</sup> But I find strong support extending back to the *Osborn* case.<sup>102</sup> The existence or nonexistence of a “good reason” for the exercise of that jurisdiction is not controlling, just as (in my view) it is not controlling in determining whether Article III grants authority to a federal court to exercise federal diversity jurisdiction in a particular case.

Second, now that the choice of whether or not to accept a state court decision for plenary review is left by statute entirely to the Supreme Court’s discretion (i.e., the vote of four Justices under the rule-of-four tradition<sup>103</sup>), I share what I believe to be the view Dan implied in his discussion: there is no need to articulate a rule or principle to govern that selection in cases involving embedded federal questions. The Court’s self-interest in choosing—from among the many thousands of petitions it receives each Term—the fewer than 100 cases in which it will afford plenary review is more than sufficient to do the job of limiting plenary review to cases that are of significant federal concern. Observers may be critical of particular choices made by the Court on the ground that there was an insufficient basis for the choice (whether to review or not to review), but that is likely to occur in any event.

Third, with respect to *Standard Oil* itself, I still believe—again in contrast to Greene and perhaps here to Dan as well—that the decision fits within the

100 U.S. CONST. art. III, § 2, cl. 1.

101 See *supra* notes 28–45 and accompanying text.

102 *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 823 (1824) (holding that original federal-question jurisdiction may be founded on the presence of a federal “ingredient” in a state-created cause of action). While the decision in *Osborn* might have been based on the presence of a substantial federal interest (in protecting the Bank against state interference), it was not. For a revealing insight into the *Osborn* rationale in the light of contemporary understandings, see Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 642 n.151 (2015).

103 For a history and analysis of the rule, see generally Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975 (1957). See also HART & WECHSLER VI, *supra* note 91, at 1470–75.

broad authority delegated by Article III. Study of the state supreme court's opinion in the case shows that much of the (exclusively) federal case law relied on by the state supreme court in determining that post exchanges were not federal government instrumentalities consisted of lower court decisions challenging a state's authority to tax.<sup>104</sup> Thus, Dan's probing question about what federal law was involved<sup>105</sup> has an answer: the definition that would be used in determining whether the imposition of a state tax would exceed state authority under the Constitution.

But was this a sound exercise of the Court's authority to decide a question of federal law embedded in an issue of state law, without reaching the federal constitutional question? Here, it is surely not irrelevant that at the time there was an appeal as of right from the state court decision upholding the application of the state statute against a constitutional challenge; the Court may have wished, as it often does,<sup>106</sup> to avoid deciding that question. Moreover, even if (as is unlikely) California was the only state whose own law exempted the federal government from tax, I remain obdurate in the view that the threat of a burden on the federal fisc is a sufficient basis to warrant giving the state court an opportunity to reconsider its own definition even if the imposition of a tax would pass constitutional muster. Finally, if there is widespread agreement that it is appropriate for the Court to review and correct a misunderstanding of federal law that may have led the state courts to give a *narrow* construction to a state statute (as in *Van Cott*), there is surely a respectable argument, at the very least, for reviewing and correcting a misunderstanding that may have given rise to a *broad* construction of a state statute.<sup>107</sup> Nevertheless, I realize now, if I didn't before, that in this view, I stand on shaky ground.

On a matter of consequence that is collateral to the central focus of this Essay, I now believe that I was too casual in suggesting only in a footnote a possible difference between the appropriate measure of appellate and original jurisdiction.<sup>108</sup> In determining original district court jurisdiction, I would not revert to the rigid Holmes test,<sup>109</sup> but I would and do support a

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104 See *Standard Oil Co. v. Johnson*, 119 P.2d 329, 330–32 (Cal. 1941).

105 See *supra* text accompanying notes 87–92.

106 On the pros and cons of the familiar avoidance doctrine, see HART & WECHSLER VII, *supra* note 1, at 79–81.

107 Indeed, the Court itself made a similar point, citing *Standard Oil*, in the *Three Affiliated Tribes* case. See *supra* note 91. As to the use of “may” in text, I rely on the Court's decision, in *Michigan v. Long*, 463 U.S. 1032 (1983), to employ a presumption of reviewability when confronted with a state court judgment that may have rested on a federal ground. See *id.* at 1038 n.4 (“We may review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied.” (citing *Beecher v. Alabama*, 389 U.S. 35, 37 n.3 (1967) (per curiam))).

108 See *supra* notes 53–66 and accompanying text.

109 “Revert” may not be the right word, since the research of Ann Woolhandler and Michael G. Collins in *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151 (2009), has demonstrated that in the nineteenth century, acceptance of federal jurisdic-

rule confining the exercise of district court jurisdiction to those few compelling cases (like *Smith* and *Grable*) where ultimate Supreme Court authority to review is likely to be insufficient to protect the federal interest in the outcome. The rigorous standard laid down by the Court in 2013 in *Gunn v. Minton*,<sup>110</sup> even if a bit too confining for me, moves strongly towards the goals of simplicity and predictability that Dan advocated, and assures that district courts will not be overburdened.

Notably, this conclusion does not rest—for me or any member of the Supreme Court (including, interestingly, Justice Thomas, who stated in his *Grable* concurrence that, like Dan, he would consider adoption of the Holmes test on essentially pragmatic grounds)—on the view that such a limitation is required by Article III or by the terms of the statutory grant of original federal-question jurisdiction. Indeed, that grant traces back to a post-Civil War statute that was almost surely designed to extend the reach of federal lower court jurisdiction as far as Article III permitted.<sup>111</sup> Rather, it rests on a view of the proper scope of judicial discretion to confine the exercise of judicial authority to hear a case on the merits. That discretion, as I have argued before, is inherent in both the constitutional and statutory grants of subject-matter jurisdiction, in the absence of a clear mandate to the contrary.

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The discussion of this interesting and important topic—here presented only in part<sup>112</sup>—will surely continue.<sup>113</sup> But Dan’s extraordinary insights, wisdom, generous but stern critical eye, and joy in sharing ideas will be sorely missed.

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diction on the basis of a federal question embedded in a state law cause of action was far more common than is generally believed.

110 133 S. Ct. 1059, 1065 (“[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.”).

111 See, e.g., James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 642–45 (1942) (examining legislative history of the Judiciary Act of 1875); Ray Forrester, *The Nature of a “Federal Question”*, 16 TUL. L. REV. 362, 374–85 (1942) (discussing statutory meaning of “arising under” and analyzing subsequent case law).

112 I have not attempted a complete survey of the literature, since my purpose has been to focus on the contributions of the many editions of Hart and Wechsler, and particularly of Dan himself, and their influence on my own thinking.

113 As this Article was going to press, the Supreme Court in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016) (holding that a federal district court lacked federal-question subject-matter jurisdiction over a removed state law action), considered the interpretation and application of the standards laid down in *Gunn v. Minton*, see *supra* note 110 and accompanying text.

