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THE INCREASINGLY "UNFLAGGING OBLIGATION": FEDERAL JURISDICTION AFTER SAUDI BASIC AND ANNA NICOLE

Stephen I. Vladeck*

I. INTRODUCTION

The tension inherent in the study of federal jurisdiction and the federal courts is perhaps best understood as the result of attempts to effectuate two often irreconcilable commands: first, that federal courts are courts of limited subject-matter jurisdiction1 and second, that they nevertheless have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."2 Increasingly, in recent years, this tension has manifested itself as a sharp divide between the U.S. Supreme Court and the lower federal courts over the scope of various explicit (or implicit) doctrinal and statutory exceptions to the federal jurisdiction conferred by general jurisdictional statutes such as 28 U.S.C. §§ 1331, 1332, and 1334.3 In a pattern that has come to repeat itself time and again, the lower courts have consistently favored applicability of these exceptions, with the Supreme Court, often unanimously, reversing in favor of original federal jurisdiction.4

* Associate Professor, University of Miami School of Law. This article was prepared in conjunction with the Tulsa Law Review's 2005–2006 Supreme Court Symposium, for my participation in which I owe special thanks to Mark Tushnet, the Symposium's guest editor, and Misty Cooper Watt, the Review's Editor-in-Chief. My thanks also to Patrick Gudno and David Vladeck for their comments and camaraderie, to Rick Bierschbach, Bruce Boyden, Lynda Dodd, Amanda Frost, Toby Heytens, and especially David Zaring for insightful and thoughtful feedback at a junior faculty colloquium at the Washington & Lee School of Law, and to Jason Berkowitz for excellent research assistance. By way of disclosure, I played a recurring role on the legal team for the petitioner in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

2. Colo. River Water Conservation Dist v. U S., 424 U.S. 800, 817 (1976); see also Cohens v. Va., 19 U.S 264, 404 (1821) (Marshall, C.J.) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should . . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").
3. It bears noting that there is something wholly unsatisfying about the statutory/ doctrinal distinction I draw in this Article. Even for cases—such as Roche, 546 U.S. 81 (2005), and Schmidt, 126 S. Ct. 941 (2006)—where the interpretation of the diversity statute is at issue, the requirement of "complete" diversity animating both decisions is itself arguably doctrinal, read into § 1332's predecessor by Chief Justice Marshall in Strawbridge v. Curtiss, 7 U.S. 267 (1806); so too, the federal question statute and the "well-pleaded complaint rule," per Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908). Similarly, one might think of the Rooker-Feldman doctrine and the probate exception as both being predicated, to some degree, on statutory construction, the former on 28 U.S.C. §§ 1257, 1331, and 1332, and the latter on 28 U.S.C. § 1332.
4. The jurisdictional trend comes notwithstanding the general substantive hostility to litigation that some have found as a consistent pattern in the jurisprudence of the Rehnquist Court. See Judith Resnik, Constraining Remedies: The Rehnquist Judiciary, Congress, and Federal Power, 78 Ind. L.J. 223 (2003); Andrew M. Siegel,
For federal courts scholars, the Supreme Court’s decision last Term in the case of Anna Nicole Smith, known to the legal world as *Marshall v. Marshall*, is one of the more prominent. There, the Ninth Circuit Court of Appeals had concluded that the so-called “probate exception” to federal jurisdiction applied to divest the federal bankruptcy court of jurisdiction over Anna Nicole’s counterclaim against her stepson Pierce for tortious interference. The Supreme Court unanimously reversed, holding that the 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. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

That is, the Court held that the probate exception was, at most, a narrow bar to jurisdiction applicable only to hyper-specific facts—foreclosing jurisdiction only where federal courts were asked to directly interfere with the res of a state probate proceeding.

What is intriguing about Anna Nicole’s case, besides the obvious, is the extent to which it is representative of a far larger trend that has emerged in the Supreme Court’s jurisprudence concerning federal subject-matter jurisdiction. Consistently, over the last several years, the Court has taken an increasingly skeptical view toward doctrinal or statutory exceptions to federal jurisdiction, and has, in almost every case where such an exception was argued to be at issue, held that it did not apply, and that the case could go forward in a federal forum. So too, the Court has looked askance at lower court decisions interpreting requirements for entitlement to statutory relief as “jurisdictional,” as in the *Arbaugh* case from last Term.

During the 2005 Term alone, *Marshall* was one of six cases the Court decided on...
the merits where original federal jurisdiction was substantially in dispute. In four of the other five—Hamdan v. Rumsfeld, Lance v. Dennis, Wachovia Bank, N.A. v. Schmidt, and Lincoln Property Co. v. Roche—the Court squarely rejected either (1) the applicability of an exception to federal jurisdiction or (2) a narrow interpretation of statutory jurisdiction, reversing the lower courts' decisions to the contrary in each of the cases (Marshall, Lance, Schmidt, and Roche) where their jurisdiction had been at issue. The only one of these half-dozen cases to reject federal jurisdiction—Empire Healthchoice Assurance, Inc. v. McVeigh—did so on complicated and hyper-narrow grounds, and produced the only 5–4 divide in the six cases, with Justices Kennedy, Souter, and Alito joining Justice Breyer's impassioned and somewhat intemperate dissent.

What is perhaps most exceptional about what might best be called the "jurisdictional success rate" is that it is, at least for recent Terms, unexceptional. A similar pattern unfolded during the Court's 2004 Term, as reflected in the sweeping denunciation of the eponymous Rooker-Feldman doctrine in Exxon Mobil Corp. v. Saudi Basic Industries Corp., the broader reading of the well-pleaded complaint rule adopted in Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing (at the expense of two decades of lower-court decisions embracing expansive readings of the
narrower view adopted in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, and the endorsement of an expansive conception of supplemental jurisdiction under 28 U.S.C. § 1367 in *Exxon Mobile Corp. v. Allapattah Services* and *Ortega v. Star-Kist Foods, Inc.* And the 2003 Term ended with what might be the Court’s most important jurisdictional decision of all of the cases noted herein, in which it sustained federal jurisdiction over habeas petitions from Guantanamo Bay in *Rasul v. Bush*.

What are we to make of this jurisdictional love-in? If the jurisdictional doctrines are as clear in their narrowness as the Supreme Court decisions rejecting their application make them out to be, why are the lower courts so wrong, so often, about the absence of federal jurisdiction? And why, with the exception of *Hamdan* and perhaps *Allapattah*, do these cases tend to be apolitical, at least from the outsider’s viewpoint? More to the point, what can we take away, going forward, about what these cases have to say vis-à-vis the future of federal jurisdiction in the lower courts? Are these Supreme Court decisions part of a coordinated reaffirmation of the supremacy of federal courts? Are they nothing more than a series of coincidences? Or are the Supreme Court and the lower courts talking past each other on jurisdictional issues, the former possibly oblivious to the immense docket-clearing pressures faced by the latter, and the latter just as unsympathetic to the former’s attempt at coherent jurisdictional doctrine?

In this article, I attempt to explore these questions, using the 2005 Term (and, to some degree, the 2004 Term), as the defining parameters of the inquiry. I begin in Part II with the decisions themselves, exploring the underlying jurisdictional questions and how they were resolved in the lower courts (where they were resolved at all), and ascertaining what broader implications, if any, we might garner from the cases when taken together. In Part III, I turn to four possible arguments for how the lower courts and the Supreme Court came to view jurisdictional questions in so different a light, examining the feasibility of each and suggesting possible counterarguments. Finally, in Part IV, I address the potential implications, going forward, of the Court’s increasingly felicitous view toward federal jurisdiction, and the extent to which such a view may implicate problems of the proper separation of powers both vis-à-vis the other branches of the federal government and the state courts.

II. FEDERAL JURISDICTION AND THE 2004–2005 TERMS

In an attempt at coherence, I consider the Court’s various jurisdictional decisions from the 2004 and 2005 Terms grouped into substantive categories, looking first at cases involving what might best be described as “statutory” exceptions to federal

25. 545 U.S. 546 (2005) (action consolidated with *Allapattah*).
27. At least in the statutory context, it is unconventional to think of these cases as involving “exceptions” to federal jurisdiction. A more precise characterization might be “statutory limitations on pre-existing federal jurisdiction.” For ease of reference, however, I will resort to the “exceptions” terminology throughout.
jurisdiction, before moving on to the “doctrinal” exceptions, including the probate exception at the core of Anna Nicole’s case.

A. Hamdan and Jurisdiction-Stripping

No review of federal jurisdiction and the Supreme Court’s 2005 Term could begin without discussing Hamdan v. Rumsfeld. The jurisdictional issue, which arose only after the Supreme Court granted certiorari on November 7, 2005, was whether the subsequently enacted Detainee Treatment Act of 2005 (DTA) divested the federal courts—including the Supreme Court—of jurisdiction over Hamdan’s habeas petition.

Writing for the majority, Justice Stevens focused on the ambiguity in section 1005(h), which defined the “effective date” of the DTA’s jurisdiction-stripping provisions:

(1) In General.—This section shall take effect on the date of the enactment of this Act.

(2) Review of Combatant Status Tribunal and Military Commission Decisions.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

Avoiding the constitutional avoidance canon, the Hamdan Court instead relied on “[o]rdinary principles of statutory construction,” concluding the emphasis in section 1005(h)(2) on the applicability of sections 1005(e)(2) and (e)(3) to pending cases cut against the applicability of section 1005(e)(1)—the general jurisdiction-stripping provision—to such ongoing litigation. That is, because Congress, in DTA, was at pains to specify that the exclusive review procedures of sections 1005(e)(2) and (e)(3) would apply to pending cases, the “negative inference” was that the jurisdiction-stripping language of section 1005(e)(1) would not. The Court also emphasized that earlier versions of DTA lacked such a distinction, and that “Congress’ rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government’s interpretation.” Invoking a series of precedents for the proposition that, as an effective date, section 1005(h)(1) was insufficient, on its own, to establish the applicability of section 1005(e)(1) to pending cases, the Court denied the government’s motion to dismiss and reached the merits of Hamdan’s claims.

Especially in light of Justice Scalia’s acerbic—if somewhat unconvincing—
dissent, there is much to say about the Court's resolution of the jurisdictional question. Perhaps too much. Even assuming that the Court's application of "ordinary canons of statutory interpretation" did not compel the result reached by the majority, it is not difficult to see why resort to the constitutional avoidance canon would have compelled the same result. In an analogous holding in INS v. St. Cyr, the Court rejected an interpretation of a statute as foreclosing habeas jurisdiction and emphasized that "[t]he fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely."

Thus, even if Justice Scalia was ultimately correct that DTA, if applied to Hamdan's case, would violate neither the Suspension Clause, the Due Process Clause, nor the Exceptions Clause of Article III (and such a conclusion is hardly a given), the mere need to resolve such fundamentally important constitutional claims would justify interpreting an ambiguous statute so as to not raise those questions in the first place. Because section 1005(h) of DTA was nothing if not ambiguous, Hamdan was ultimately an easy—if surprising—case on the jurisdictional question.

B. Diversity and Supplemental Jurisdiction

Whereas Hamdan concerned an explicit attempt by Congress to take away federal jurisdiction, five other cases decided during the 2004 and 2005 Terms dealt with less explicit statutory limits of such jurisdiction. Leaving aside, for the moment, the two cases concerning the scope of the well-pleaded complaint rule under 28 U.S.C. § 1331, I begin with the three other cases, in all of which the Supreme Court reversed the narrow constructions of federal jurisdiction adopted by the lower courts.

The first among the three is also perhaps the most significant. In Allapattah, the Court answered what had been a long-debated question over the scope of supplemental jurisdiction in diversity cases where the parties were completely diverse, but the claims of additional plaintiffs under Rule 20 or Rule 23 did not satisfy the $75,000 amount-in-controversy requirement of 28 U.S.C. § 1332. At least in the context of class actions,
the Court had previously held, in Zahn v. International Paper Co.,\textsuperscript{43} that all plaintiffs had to meet the amount-in-controversy requirement. The question raised in Allapattah was whether Congress, in enacting the supplemental jurisdiction statute—28 U.S.C. § 1367—in 1990, had also intended to overrule Zahn.

Writing for a 5–4 Court,\textsuperscript{44} Justice Kennedy answered that question in the affirmative, resolving a sharp circuit split\textsuperscript{45} by holding that so long as one of the plaintiffs satisfied the amount-in-controversy requirement, and so long as all of the parties were completely diverse, § 1367 authorized supplemental jurisdiction over claims by additional plaintiffs (under both Rule 20 and Rule 23) that did not satisfy the amount-in-controversy requirement.\textsuperscript{46}

In so holding, Justice Kennedy rejected both what he described as the “indivisibility theory”—that “all claims in the complaint must stand or fall as a single, indivisible ‘civil action’ as a matter of definitional necessity”\textsuperscript{47}—and the “contamination theory”—that “the inclusion of a claim or party falling outside the district court’s original jurisdiction somehow contaminates every other claim in the complaint, depriving the court of original jurisdiction over any of these claims.”\textsuperscript{48} Thus, in fairly stark terms, the Allapattah Court embraced an expansive conception of supplemental jurisdiction in diversity cases, albeit subject to the statutory limits of 28 U.S.C. § 1367(b).\textsuperscript{49}

In another case implicating the scope of federal jurisdiction in diversity cases, although in far narrower terms, the Court unanimously held, in Roche,\textsuperscript{50} that diversity jurisdiction (and, a fortiori, removal of a diversity suit from state court) is not precluded when the named defendant is completely diverse, but unnamed prospective defendants are not. Writing for a unanimous Court, Justice Ginsburg emphasized

Congress surely has not directed that a corporation, for diversity-of-citizenship purposes,

\textsuperscript{43} 414 U.S. 291 (1973), overruled, Allapattah, 545 U.S. 546.
\textsuperscript{44} Justice Kennedy wrote for himself, Chief Justice Rehnquist, Justice Scalia, Justice Souter, and Justice Thomas. Justice Stevens and Justice Ginsburg filed dissenting opinions, the latter joined by Justices Stevens, O'Connor, and Breyer. Allapattah, 545 U.S. at 547.
\textsuperscript{45} Allapattah was the consolidation of two cases. First is the Eleventh Circuit Court of Appeals’ decision in Allapattah Servs., Inc. v. Exxon Mobil Corp., 333 F.3d 1248 (11th Cir. 2003), in which the court had sustained supplemental jurisdiction in a class action where additional diverse plaintiffs did not satisfy the amount-in-controversy requirement. Accord Rosner v. Pfizer, Inc., 263 F.3d 110 (4th Cir. 2001); Olden v. LaFarge Corp., 383 F.3d 495 (6th Cir. 2004); Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928 (7th Cir. 1996). Second is the First Circuit’s Court of Appeals decision in Ortega v. Star-Kist Foods, Inc., 370 F.3d 124 (1st Cir. 2004), in which the court had rejected supplemental jurisdiction over Rule 20 plaintiffs who did not meet the amount in controversy requirement. Accord Mernicore, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999); Leonhardt v. W. Sugar Co., 160 F.3d 631 (10th Cir. 1998); Trimble v Asarco, Inc., 232 F.3d 946 (8th Cir. 2000).
\textsuperscript{46} Allapattah, 125 S. Ct. at 2625.
\textsuperscript{47} Id. at 2621.
\textsuperscript{48} Id.
\textsuperscript{49} Under 28 U.S.C. § 1367(b), district courts lack supplemental jurisdiction in diversity cases over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
\textsuperscript{50} 546 U.S. 81 (2005).
shall be deemed to have acquired the citizenship of all or any of its affiliates. For cases of the kind the Roches have instituted, Congress has provided simply and only this instruction: "[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." The jurisdictional rule governing here is unambiguous and it is not amenable to judicial enlargement. Under § 1332(c)(1), Lincoln is a citizen of Texas alone, and under § 1441(a) and (b), this case was properly removed.\(^{51}\)

Thus, Roche rejected the argument that an unnamed local defendant could prevent removal of a diversity action where the named defendant was not "nominal." A seemingly obvious proposition, except that the Fourth Circuit Court of Appeals had unanimously concluded to the contrary.\(^{52}\)

The pattern embodied in Roche—unanimous reversal by the Supreme Court of a lower-court decision narrowly construing diversity jurisdiction—repeated itself in Schmidt,\(^{53}\) in which the Court took up the question of the citizenship, for purposes of federal diversity jurisdiction, of "national" banks. Under 28 U.S.C. § 1348, national banks "shall . . . be deemed citizens of the States in which they are respectively located." The question before the Court was the meaning of the term "located." Judge Luttig, writing for a divided panel of the Fourth Circuit, had held that "a national bank is located where it operates branch offices,"\(^{54}\) rendering it virtually impossible for national banks to invoke the diversity jurisdiction of the federal courts either initially or via removal.

Writing (again) for a unanimous Court,\(^{55}\) Justice Ginsburg disagreed and concluded that the term "located" must mean only "the State in which [the bank's] main office, as set forth in its articles of association, is located." As Justice Ginsburg explained,

in § 1348, "located" appears in a prescription governing not venue but federal-court subject-matter jurisdiction. Concerning access to the federal court system, § 1348 deems national banks "citizens of the States in which they are respectively located." There is no reason to suppose Congress used those words to effect a radical departure from the norm. An individual who resides in more than one State is regarded, for purposes of federal subject-matter (diversity) jurisdiction, as a citizen of but one State. Similarly, a corporation's citizenship derives, for diversity jurisdiction purposes, from its State of incorporation and principal place of business. It is not deemed a citizen of every State in which it conducts business or is otherwise amenable to personal jurisdiction. Reading

\(^{51}\) Id. at 616 (brackets in original) (citation omitted).

\(^{52}\) Roche v. Lincoln Prop. Co., 373 F.3d 610 (4th Cir. 2004), rev'd, 546 U.S. 81. The Fourth Circuit's decision was predicated on the (apparently erroneous) assumption that Lincoln Property Company was a limited partnership (in which case its "citizenship" for diversity purposes would be the citizenship of each of the partners), and not a corporation. But see Roche, 126 S. Ct. at 613 ("The Roches, both citizens of Virginia, acknowledge that Lincoln is indeed a corporation, not a partnership, and that Lincoln is chartered in and has its principal place of business in Texas.").


\(^{55}\) Justice Thomas did not participate in the decision. Schmidt, 126 S. Ct. at 942.

\(^{56}\) Id. at 945.
§ 1348 in this context, one would sensibly "locate" a national bank for the very same purpose, *i.e.*, qualification for diversity jurisdiction, in the State designated in its articles of association as its main office.57

Given that both decisions resolved circuit splits, and that it is unsurprising that the Court granted certiorari from the circuits it intended to disagree with, it is hard to read too much into the disagreement between the lower courts and the Supreme Court in *Roche* and *Schmidt*. That is not to say, however, that the two unanimous opinions endorsing somewhat broader views of diversity jurisdiction are without any significance. To the contrary, in subtle ways, both *Roche* and *Schmidt* open the jurisdictional door just a little bit wider in diversity cases by narrowing the potential number of states of which corporations and national banks, respectively, will be held to be citizens.

C. Federal Question Jurisdiction

In marked contrast to *Roche* and *Schmidt*, which arguably righted lower-court decisions that departed from well-established precedent, the Court’s 2005 decision in *Grable*58 answered a question left open two decades earlier in *Merrell Dow*59—whether a well-pleaded federal cause of action was necessary to the exercise of federal question jurisdiction under 28 U.S.C. § 1331, or merely sufficient.60 Specifically, in a state-law quiet title action, could federal question jurisdiction be predicated on the interpretation of a federal statute—a provision of the Internal Revenue Code—that did not itself create a private cause of action but resolution of which was dispositive of the state-law claim? Writing for a unanimous Court, Justice Souter answered that question in the affirmative:

*Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the "sensitive judgments about congressional intent" that § 1331 requires. . . . The Court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues.

[A] comparable analysis yields a different jurisdictional conclusion in this case. Although Congress also indicated ambivalence in this case by providing no private right of action to *Grable*, it is the rare state quiet title action that involves contested issues of federal law.

57. *Id.* at 951–52 (citations omitted); *id.* at 952 ("Treating venue and subject-matter jurisdiction prescriptions as *in pari materia*, the Court of Appeals majority overlooked the discrete offices of those concepts. The resulting Fourth Circuit decision rendered national banks singularly disfavored corporate bodies with regard to their access to federal courts. The language of § 1348 does not mandate that incongruous outcome, nor does this Court’s precedent.” (citation omitted)).


Consequently, jurisdiction over actions like Grable’s would not materially affect, or threaten to affect, the normal currents of litigation. Given the absence of threatening structural consequences and the clear interest the Government, its buyers, and its delinquents have in the availability of a federal forum, there is no good reason to shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of the state-law title claim.

In subtle but perhaps important ways, Grable reaffirmed a broader view of federal question jurisdiction, under which there need not be a federal cause of action to trigger §1331. Although lower courts—and even the Supreme Court—have struggled to define the precise parameters of §1331 in the absence of a federal cause of action, there is little question that the answer is broader than the alternative.

Thus, taking the “statutory” cases together, the 2004 and 2005 Terms might fairly be characterized as embracing broader conceptions of federal jurisdiction, even if only doing so through baby steps.

D. Judge-Made Doctrinal Exceptions

More so than the “statutory” cases described above, however, the most prominent and forceful of the Court’s pro-jurisdiction decisions of the last two Terms have been in cases involving two long-recognized (if over-interpreted) doctrinal exceptions to federal jurisdiction—the Rooker-Feldman doctrine and the probate exception. I consider each of these in turn.

1. Rooker-Feldman

Scholars love to mock, ridicule, and otherwise decry what has become known as the “so-called Rooker-Feldman doctrine,” even wondering in print whether it’s “worth only the powder to blow it up?” A thinly disguised, infrequently defined, and often

61. Grable, 545 U.S. at 318–20 (citation and footnote omitted). Justice Thomas filed a concurrence expressing his agreement with the majority’s application of precedent, but also noting his willingness to consider whether the Court should instead adopt Justice Holmes’ famous dissent in American Well Works v. Layne & Bowler Co., 241 U.S. 257 (1916), which argued for requiring a federal cause of action to trigger federal question jurisdiction under §1331. Grable, 545 U.S. at 320–21 (Thomas, J., concurring); see id. at 318 (majority) (“At the end of Merrell Dow, Justice Holmes was still dissenting.”).

62. One of the three jurisdictional arguments the Court rejected in McVeigh, 126 S. Ct. 2121 (2006), was that the state-law reimbursement action satisfied Grable because it required resolution of a question under the Federal Employees Health Benefits Act of 1959, 5 U.S.C. §§ 8901–8913. As Justice Ginsburg wrote for the majority,

This case is poles apart from Grable. The dispute there centered on the action of a federal agency (IRS) and its compatibility with a federal statute, the question qualified as “substantial,” and its resolution was both dispositive of the case and would be controlling in numerous other cases. Here, the reimbursement claim was triggered, not by the action of any federal department, agency, or service, but by the settlement of a personal-injury action launched in state court, and the bottom-line practical issue is the share of that settlement properly payable to Empire.

Id. at 2137 (citations omitted).

63. For a decision in which the divided opinions manifest this divide, review Mikulski v Centerior Energy Corp., 435 F.3d 666 (6th Cir. 2006), vacated on reh’g en banc, No. 03-4486 (6th Cir. Apr. 26, 2006); see also Nicodemus v. Union P Corp., 440 F.3d 1227 (10th Cir. 2006).


badly misunderstood confluence of principles of preclusion and vertical federalism, *Rooker-Feldman*, at its simplest, operates as a bar on subject-matter jurisdiction in any lower federal court over a lawsuit that is tantamount to an appeal of a final state court decision. In that regard, the analogy to the “favorable termination” rule of *Heck v. Humphrey* is inescapable—both doctrines purport to limit lawsuits that would require a subsequent court to collaterally invalidate an earlier decision. As one article recently put it, *Rooker-Feldman* “rests on inferences from two aspects of the federal courts’ statutory jurisdictional structure—that district-court jurisdiction is original, not appellate, and that the Supreme Court is the only federal court given statutory appellate jurisdiction over decisions of any state courts.”

The Supreme Court, the story goes, had a much dimmer view of the doctrine than the lower federal courts, to whom *Rooker-Feldman* became a quasi-magical means of docket-clearing in the years after the latter of the eponymous twins—*Feldman*—was decided. Indeed, the Supreme Court has actually applied *Rooker-Feldman* only twice, in *Rooker* and *Feldman*, despite literally hundreds, if not thousands, of lower federal court decisions dismissing federal lawsuits entirely by reference to the doctrine. As the Court would note in *Saudi Basic*, “the doctrine has sometimes been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress’ conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law pursuant to 28 U. S. C. § 1738.” After years of lower-court uncertainty over the continuing scope of *Rooker-Feldman*, the Supreme Court finally stepped in during the 2004 Term, unanimously reining in the lower courts’ excessive reliance on the doctrine in *Saudi Basic*.

At issue in *Saudi Basic* were royalty charges arising out of joint venture

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71. Sherry, *supra* n. 68, at 1088. As Justice Ginsburg explained,


72. *Saudi Basic*, 544 U.S. at 288 n. 3.
73. *Id.* at 280.
agreements between Saudi Basic and two Exxon Mobil subsidiaries. Saudi Basic brought a preemptive lawsuit in Delaware Superior Court, seeking declaratory judgment that the royalty charges were consistent with the joint venture agreements. Two weeks later, Exxon Mobil brought its own suit in the U.S. District Court for the District of New Jersey, alleging that Saudi Basic had overcharged the royalties. The Delaware state suit eventually went to trial, and the jury returned a verdict exceeding $400 million in favor of the Exxon Mobil defendants. Meanwhile, Saudi Basic moved to dismiss the federal lawsuit on the ground that it was entitled to sovereign immunity under the Foreign Sovereign Immunities Act. After the district court denied the motion on the ground that Saudi Basic waived its immunity by filing the Delaware state court suit, Saudi Basic took an interlocutory appeal, which was heard over eight months after the jury verdict in state court.

On its own motion, the Third Circuit Court of Appeals held that, although federal jurisdiction existed at the time Exxon Mobil filed the federal lawsuit, and although Exxon Mobil, the plaintiff in the federal lawsuit, was hardly “appealing” an adverse state court judgment, the jury verdict returned by the Delaware Superior Court served to divest the federal courts of continuing jurisdiction pursuant to Rooker-Feldman. The Supreme Court, in forceful language, reversed, emphasizing that Rooker-Feldman is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. Rooker-Feldman does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.

Thus, the Saudi Basic Court unanimously held that federal jurisdiction over Exxon Mobil’s suit was not foreclosed:

This case surely is not the “paradigm situation in which Rooker-Feldman precludes a federal district court from proceeding.” ExxonMobil plainly has not repaired to federal court to undo the Delaware judgment in its favor. Rather, it appears ExxonMobil filed suit in Federal District Court (only two weeks after SABIC filed in Delaware and well before any judgment in state court) to protect itself in the event it lost in state court on grounds (such as the state statute of limitations) that might not preclude relief in the federal venue. Rooker-Feldman did not prevent the District Court from exercising jurisdiction when ExxonMobil filed the federal action, and it did not emerge to vanquish jurisdiction after ExxonMobil prevailed in the Delaware courts.

Any lingering doubt about the forcefulness of Saudi Basic’s strongly worded renunciation of Rooker-Feldman was laid to rest early in the 2005 Term, in Lance v.
Lance was the third in a series of lawsuits arising out of Colorado's redistricting after the 2000 census. In the first case, People ex rel. Salazar v. Davidson, the Colorado Supreme Court invalidated a redistricting plan enacted by the Colorado General Assembly on the ground that it violated the Colorado Constitution, and instead ordered the Secretary of State to use a court-ordered plan. In the second suit, Keller v. Davidson, a three-judge federal district court held that Rooker-Feldman precluded the defendants from amending their counterclaims to include additional claims that sought to challenge the Colorado Supreme Court's decision in Salazar.

Lance, the third suit, was filed by Colorado citizens unhappy with the decision in Salazar seeking an order requiring the Colorado Secretary of State to use the legislature's plan, rather than the plan fashioned by the Colorado Supreme Court. The Lance suit alleged that the state constitutional provision relied upon by the Colorado Supreme Court in Salazar was itself inconsistent with the Elections Clause of Article I of the U.S. Constitution, and the First Amendment's Petition Clause. A three-judge federal district court dismissed the suit on the ground that Rooker-Feldman applied and foreclosed jurisdiction. Exercising its mandatory appellate jurisdiction, the Supreme Court summarily reversed.

At the heart of the Court's decision was the question of privity. The district court had concluded that the citizen plaintiffs in Lance were in privity with the Colorado General Assembly, one of the losing parties in Salazar, and that Rooker-Feldman therefore applied to bar their federal lawsuit. The Supreme Court disagreed, concluding that the district court had erroneously conflated principles of preclusion with the Rooker-Feldman doctrine:

Whatever the impact of privity principles on preclusion rules, Rooker-Feldman is not simply preclusion by another name. . . . The Rooker-Feldman doctrine does not bar actions by nonparties to the earlier state-court judgment simply because, for purposes of preclusion law, they could be considered in privity with a party to the judgment.

Far more noteworthy than the majority's short per curiam reversal, however, is Justice Stevens' dissent. Although Justice Stevens would have affirmed the district

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82. For a more recent survey of the background, review Lance v. Coffman, 127 S. Ct. 1194, 1195–96 (2007) (per curiam).
83. 79 P.3d 1221 (Colo. 2003); 541 U.S. 1093 (2004).
84. Id. at 1283.
86. 79 P.3d at 1284.
87. Lance, 379 F. Supp. 2d. at 1122.
89. Id. at amend. 1.
91. Id. at 1124.
92. Id. at 1125.
93. Lance, 126 S. Ct. at 1202 ("Incorporation of preclusion principles into Rooker-Feldman risks turning that limited doctrine into a uniform federal rule governing the preclusive effect of state-court judgments, contrary to the Full Faith and Credit Act.").
court's dismissal on other grounds,\(^9\) he reiterated, at first, that the Court's rejection of Rooker-Feldman in Lance demonstrated just how little of the doctrine survived the Court's decision the previous Term in Saudi Basic:

Rooker and Feldman are strange bedfellows. Rooker, a unanimous, three-page opinion written by Justice Van Devanter in 1923, correctly applied the simple legal proposition that only this Court may exercise appellate jurisdiction over state-court judgments. Feldman, a nonunanimous, 25-page opinion written by Justice Brennan in 1983, was incorrectly decided and generated a plethora of confusion and debate among scholars and judges. Last Term, in Justice Ginsburg's lucid opinion in Exxon Mobil Corp. v. Saudi Basic Industries Corp., the Court finally interred the so-called "Rooker-Feldman doctrine." And today, the Court quite properly disapproves of the District Court's resuscitation of a doctrine that has produced nothing but mischief for 23 years.\(^9\)

Thus, whereas Saudi Basic had rejected Rooker-Feldman's applicability to a "protective action" filed in federal court by a state court defendant while the state court proceeding remained pending, Lance went an important step further, disclaiming Rooker-Feldman's applicability to almost all federal lawsuits brought by non-losing parties (including non-parties) in the relevant state court action.\(^9\)

Lower courts, in the aftermath of the two decisions, have begun to take the Court's repudiation of Rooker-Feldman to heart, and the twin killing that Rooker-Feldman received in Saudi Basic and Lance may fairly be characterized as a decisively pro-jurisdiction result. As subsequent cases have suggested, Rooker-Feldman after Saudi Basic and Lance is an incredibly narrow exception to federal jurisdiction, applying only to lawsuits that are inescapably tantamount to appeals by state-court losers.\(^9\) It is no overstatement to describe the current Rooker-Feldman doctrine as but a shadow of its former self.

2. The Probate Exception

I began this article by discussing the Supreme Court's decision in the Anna Nicole case, Marshall v. Marshall.\(^9\) In important ways, Marshall is perhaps the best microcosm of whatever jurisdictional trend we might infer from the last two Terms, and looks, for all intent and purposes, very much like the anti-Rooker-Feldman decisions in

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\(^9\) Id. at 1204 (arguing that issue preclusion should have precluded the plaintiffs' claims); but see id. at 1203 (Ginsburg & Souter, JJ., concurring) ("Although Justice Stevens has persuasively urged that issue preclusion warrants affirmance, that question of Colorado law seems to me best left for full airing and decision on remand." (citation omitted)).

\(^9\) Id. at 1203–04 (Stevens, J., dissenting) (citations omitted).

\(^9\) On this point, the majority left the door open, but only barely. See id. at 1202 n. 2 ("In holding that Rooker-Feldman does not bar plaintiffs here from proceeding, we need not address whether there are any circumstances, however limited, in which Rooker-Feldman may be applied against a party not named in an earlier state proceeding—e.g., where an estate takes a de facto appeal in a district court of an earlier state decision involving the decedent.").

\(^9\) E.g. Turner v. Crawford Square Apts. III, L.P., 449 F.3d 542 (3d Cir. 2006); Adkins v. Rumsfeld, 464 F.3d 456 (4th Cir. 2006); Mo's Express, LLC v. Sopkin, 441 F.3d 1229 (10th Cir. 2006) (discussing the near evisceration of Rooker-Feldman). For two rare examples of circuit court decisions upholding application of Rooker-Feldman after Saudi Basic and Lance, review O'Malley v. Lutscher, 465 F.3d 799 (7th Cir.) (per curiam), and Tal v. Hogan, 453 F.3d 1244 (10th Cir. 2006).

\(^9\) 126 S. Ct. 1735.
Saudi Basic and Lance.

The facts of Marshall, save for perhaps the dollar signs, are unextraordinary. Vickie Lynn Marshall (Anna Nicole Smith) married J. Howard Marshall II, in June 1994. J. Howard died in August 1995, leaving almost all of his estate to his son, Pierce, through a living trust and a "pourover" will, even though Vickie Lynn maintained that J. Howard had intended to provide for her financial security upon his death via a "catch-all" trust. While J. Howard's will was subject to ongoing probate proceedings in state court in Harris County, Texas, Vickie Lynn filed for bankruptcy in the U.S. Bankruptcy Court for the Central District of California in January, 1996. Pierce subsequently filed a proof of claim in the bankruptcy proceeding, alleging that Vickie Lynn was liable for defamation arising out of claims made by her lawyers about Pierce's interference with J. Howard's will. Vickie Lynn answered and counterclaimed, alleging tortious interference with an inter vivos gift, which converted the bankruptcy filing into an adversary proceeding. After a trial on the merits, the bankruptcy court entered judgment for Vickie Lynn, awarding $449 million in compensatory damages and $25 million in punitive damages. Pierce objected, arguing for the first time that the "probate exception" to federal jurisdiction prevented the bankruptcy court from proceeding to the merits of Vickie Lynn's counterclaim.99

The bankruptcy court held that Pierce's "probate exception" argument had been waived. On appeal, the district court disagreed with the conclusion that applicability of the probate exception was waivable, but held that, in any event, the exception did not apply.100 The Ninth Circuit reversed, concluding that

[the] reach of the probate exception encompasses not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument. Such questions include fraud, undue influence upon a testator, and tortious interference with the testator's intent.101

The Supreme Court disagreed. After summarizing the somewhat dubious history of the probate exception, which, like the "domestic relations" exception, arguably derives from language contained in the Judiciary Act of 1789,102 the Court concluded that it "need not consider in this case whether there exists any uncodified probate exception to federal bankruptcy jurisdiction under § 1334," because "Vickie Marshall's claim falls far outside the bounds of the probate exception described in Markham [v. Allen]."103 As Justice Ginsburg wrote for a unanimous Court,

99. Id. at 1742. For a summary of the facts, review id. at 1741–44; Marshall, 253 B.R. at 553–56.
100. Marshall, 126 S. Ct. at 1743.
101. Marshall, 392 F.3d at 1133.
102. See Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992) (anchoring the domestic relations exception in the original language of the Judiciary Act's grant of federal diversity jurisdiction, which extended to "suits of a civil nature at common law or in equity"). Thus, the domestic relations exception, and the probate exception after it, see Markham v. Allen, 326 U.S. 490, 494 (1946), has been justified largely by the extent to which certain actions were not cognizable before English Courts of Chancery in 1789. Cf. Grupo Mexicano de Desarrollo S.A v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999). For a persuasive argument that there is no support in Chancery practice for the existence of any probate exception, see John F. Winkler, The Probate Jurisdiction of the Federal Courts, 14 Prob. L.J. 77 (1997).
103. Marshall, 126 S. Ct. at 1746.
Vickie’s claim does not involve the administration of an estate, the probate of a will, or any other purely probate matter. Provoked by Pierce’s claim in the bankruptcy proceedings, Vickie’s claim, like Carol Ankenbrandt’s, alleges a widely recognized tort. . . . Vickie seeks an in personam judgment against Pierce, not the probate or annulment of a will. . . . Nor does she seek to reach a res in the custody of a state court.

Furthermore, no sound policy considerations militate in favor of extending the probate exception to cover the case at hand. Trial courts, both federal and state, often address conduct of the kind Vickie alleges. State probate courts possess no special proficiency . . . in handling [such] issues.104

Rejecting the Ninth Circuit’s alternative holding that the Texas Probate Court’s conclusion that it had exclusive jurisdiction ousted the federal district court’s authority, the Court reversed the Ninth Circuit and remanded to allow the lower courts to consider Pierce’s other arguments.105

As in Lance, however, perhaps the more interesting opinion came from Justice Stevens, who wrote separately to concur in part and concur in the judgment. Justice Stevens did not object to the majority’s conclusion that Anna Nicole’s claim fell outside the “probate exception”; he objected to its refusal to do away with the probate exception altogether:

To be sure, there are cases that support limitations on federal courts’ jurisdiction over the probate and annulment of wills and the administration of decedents’ estates. But careful examination reveals that at least most of the limitations so recognized stem not from some sui generis exception, but rather from generally applicable jurisdictional rules. Some of those rules, like the rule that diversity jurisdiction will not attach absent an inter partes controversy, plainly are still relevant today. Others, like the rule that a bill in equity will lie only where there is no adequate remedy elsewhere, have less straightforward application in the wake of 20th-century jurisdictional developments. Whatever the continuing viability of these individual rules, together they are more than adequate to the task of cabining federal courts’ jurisdiction. They require no helping hand from the so-called probate exception.

Rather than preserving whatever vitality that the “exception” has retained as a result of the Markham dicta, I would provide the creature with a decent burial in a grave adjacent to the resting place of the Rooker-Feldman doctrine.106

At most, then, the probate exception after Marshall “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.”107 And yet, one important post-Marshall case suggests that Justice Stevens may well have his way, and that the probate exception may well disappear altogether.

In Jones v. Brennan,108 Judge Posner rejected the district court’s applicability of

104. Id. at 1748–49 (citations and internal quotation marks omitted).
105. Id. at 1750.
106. Id. at 1751–52 (citations omitted).
107. Id. at 1758.
108. 465 F.3d 304 (7th Cir. 2006).
the probate exception, even though the plaintiff's civil rights suit was "complaining simply about the maladministration of her father's estate by the Cook County probate court, . . . tantamount to asking the federal district court to take over the administration of the estate. That clearly would violate the probate exception."\textsuperscript{109} In reversing the district court, the Seventh Circuit Court of Appeals emphasized that one of the plaintiff's claims—for mismanagement of her father's estate—"does not ask the court in which it is filed to administer the estate, but rather to impose tort liability on the guardians for breach of fiduciary duty."\textsuperscript{110} Although the basis for original jurisdiction might have fallen within the probate exception, the court was unwilling to dismiss the entire lawsuit on the record before it because of the possibility that supplemental jurisdiction existed over the breach of fiduciary duty claim.\textsuperscript{111} What Jones suggests, then, is that the probate exception may only apply when it is absolutely clear that the only basis for federal jurisdiction is a claim directly attacking the property in possession of the state probate court, a narrow class of lawsuits, indeed.

All told then, the Court's decisions in \textit{Saudi Basic}, \textit{Lance}, and \textit{Marshall} reduce almost to nothingness two longstanding and oft-invoked doctrinal exceptions to federal jurisdiction. That the Court was aware of the relationship between the decisions is obvious, given the explicit link between Justice Stevens' dissenting opinion in \textit{Lance} and his opinion concurring in the judgment in \textit{Marshall}. For whatever reason, the Court seemed bent, during the 2004 and 2005 Terms, on reining in excessive and unduly expansive lower-court interpretations of exceptions to federal jurisdiction. But why? And why now?

\textbf{III. THE LOWER COURTS VS. THE SUPREME COURT: FOUR THEORIES}

To whatever extent there is a pattern to be found in the Supreme Court's jurisdictional decisions over the past two Terms,\textsuperscript{112} obvious explanations for such a pattern are not easily found. It is possible, of course, that the Court was merely confronted with a series of bad lower-court decisions overreaching in their interpretation of limitations in federal jurisdictional statutes, or of doctrinal exceptions to federal jurisdiction such as \textit{Rooker-Feldman} and the probate exception. And yet, the timing is perhaps the best indicator that the coincidence of these cases are not just fortuitous.

In this part, I investigate four possible theories: first, that the trend reflects the simple and unsurprising truth that, in response to increasing pressure on the district courts to manage their overcrowded dockets, there is no simpler or more efficient means of disposing of cases than by rejecting subject-matter jurisdiction. Second, I consider the jurisdictional trend as a variation on the "Backdoor Federalization" thesis proposed by

\textsuperscript{109} \textit{Id.} at 307.

\textsuperscript{110} \textit{Id.} at 307–08.

\textsuperscript{111} \textit{See id.} at 308–09.

\textsuperscript{112} I have not devoted much of this article to suggesting that this trend in the last two Terms, to whatever extent it is deliberate, is also new. But as one article suggests, in the five years leading up to (and including) the 2002 Term, the Court displayed something of a "conservative" trend in cases in which federal jurisdiction was at issue. Richard G. Wilkins et al., \textit{Supreme Court Voting Behavior: 2002 Term}, 31 Hastings Const. L.Q. 499, 510 (2004).
Professors Issacharoff and Sharkey, specifically that there has been an increasing trend of "partial federalization" of areas historically governed by state law. Although the narrowing of anti-jurisdictional doctrines does not neatly dovetail with the topics surveyed by Issacharoff and Sharkey, I suggest that some of the same trends may explain both results. Third, after suggesting that neither of the first two explanations sufficiently account for the timing of this trend—that is, why the last two Terms, in particular, have seen the emergence of such a pro-jurisdiction view—I suggest that there may be deeper separation of powers concerns at work in these cases, particularly in light of the unusual volume of jurisdiction-conferring and jurisdiction-stripping legislation enacted by the 109th Congress.

Finally, and given the extent to which the separation-of-powers theory provides little insight into the decisions in Saudi Basic, Lance, and Marshall, I suggest that we might better conceive of these decisions as part of the Court's new jurisdictional formalism, a (perhaps inevitable) result of the aftermath of the 1998 decision in Steel Co. v. Citizens for a Better Environment, which, in rejecting the doctrine of hypothetical jurisdiction, has been mistakenly overestimated as turning the existence of federal jurisdiction into a far more formalistic inquiry than even the Steel Co. Court intended. That is to say, perhaps most of these decisions can best be explained as the Supreme Court's response to the lower courts' implicit (but undeniable) overreaction to Steel Co., especially when considered alongside the Court's increasing frustration with lower-court decisions holding that various time limits or substantive statutory requirements are "jurisdictional." Indeed, perhaps what these cases really teach us is that the new jurisdictional formalism is really just a new variation on the old jurisdictional minimalism.

A. Docket Clearing

The easiest explanation is also the one that is most quickly rejected. No one seriously contests that federal judges are overworked, and that the increase in the size of federal court dockets in recent years (and decades) has far outstripped, by several orders of magnitude, the rather stable size of the federal judiciary. With the increasing workload, the obvious pressures on district judges (and circuit judges) to avoid reaching the merits of any lawsuit in which a dispositive procedural obstacle may be found are undeniable. And especially with respect to Rooker-Feldman, it has long been suggested that the warm reception the doctrine received in the district courts was


115. E.g. Evans v. Chavis, 126 S. Ct. 846, 858 (2006) (Stevens, J., concurring in the judgment); see also Super. Fireplace Co. v. Majestic Prods. Co., 270 F.3d 1358, 1382 (Fed. Cir. 2001) (Dyk, J., dissenting) ("District courts already are overworked and we need not add to their burden.").

116. See William H. Rehnquist, 2004 Year-End Report on the Federal Judiciary 10 n. 1 (2005) (available at http://www.supremecourts.gov/publicinfo/year-end/2004year-endreport.pdf) (noting an overall nineteen-percent increase in civil filings over the previous ten years); id. at 10 n. 3 (noting an overall fifty-five percent increase in criminal filings over the previous ten years); id. at 10 n. 2 (noting a twenty-five percent increase in appeals to the twelve regional courts of appeals over the same period).
directly related to its utility as a docket-clearing device.117

Thus, the “docket clearing” theory posits that district courts have clear incentives to under-interpret jurisdictional statutes and to over-interpret doctrinal exceptions thereto. If given a choice between two competing interpretations of a statute, one which confirms the existence of subject-matter jurisdiction and one which rejects it, it hardly strains credulity to understand why judges would choose the anti-jurisdiction interpretation, particularly where, as in virtually all non-habeas cases,118 a state-court forum remains available.

As will become clear with respect to most of the possible explanations for this jurisdictional trend, the docket-clearing theory cannot overcome the most obvious question: why now? Civil filings in federal court actually declined in 2005 as compared to 2004,119 and there is no other obvious explanation for why docket-clearing pressures, at least in the district courts,120 would be any greater today than at any prior point during the last decade. Thus, whereas there is every reason to expect overworked judges to embrace narrower conceptions of federal jurisdiction, there is no reason why there would be any noticeable increase in such decisions in the past several years, as compared to the past decade on the whole. Simply put, docket clearing is unconvincing simply because it is too generic, and does not do the work of explaining why, all of a sudden, the Supreme Court would be particularly sensitive to the scope of federal subject-matter jurisdiction in the lower courts.

B. Federal Jurisdiction and “Backdoor Federalization”

The second possibility is best understood as an analogy to Issacharoff and Sharkey’s “Backdoor Federalization” thesis—that “that the U.S. Supreme Court has, in preemption and forum-allocation cases, attempted to capture the considerable benefits that flow from national regulatory uniformity and to protect an increasingly unified national (and international) commercial market from the imposition of externalities by unfriendly state legislation.”121 Thus, Issacharoff and Sharkey argue, “federal

117. E.g Bandes, supra n. 68.
120. The Courts of Appeals present something of a different story. As Chief Justice Roberts noted in his 2005 Year-End Report,
Filings in the regional courts of appeals rose 9 percent to an all-time high of 68,473, marking the 10th consecutive record-breaking year and the 11th successive year of growth. This increase stemmed from upswings in criminal appeals, original proceedings, and prisoner petitions following the U.S. Supreme Court’s decisions in Blakely v. Washington, 542 U.S. 296 (2004) and U.S. v. Booker, 543 U.S. 220 (2005), and from continued growth in appeals of administrative agency decisions involving the Board of Immigration Appeals (BIA). As large as the increase is, it would have been higher had not the Court of Appeals for the Fifth Circuit’s operations been affected by Hurricane Katrina.

Id. at 8 n. 2.
121. Issacharoff & Sharkey, supra n. 113, at 1356.
substantive law and federal forum law, in tandem, serve to stave off the inherent risk of predation—when one state encroaches upon the decisional autonomy of another.¹²² Preemption, then, is perhaps the central player to backdoor federalization, for it preserves horizontal federalism—the allocation of power as between the states—by reinforcing vertical federalism—the supremacy of federal law.

There is a superficial correlation between backdoor federalization and broader conceptions of federal subject-matter jurisdiction, because a federal judicial forum is inevitably a central player in the “national regulatory uniformity” that is the ultimate end to which backdoor federalization aspires. And yet, the analogy is not much more than superficial. Whereas preemption displaces state substantive law, federal jurisdiction does not, at least of its own operation. Indeed, in most of the cases surveyed in this article, the existence of federal jurisdiction was to provide a federal forum for the vindication of claims based on state law, e.g., Marshall, Saudi Basic, Grable, Roche, Schmidt, and Allapattah. Absent some suggestion that federal resolution of state-law cases implicates and otherwise manifests partial federalization in ways that state court resolution would not, the backdoor federalization thesis simply cannot carry the weight of the cases surveyed herein.

C. Federal Jurisdiction and the Separation of Powers

A third possible explanation for the Court’s increasing sensitivity to overbearing lower-court constraints on federal jurisdiction derives largely from Hamdan. Although the Court in Hamdan concluded that DTA did not apply, and therefore did not divest it of jurisdiction over Hamdan’s case,¹²³ there is little question that the 109th Congress took an unusually aggressive approach to federal jurisdiction, and to its relationship with the federal judiciary more generally. Consider, briefly, the list of statutes enacted by the 109th Congress implicating federal jurisdiction (in chronological order): The Class Action Fairness Act of 2005,¹²⁴ the Terri Schiavo Bill,¹²⁵ the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,¹²⁶ the REAL ID Act of 2005,¹²⁷ the Detainee Treatment Act of 2005,¹²⁸ and, with some smaller statutes in the middle,¹²⁹ the increasingly notorious Military Commissions Act of 2006.¹³⁰ Indeed, it might fairly be suggested that Congress has not taken such a specific and case-by-case interest in federal jurisdiction since the time of Reconstruction and the great debates over the Military Reconstruction Act¹³¹ (and Congress’ attempts to preclude the Supreme Court from

¹²². Id. at 1431.
¹²³. Hamdan, 126 S. Ct. at 2762–69.
¹²⁸. 119 Stat. at 2739–44.
¹³⁰. 120 Stat 2600.
pronouncing upon its constitutionality\textsuperscript{132}). Nor has this interest been solely in the direction of \textit{curtailing} the jurisdiction of the federal courts. The Class Action Fairness Act, for one, expands federal jurisdiction in some exceedingly important respects,\textsuperscript{133} and the Schiavo bill was arguably necessary to overcome the jurisdictional bar that \textit{Rooker-Feldman} might have interposed. So, too, the REAL ID Act actually restores to the direct appellate jurisdiction of the circuit courts the authority to decide entire classes of claims over which jurisdiction had been foreclosed by Antiterrorism and Effective Death Penalty Act of 1996\textsuperscript{134} and Illegal Immigration Reform and Immigrant Responsibility Act of 1996,\textsuperscript{135} albeit while foreclosing habeas jurisdiction over the same claims in the process.\textsuperscript{136}

Regardless of where one comes down on the merits of each individual measure, it seems clear that Congress has increasingly come to view its power over federal jurisdiction as an important means by which it can achieve substantive policy outcomes. With that increase, however, comes a wholly unsurprising concern for the separation of powers, which are understandably implicated by too much congressional interference in the workload and operation of the federal courts.\textsuperscript{137}

Concomitant with the growing concern over the trend of congressional interference in federal jurisdiction has been the reaffirmation by the Supreme Court of a clear statement rule in the jurisdiction-stripping context. Thus, in \textit{Hamdan}, the Court's jurisdictional analysis turned entirely on the absence of a clear statement in the DTA that the jurisdiction stripping was intended to apply to pending cases.\textsuperscript{138} Although Justice Scalia has criticized the Court's jurisdiction-stripping jurisprudence as requiring a "superclear statement" (or "magic words"),\textsuperscript{139} there are important institutional prerogatives served by such an interpretive canon. Because of the myriad constitutional issues that jurisdiction-stripping legislation raises—issues that are only heightened in the context of statutes depriving the federal courts of habeas jurisdiction—there is every reason for courts to assume, absent an absolutely express statement from Congress, that no desire to reach the underlying constitutional questions exists.\textsuperscript{140}

The question that emerges, then, is whether we might re-conceive of the Court's jurisdictional jurisprudence in non-jurisdiction-stripping cases as also moving toward

\begin{itemize}
  \item \textsuperscript{132} See \textit{Ex parte McCardle}, 74 U.S. 506 (1868); see generally William W. Van Alstyne, \textit{A Critical Guide to Ex parte McCardle}, 15 Ariz. L. Rev. 229 (1973).
  \item \textsuperscript{133} See generally Edward F. Sherman, \textit{Class Actions after the Class Action Fairness Act of 2005}, 41 Tulsa L. Rev. 1593 (2006).
  \item \textsuperscript{134} Pub L. No. 104-132, 110 Stat. 1214 (1996).
  \item \textsuperscript{136} For an intriguing survey of the issues raised by REAL ID's reallocation of jurisdiction, see Aaron G. Leiderman, Student Author, \textit{Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions under the REAL ID Act}, 106 Colum. L. Rev. 1367 (2006).
  \item \textsuperscript{137} \textit{E.g. Schiavo ex rel. Schindler v. Schiavo}, 404 F.3d 1270, 1272–75 (11th Cir. 2005) (Birch, J., specially concurring in denial of rehearing en banc) (suggesting that the Schiavo bill unconstitutionally infringes upon the separation of powers).
  \item \textsuperscript{138} \textit{Hamdan}, 126 S. Ct. at 2763–64.
  \item \textsuperscript{140} Id. at 301 n. 13 (majority) ("The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely.").
\end{itemize}
this principle. Whereas jurisdiction stripping specifically implicates the due process rights of litigants (and the Suspension Clause rights of detainees in habeas cases), undue jurisdictional interference, even in non-stripping cases, may more broadly implicate the proper separation of powers, largely for the reasons traced by Judge Birch in his Schiavo opinion.\(^{141}\) So understood, the Court might tacitly be moving its *entire* jurisprudence concerning the scope of federal jurisdiction toward more of a clear statement regime, narrowing exceptions that have been read into statutory language, or that have resulted from judge-made law, in the absence of clear indicia of congressional intent. These cases, then, might be seen as the opening salvo in the coming separation-of-powers conflict, or, perhaps, as the Court's attempt to clear the doctrine of unnecessary underbrush before the true interbranch conflict arises.

*Hamdan,* at least, would fit into such a paradigm. But, with the possible exception of *Allapattah,* none of the Court's other jurisdictional decisions from the last two Terms are easily reconciled with this theory. Take *Grable,* for example—there, the Supreme Court interpreted the scope of the judicially created "well-pleaded complaint rule," which is, at best, only implicitly tied to the text of § 1331.\(^{142}\) Neither *Saudi Basic* nor *Marshall* can really be seen as rejecting an insufficiently clear statement of congressional intent to deny federal jurisdiction. Concerns over the proper separation of powers may well have been a serious motivating factor behind the jurisdictional analysis in *Hamdan,* and to some degree *Allapattah,* but it helps to explain little else about the jurisdictional jurisprudence of the 2004 and 2005 Terms.

**D. The New Jurisdictional Formalism: Whither Steel Co.?**

Whereas each of the theories above may have something to do with *some* of the Court's decisions in jurisdictional cases from the last two Terms, none of them, as I have suggested, convincingly tie the decisions together. And yet, there is one more possible explanation that transcends both the type of jurisdiction at issue and the federalism/separation-of-powers implications at stake in each case: The aftermath of *Steel Co.*

Much has been written about the Court's 1998 decision in *Steel Co.*,\(^{143}\) in which the Court rejected the doctrine of "hypothetical jurisdiction," wherein lower courts had often reached the merits of cases where jurisdiction presented a close question, but the merits were easily resolved in favor of the party opposing jurisdiction.\(^{144}\) That is, courts assumed the existence of jurisdiction in order to reach (and decide) easier questions on the merits. In sweeping and formalistic terms, *Steel Co.* emphasized that subject-matter jurisdiction either did or did not exist, but that the federal courts lacked the authority to do *anything,* including decide easier questions on the merits, unless they first satisfied

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141. *Schiavo,* 404 F.3d at 1272–75.
themselves as to the presence of subject-matter jurisdiction.145

The response to Steel Co. in the lower courts was hardly surprising. All of a sudden, the lower courts became preoccupied with the existence vel non of federal subject-matter jurisdiction, and also with questions as to what aspects of a lawsuit are, in the first instance, "jurisdictional" (because Steel Co. denied to the lower courts the power to ignore, or at least forestall resolution of, such questions). Thus, the aftermath of Steel Co. saw a dramatic upsurge in lower-court opinions deciding "jurisdictional" questions. Even after the Court slightly retreated from Steel Co. in the Marathon Oil case in 1999,146 the reaction in the lower courts was a newfound respect (perhaps too much so) for the scope of federal jurisdiction.

That the lower courts went too far in reacting to the Supreme Court is hardly surprising, given the literalistic formalism that pervades the majority opinion in Steel Co. If "jurisdiction" is to be such an immutable and unwaivable construct, then such a conception necessarily results in enormous pressure on the lower courts first to identify the range of issues that are "jurisdictional," and then to decide whether jurisdiction exists.147

So construed, a second relevant line of cases to consider alongside the pro-jurisdiction decisions are those recent cases in which the Court has reversed lower-court decisions holding that aspects of a lawsuit are "jurisdictional" when they are not. Last Term, for example, the Court unanimously held, per Justice Ginsburg, that the numerosity requirement for establishing whether a company is an "employer" within the meaning of Title VII is not jurisdictional,148 reversing a Fifth Circuit Court of Appeals' decision to the contrary.149 Emphasizing that "[j]urisdiction . . . is a word of many, too many, meanings," the Court held that the numerosity requirement was an element of the plaintiff's substantive Title VII claim, and that the defendant therefore waived its claim that it was not satisfied by failing to object until after the trial court entered judgment.150

To similar effect was the Court's unanimous 2003 decision in Kontrick v. Ryan,151 in which Justice Ginsburg, again writing for the Court, held that the time limit for objecting to discharge of a bankruptcy by contesting the timeliness of the original complaint was not jurisdictional.152 Whereas "a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be

145. Id. at 101–02.
147. Indeed, various Justices bemoaned the seeming inflexibility of the majority opinion on precisely these grounds. E.g., Steel Co., 523 U.S. at 111 (Breyer, J., concurring in part and concurring in the judgment).
148. Arbaugh, 126 S. Ct. 1235. Justice Alito did not participate. For a far more thorough treatment of Arbaugh, and one that argues that the Court did not go far enough in drawing the divide between subject-matter jurisdiction and the substantive merits (in similar form as Justice Stevens' concurrence in Marshall), review Howard Wasserman, Jurisdiction, Merits, and Substantiality, 42 Tulsa L. Rev. 579 (2007).
152. Id. at 459–60.
forfeited if the party asserting the rule waits too long to raise the point."\textsuperscript{153} A few weeks later, in \textit{Scarborough v. Principi},\textsuperscript{154} the Court, once more per Justice Ginsburg, reaffirmed the extent to which most time limits do not implicate the federal courts’ subject-matter jurisdiction, holding that the thirty-day time limit for filing an application for fees under the Equal Access to Justice Act\textsuperscript{155} is not “jurisdictional.”\textsuperscript{156}

I mention these cases not to expand the scope of this article, but to suggest that they support this conception of what is truly driving the Court in most of the present “jurisdictional” cases. That is, perhaps what we are seeing in the decisions of the 2004 and 2005 Terms is the Supreme Court’s reaction to the lower courts’ overreaction to the Supreme Court’s decision in \textit{Steel Co}. The Court, in formalistic terms, is emphasizing the narrow scope of what it means for an issue to be “jurisdictional,” and is, in the process, narrowing the scope of previously recognized exceptions to that jurisdiction. For lack of a better term, we might conceive of this trend as a new jurisdictional formalism, eschewing broad conceptions of what is “jurisdictional” and embracing broad conceptions of what “jurisdiction” is. Put differently, if the Court is to take such a formalistic view toward federal jurisdiction, it makes sense that the Court would also take a far more literal view toward its scope. The “virtually unflagging obligation” identified in prior cases\textsuperscript{157} becomes all the more so with respect to those facets of a lawsuit that actually are “jurisdictional.”

\section*{IV. Conclusion}

Whatever the ultimate explanation for the Court’s movement toward broader conceptions of federal jurisdiction, the remaining question is what implications this trend might have in future cases. On a case-by-case basis, the answer is readily discernable. \textit{Marshall}, as discussed above, narrows the probate exception almost to the point of nonexistence. \textit{Saudi Basic} and \textit{Lance}, too, render \textit{Rooker-Feldman} a mere shadow of its former self. But as we approach the tenth anniversary of \textit{Steel Co}., what implications might this new jurisdictional formalism have in other areas of the law of federal jurisdiction, or of federal law more generally?

One obvious potential target is abstention doctrine, which, like the \textit{Rooker-Feldman} doctrine and the probate exception, has long been far more well-received in the lower courts than in the Supreme Court. Particularly vulnerable may be the form of abstention deriving from the \textit{Burford v. Sun Oil Co}. decision,\textsuperscript{158} under which federal courts are to abstain from entertaining lawsuits that might interfere with complex state administrative processes. For one quick example of the decreasing utility of \textit{Burford},

\begin{itemize}
\item 153. \textit{Id}. at 444–45.
\item 154. 541 U.S. 401 (2004).
\item 156. \textit{Scarborough}, 541 U.S. at 413–14 (citing \textit{Kontrick}, 540 U.S. at 454–55); but see \textit{id}. at 426–27 (Scalia, J., dissenting) (arguing that the thirty-day filing limit, because it constitutes a waiver of the federal government’s sovereign immunity, is not waivable, without suggesting that it is therefore “jurisdictional”); cf Katherine Florey, Student Author, \textit{Insufficiently Jurisdictional: The Case against Treating State Sovereign Immunity as an Article III Doctrine}, 92 Cal. L. Rev. 1375 (2004).
\item 158. 319 U.S. 315 (1943).
\end{itemize}
consider the Ninth Circuit's 2004 decision in *Hawthorne Savings Bank v. Reliance Insurance Co. of Illinois*,\(^{159}\) taking a narrow view of the scope of the federal abstention doctrine and focusing instead on whether California state law would require a California state court to defer to a Pennsylvania insurance insolvency proceeding.\(^{160}\) As the court concluded in summarizing the narrow scope of *Burford*, "abstention under *Burford* in cases removed to federal court is inappropriate when the state court from which the case was removed is in no better position to protect the state interests arguably impaired by the exercise of federal jurisdiction."\(^{161}\)

Such a decision manifests the narrower approach to jurisdictional exceptions that may well be the pervasive theme going forward. In rejecting *Burford* abstention, the Ninth Circuit was at pains to first identify the situations in which *Burford* was meant to apply, and then to carefully consider whether the case before it fell within those narrow parameters. Thus, we might view the result of the new jurisdictional formalism from the perspective of the lower courts as a far more rigorous jurisdictional inquiry, to assure that the case sub judice falls squarely within the narrow scope of previously recognized exceptions to federal jurisdiction. At bottom, lower-court *expansions* of jurisdictional exceptions seem to be buried, in the grave described by Justice Stevens, alongside both *Rooker-Feldman* and the probate exception.

But it does not stop there. The animating principle behind the theory that may itself be behind these decisions is the concept that federal subject-matter jurisdiction truly is black and white, with very little gray area. A far smaller class of rules are "jurisdictional," and the conferral of subject-matter jurisdiction is subject to far fewer implicit exceptions. Necessarily, this conception of jurisdiction will shift judicial resources far more toward the merits of lawsuits—and, if nothing else, will therefore further burden an overworked federal judiciary, with far fewer jurisdictional dismissals (and far more work in cases that might previously have disappeared) as an inevitable result. Especially given the trend in other areas of jurisprudence toward *hostility* to litigation,\(^ {162}\) to which the Court's jurisdictional jurisprudence provides an odd and countervailing example, the increasing felicitousness toward the availability of a federal forum should necessarily reinvigorate the debate over how to relieve the enormous pressures faced by federal judges today, while keeping the courthouse doors open to those litigants who would choose to walk through them.

But perhaps the harder question is how, if at all, this trend will have ramifications for other substantive areas of the Supreme Court's jurisprudence (or, perhaps, for those rare cases in which it is asked to pronounce upon the *constitutional* scope of federal jurisdiction\(^ {163}\)). *Steel Co.*, its detractors notwithstanding, has proven to be a watershed

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159. 421 F.3d 835 (9th Cir. 2005), as amended, 433 F.3d 1089 (9th Cir. 2006).
160. See *Hawthorne*, 421 F.3d at 844-49.
161. Id. at 846 n. 9.
162. E.g. Siegel, supra n. 4.
163. E.g. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 446, 459 (1957) (Burton & Harlan, JJ., concurring in the result); id. at 460 (Frankfurter, J., dissenting). For a discussion of one important (and currently pending) question concerning the constitutional scope of federal jurisdiction with respect to habeas petitions brought by detainees in foreign or international custody, review Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 Geo. L.J. ___ (forthcoming 2007).
moment in the Supreme Court’s jurisprudence not just on federal subject-matter jurisdiction, but on the structural allocation of power as between the federal courts and both the other branches of the federal government and the states. *Steel Co.* ushered in a new era of jurisdictional formalism; that, almost a decade later, we are still assessing the true importance of that move—and still taking stock of its myriad reverberations—testifies to just how pronounced an effect it has had, and will ultimately have, on the business of the federal judiciary.