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# *Grable* on the Ground: Mitigating Unchecked Jurisdictional Discretion

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*In 2005, the Supreme Court handed down its opinion in Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, attempting to clarify when federal jurisdiction exists over a case presenting a state-law claim that includes a federal question. This issue has confounded the Court for the last century. Unfortunately, Grable has not satisfactorily ended the confusion. Instead, Grable promulgated a flexible, tripartite test that has allowed district courts virtually unlimited leeway in denying, often with no explanation, federal jurisdiction over many cases that should be heard in federal court. Making matters worse, because courts often apply Grable when resolving motions to remand, which are unreviewable by statute, there is almost no appellate review. This means the state of the law remains underdeveloped, and litigants have little guidance. As a result, the Court failed to achieve its stated goal in Grable: to take advantage of federal-court resolution of federal questions embedded in state-law claims. Acknowledging that Grable, issued recently by a unanimous Court, is here to stay, I propose two palliatives to this problem. First, I argue that the third step of the Grable test, which requires courts to consider the effect of retaining jurisdiction on the balance of work between federal and state courts, should be recognized as a new abstention doctrine, the application of which would be reviewable by appellate courts. Second, I propose the outlines of a system under which state courts might certify federal questions to courts of*

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*appeals — a “reverse certification” system. Adopting these proposals would resolve many of the problems Grable perpetuates.*

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## INTRODUCTION

In 2005, a unanimous Supreme Court issued its unanimous decision in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,<sup>1</sup> which attempted to clarify the appropriate test to determine jurisdiction under the federal-question statute<sup>2</sup> over cases involving a “state-law claim” raising a federal question. As commentators and courts have often noted, this has long been a vexing problem.<sup>3</sup> Indeed, the Court’s prior major foray into this area, *Merrell Dow Pharmaceuticals, Inc. v. Thompson*,<sup>4</sup> spawned a three-way circuit split, with several circuits holding that federal courts had no jurisdiction over state-law claims, even if they turned entirely on questions of federal law.<sup>5</sup> In *Grable*, the Court rejected this restrictive reading of *Merrell Dow* and reaffirmed the “commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.”<sup>6</sup>

The *Grable* Court promulgated a tripartite jurisdictional test for when a federal court must entertain a state-law claim containing a federal question: “the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”<sup>7</sup> The Court’s test confirms the longstanding doctrine that a state-law claim

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<sup>1</sup> 545 U.S. 308 (2005).

<sup>2</sup> 28 U.S.C. § 1331 (2006).

<sup>3</sup> See, e.g., *Almond v. Capital Props.*, 212 F.3d 20, 22 (1st Cir. 2000) (noting this “remarkably tangled corner of the law”); Douglas D. McFarland, *The True Compass: No Federal Question in a State Law Claim*, 55 U. KAN. L. REV. 1, 3 (2006) (calling this issue one “that has caused the most analytical difficulty for the allocation of jurisdiction over the past [half] century”); see also 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3562 (3d ed. 2007) (noting that “most difficult” problem in determining whether federal-question jurisdiction exists is deciding when relation of federal law to case is such that action may be said to be one “aris[ing] under” federal law).

<sup>4</sup> 478 U.S. 804 (1986).

<sup>5</sup> See Jason Pozner, *The More Things Change, the More They Stay the Same: Grable & Sons v. Darue Engineering Does Not Resolve the Split Over Merrell Dow v. Thompson*, 2 SETON HALL CIRCUIT REV. 533, 554-56 (2005) (explaining circuit split); *infra* Part I.D.

<sup>6</sup> *Grable*, 545 U.S. at 312.

<sup>7</sup> *Id.* at 314.

presenting a substantial federal question falls within the ambit of the federal-question statute. But the test's third step formally adds a new wrinkle, a balancing test: "even when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto."<sup>8</sup> This veto, which allows rejecting a case despite the presence of a substantial federal question if there is a risk of "any disruptive portent in exercising federal jurisdiction," echoes both the rationales and processes of abstention doctrines in a way that provides district courts enormous latitude when confronted with a *Grable* question.<sup>9</sup>

Now that *Grable* has been the law for several years, it is worth assessing both how courts apply the test in practice and whether the *Grable* test achieves the Court's stated goal of animating the "commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law."<sup>10</sup> When district courts have applied it rigorously, the Supreme Court's flexible test has provoked intricate analyses by district courts that provide guidance to the parties involved and to future litigants, by contributing to a common law development of *Grable* doctrine.<sup>11</sup> But at its worst, *Grable* has allowed district courts to employ standardless analyses that offer little explanation of their conclusions and fail to achieve the Supreme Court's goal of taking advantage of the benefits of a federal forum in cases presenting significant federal questions. This latter approach, unfortunately, is the rule, not the exception. Perhaps more importantly, because most of these unexplained *Grable* decisions are made as part of unreviewable remand orders, no "common law" has developed to guide litigants or to prevent district courts from ducking important federal questions.<sup>12</sup>

Early *Grable* scholarship has focused little on how district courts have applied the test and more on the Supreme Court's test in the abstract. Such articles renew the debate over the amount of discretion federal courts ought to have in deciding whether to resolve cases at the outer edges of federal jurisdiction.<sup>13</sup> *Grable's* detractors argue that the

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<sup>8</sup> *Id.* at 313.

<sup>9</sup> *Id.* at 314; see *infra* Part IV.A.1.

<sup>10</sup> *Id.* at 312.

<sup>11</sup> See *infra* Part II.A.

<sup>12</sup> See *infra* Part II.A.

<sup>13</sup> Compare David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (approving generally of discretionary jurisdictional doctrines), with Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE

test is “a quintessential open-ended ‘consider everything’ standard offering neither guidance nor constraints,” which provides no predictability to litigants, causes delay as cases bounce between federal and state courts, and wastes precious court resources.<sup>14</sup> This distaste for the *Grable* standard echoes the position of most courts and scholars favoring bright line rules for jurisdictional questions.<sup>15</sup> Conversely, others have argued that the test provides district court judges the necessary flexibility to retain jurisdiction over cases truly revolving around federal questions.<sup>16</sup> Under this view, *Grable* provides a “workable package of discretionary factors” for a district court to assess what cases accurately belong in federal court.<sup>17</sup> This position dovetails with the views of a number of scholars, most notably Professor David Shapiro, who favor more flexibility and case-by-case analysis in jurisdictional doctrine.<sup>18</sup> Those who consider arbitrary the bright-line jurisdictional rules which currently prevail, such as the

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L.J. 71 (1984) [hereinafter *Abstention*] (arguing that courts should have much less discretion to decline to exercise jurisdiction over cases within confines of Article III and federal-question statute).

<sup>14</sup> Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 140, 144-45 (2006); see McFarland, *supra* note 3, at 3, 20, 39-41 (calling *Grable* test “a malleable equity guide instead of a jurisdictional rule” and noting that “every time a federal court considers federal question jurisdiction over a federal issue embedded in a state claim, it must work through pragmatic considerations”); Pozner, *supra* note 5, at 576; John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145, 202 (2006) (referring to *Grable* test as “wandering standard”).

<sup>15</sup> For the classic statement, see Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 684 (1980). See also, e.g., Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988) (noting “importance . . . of operational consistency and predictability” in jurisdictional rules).

<sup>16</sup> See Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on “Arising Under Jurisdiction,”* 82 IND. L.J. 309, 343 (2007); see also Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515, 1563 (2007) (critiquing, but ultimately favoring more discretionary approach to exercising jurisdiction over state-law claims that “likely turn” on federal law); William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 692 (1994) (noting that jurisdictional “decisions that drive this process are [] inescapably pragmatic and ad hoc”).

<sup>17</sup> Freer, *supra* note 16, at 341.

<sup>18</sup> See Shapiro, *supra* note 13, at 545 (arguing that jurisdiction has always been subject to flexible rules and that judges ought to exercise discretion often when applying jurisdictional doctrine). Other scholars have argued that jurisdictional discretion is part of a conversation between the Congress and the courts, with the Congress able to overrule the courts’ prudential policies. See Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035, 1049 (1990); Barry Friedman, *A Different Dialogue, the Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 10 (1990) [hereinafter *A Different Dialogue*].

well-pleaded complaint rule<sup>19</sup> and the bar on removal based on a federal defense, will likely be sympathetic to the *Grable* approach.<sup>20</sup>

Whatever side of the debate one favors, and both sides have merit, one thing is clear: *Grable* is here to stay. The Court was unanimous,<sup>21</sup> and it reaffirmed the holding just one year later.<sup>22</sup> And thus far, Congress has not expressed any interest in overruling or revising the Court's test.<sup>23</sup>

In perhaps a surprise to those who thought *Grable* might represent a more permissive approach to federal courts accepting jurisdiction than previously under *Merrell Dow*,<sup>24</sup> district courts have denied jurisdiction in the overwhelming majority of cases applying the *Grable* test. In many of these cases, particularly those in which the defendant has removed the case to federal court on *Grable* grounds and the plaintiff has moved to remand, the district court opinions are extremely cursory, devoid of rigorous application of the three-step

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<sup>19</sup> See, e.g., Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987) (arguing that well-pleaded complaint rule is arbitrary and does not promote proper balance between federal and state court jurisdiction); see also Pushaw, Jr., *supra* note 16, at 1564; Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the Martian Chronicles*, 78 VA. L. REV. 1769, 1795 (1992) [hereinafter *Federal Jurisdiction*].

<sup>20</sup> James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 673 (1942) (calling rule "short-sighted" and "parochial"); Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 719-20 (1985) (arguing that Supreme Court erred in finding that Congress intended to eliminate removal based on federal defense).

<sup>21</sup> Justice Thomas concurred separately to note that he would consider the approach advocated by Justice Holmes, by which the federal courts only possess jurisdiction when federal law "creates" the claim. See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 320 (2005) (Thomas, J., concurring).

<sup>22</sup> *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699-701 (2006).

<sup>23</sup> Congress could, if it wanted to, define the scope of federal jurisdiction over these cases so long as such jurisdiction were within the boundaries of Article III. See *infra* Part II.A.

<sup>24</sup> See, e.g., Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1414 (2006) (arguing shortly after *Grable* that decision "has reinvigorated federal question jurisdiction. Whatever the federalism concerns may have been, they appear secondary to the need to provide an effective forum for claims under national law"); Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Jurisdiction*, 94 VA. L. REV. 1869, 1924 (2008) (predicting that *Grable* "will lead to more state law claims being heard in federal courts"). But see Lonny S. Hoffman, *Intersections of State and Federal Power: State Judges, Federal Law, and the "Reliance Principle"*, 81 TUL. L. REV. 283, 298 (2006) (arguing that *Grable* "is best understood as signaling that routine efforts to come within [federal-question jurisdiction] should be rejected in favor of allowing the state court to apply and interpret the applicable federal law").

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*Grable* test. While the parties in these cases might be able to predict on a purely statistical basis that they will be remanded to state court, these brief opinions are not developing the contours of the *Grable* test in a way that will provide adequate guidance to litigants or clearly mark out the bounds of federal-question jurisdiction. Accordingly, this Article will focus on how both parties and courts use and abuse *Grable*, and it will suggest potential solutions for providing greater clarity and predictability on matters of jurisdiction.

So far, district courts summarily dismissing *Grable* cases typically either find: (1) that a case does not present a substantial federal question, or (2) that a substantial question of federal law is actually disputed in a case, yet dismissing or remanding under the more flexible third step of the test. When applying that third step, courts often do so without elaboration, by restating the test and claiming nakedly that accepting jurisdiction over a particular claim would disturb the balance of responsibilities between federal and state courts. Though no judge has said so explicitly, when district courts take this approach, *Grable* looks, swims, and quacks like an abstention doctrine.<sup>25</sup> The result is that the admittedly difficult and important federal questions raised in these cases, such as the interpretation of language in federal statutes and regulations, are being decided by state courts. While state courts certainly have a role in interpreting and applying federal law, *Grable* noted that there are also significant advantages to federal courts doing so, such as the courts' expertise in federal law and the uniform application of federal statutes and regulations.<sup>26</sup> Moreover, because remand orders are rarely reviewable, circuit courts do not often weigh in on how faithfully the district courts are applying *Grable*.<sup>27</sup> As a result, *Grable* abstention is now a fact of life in the law of federal subject-matter jurisdiction.

The current state of the law, therefore, presents two realities: (1) the common law of *Grable* is underdeveloped because federal courts regularly issue unreviewable remand orders to state courts without rigorously applying the *Grable* test; and (2) state courts will continue to answer important questions of federal law, forgoing the potential benefits from federal jurisdiction that the Court described when devising the *Grable* test.

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<sup>25</sup> *Infra* Part III.A.

<sup>26</sup> *Grable*, 545 U.S. at 312.

<sup>27</sup> *Cf.* Mikulski v. Centerior Energy Corp., 501 F.3d 555, 572 (6th Cir. 2007) (en banc) (engaging in lengthy analysis of *Grable* before rejecting jurisdiction over fraud and contract claims implicating interpretation of federal tax laws).

Given the probable long life of the *Grable* test, I propose two palliatives designed to encourage clearer definition of the appropriate factors for the district court to consider and to provide for federal-court consideration of the federal questions in state-court cases. These palliatives are independent of one another, but would work well together. First, circuit courts should recognize *Grable*'s third step for what it is: an abstention doctrine. Doing so would arguably make remand decisions reviewable under the Supreme Court's decision in *Quackenbush v. Allstate Insurance Co.*<sup>28</sup> The benefit of increased circuit review would be greater development of the doctrine, particularly, what factors the district courts should assess and how *Grable* relates to similar doctrines like federal preemption and artful pleading.<sup>29</sup> Second, federal courts should adopt a procedure allowing state courts to certify federal questions in their cases to the federal circuit courts — a form of “reverse certification.” Certification by federal courts of unresolved state-law questions to state courts has been very successful, and given the number of unresolved federal questions in state-court cases due to current federal-jurisdiction rules, the procedure could be applied profitably to federal questions.<sup>30</sup> As such, even if the district courts persist in a crabbed interpretation of *Grable*, there would be a means by which to accomplish the advantages of federal adjudication of federal questions despite state courts maintaining jurisdiction.

Part I of this Article reviews the history of the doctrine and outlines the *Grable* opinion. Part II discusses early applications of *Grable*. Part III then outlines how the two proposed revisions to the current doctrine might mitigate the current reality that *Grable* is not fulfilling its promise that federal courts will answer important questions of federal law embedded in state-law claims.

#### I. HISTORY OF FEDERAL JURISDICTION OVER STATE-LAW CLAIMS INVOLVING FEDERAL QUESTIONS

Before turning to the *Grable* opinion, I will briefly review the state of the law dealing with federal-question jurisdiction over state-law claims. The Supreme Court has periodically grappled with this problem, alternating between more restrictive and expansive approaches. Despite the Court's efforts, clarity in the area has never reigned.

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<sup>28</sup> 517 U.S. 706, 731 (1996) (holding that decisions to abstain by district courts are reviewable).

<sup>29</sup> *Infra* Part III.B.

<sup>30</sup> *Infra* Part III.B.



The starting point is Article III of the Constitution, which provides that “[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.”<sup>31</sup> The Supreme Court has long held that the scope of this so-called “arising under” jurisdiction under Article III is broad. As early as 1821, Chief Justice Marshall, writing for the Court in *Cohens v. Virginia*, stated that “[a] case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.”<sup>32</sup> He famously added in *Osborn v. Bank of the United States* the formulation that a case arises under federal law if federal law “forms an ingredient of the original cause . . . [despite that] other questions of fact or of law be involved in it.”<sup>33</sup>

But the Court has also long held that the scope of jurisdiction under the general federal-question *statute* is much narrower than under Article III, despite identical language.<sup>34</sup> The Court has long endorsed numerous limitations on statutory federal-question jurisdiction, most prominently the well-pleaded complaint rule, which requires that the basis for federal jurisdiction appear on the face of the plaintiff’s complaint and not in “some anticipated defense to his cause of action.”<sup>35</sup>

These broad jurisdictional principles govern the key question the Court faced in *Grable*: when do the federal courts have constitutional and statutory authority, and perhaps the responsibility, to retain jurisdiction over cases involving exclusively “state law” claims that contain “federal law” questions? *Grable* is only the latest in a long, and ultimately unsatisfying, series of attempts to address this problem. The

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<sup>31</sup> U.S. CONST. art. III, § 2.

<sup>32</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821).

<sup>33</sup> *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 823 (1824); see also *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492 (1983). Justice Johnson dissented in *Osborn* and accurately predicted many of the difficulties at the center of jurisdictional law. See William Cohen, *The Broken Compass: The Requirement that a Case Arise “Directly” Under Federal Law*, 115 U. PA. L. REV. 890, 895 (1967).

<sup>34</sup> See, e.g., *Verlinden*, 461 U.S. at 494-95 (“Although the language of § 1331 parallels that of the ‘arising under’ clause of Article III, this Court never has held that statutory ‘arising under’ jurisdiction is identical to Article III ‘arising under’ jurisdiction. Quite the contrary is true.”).

<sup>35</sup> *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). See generally RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 74-80 (6th ed. 2009).

Court tried on numerous occasions in the early twentieth century, but never managed to clarify the doctrine.

A. *American Well Works and the Holmes Rule*

Perhaps the most famous early attempt to resolve the question of federal jurisdiction over state-law claims involving embedded federal questions is Justice Holmes's 1916 four-paragraph opinion for an 8–1 Supreme Court in *American Well Works Co. v. Layne & Bowler Co.*<sup>36</sup> Holmes's unsupported statement that “a suit arises under the law that creates the cause of action” became so influential that it was commonly known as the Holmes rule.<sup>37</sup> The case, in which the Court found no federal jurisdiction, involved a dispute between two pump manufacturers, American Well Works and Layne & Bowler. American Well Works sued in state court alleging that Layne & Bowler had damaged its reputation by telling numerous customers that American Well Works had infringed its patent and by threatening to sue customers who bought the American Well Works pump. Layne & Bowler removed to federal court on the ground that the dispute arose under federal patent law.<sup>38</sup> Justice Holmes wrote that whether a claim exists “depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state.”<sup>39</sup> Holmes continued: “The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract.”<sup>40</sup> Accordingly, Holmes concluded that the federal courts had no jurisdiction.<sup>41</sup>

B. *Hopkins, Smith, and the Limited Authority of the Holmes Rule*

Despite the prominence of the Holmes formulation, the Supreme Court has never fully embraced it in practice. Indeed, only a year after *American Well Works*, in *Hopkins v. Walker*, a unanimous Court found federal jurisdiction over a state-law quiet-title action involving

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<sup>36</sup> 241 U.S. 257 (1916).

<sup>37</sup> *Id.* at 260.

<sup>38</sup> *Id.* at 258-59.

<sup>39</sup> *Id.* at 260.

<sup>40</sup> *Id.*

<sup>41</sup> Justice McKenna, perhaps presciently, dissented, the published opinion noting only that he was “of the opinion that the case involves a direct and substantial controversy under the patent laws.” *Id.*

interpretation of the federal mining laws.<sup>42</sup> *Hopkins* involved a dispute over lands in Montana. The essence of the case (leaving aside the arcane mining laws implicated) was that plaintiffs owned a plot of land in Montana to which defendants laid claim. Plaintiffs contended that defendants' claims were invalid under federal mining laws and brought a federal equity action to remove clouds from the title.<sup>43</sup> The district court dismissed the claim for lack of jurisdiction, and the Supreme Court reversed. Writing for the unanimous Court, Justice Van Devanter stated the following test for whether a case arises under the laws of the United States: "A case does so arise where an appropriate statement of the plaintiff's cause of action, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of Congress."<sup>44</sup> Applying that test to the complaint and contravening the *American Well Works* principle that a suit arises under the law that creates the cause of action, the *Hopkins* Court found that "it is plain that a controversy respecting the construction and effect of the mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of the District Court."<sup>45</sup>

*Hopkins* did not cite *American Well Works*, even though Holmes's opinion was issued during the previous term. Nor did Justice Holmes dissent, despite obvious tension with his prior opinion. The law that "created" the cause of action was that of the state of Montana, yet the Court found federal jurisdiction because the cause of action "really and substantially involve[d] a dispute or controversy respecting the validity, construction, or effect of such a law" of Congress.<sup>46</sup>

That the Court never considered Holmes's rule sacrosanct is also apparent in the 1921 case, *Smith v. Kansas City Title & Trust*, which also found federal jurisdiction over a supposed state claim.<sup>47</sup> Smith, a shareholder in the Kansas City Title & Trust Company, sued in federal court to enjoin the company from investing in farm-loan bonds issued by the federal government under the authority of the Federal Farm Loan Act.<sup>48</sup> The sole ground for the injunction sought was

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<sup>42</sup> *Hopkins v. Walker*, 244 U.S. 486 (1917).

<sup>43</sup> *Id.* at 487-89.

<sup>44</sup> *Id.* at 489.

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., McFarland, *supra* note 3, at 5 n.30 (saying little about *Hopkins* in his otherwise comprehensive discussion of doctrine's history).

<sup>47</sup> *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 213 (1921).

<sup>48</sup> *Id.* at 195.

Smith's argument that the federal act pursuant to which the bonds were issued was unconstitutional. Neither party argued that federal jurisdiction was lacking, but the Supreme Court addressed the issue *sua sponte*.<sup>49</sup> At the outset of its discussion of jurisdiction, Justice Day, writing for a 6–2 majority,<sup>50</sup> stated the following “general rule”:

[W]here it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under [the federal-question statute].<sup>51</sup>

Turning to the case at bar, the Court again strayed from the Holmes rule. Instead of focusing on the genesis of the claim, the Court noted that it was “apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question” and concluded that “[t]he decision depends upon the determination of this issue.”<sup>52</sup> Accordingly, the Court then upheld the issuance of the bonds on the merits.<sup>53</sup>

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<sup>49</sup> *Id.* at 199.

<sup>50</sup> Justice Brandeis did not participate. *Id.* at 213.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 201.

<sup>53</sup> *Id.* at 213-15. Interestingly, despite its similarity, the *Smith* Court did not cite *Hopkins*. Rather, the Court cited Chief Justice Marshall in *Cohens* and *Osborn* and a 1902 case, *Patton v. Brady*, 184 U.S. 608 (1902). *Patton* involved a suit by a buyer of tobacco against the collector of internal revenue for the state of Virginia. Congress had passed a statute raising taxes on tobacco purchases. Although *Patton* had bought the tobacco before passage of the statute, the state levied the additional tax retroactively. *Patton* alleged that the tax was unconstitutional, lost on the merits in district court, and appealed. The Supreme Court first addressed jurisdiction, applying Marshall's test for Article III to the federal-question *statute*, noting that *Patton*'s “right of recovery was rested upon the unconstitutionality of the act, and that was the vital question.” *Id.* at 611. The Court concluded that under the *Cohens* and *Osborn* formulations of federal-question jurisdiction, “obviously the circuit court had jurisdiction.” *Id.* at 612.

The second step of the Court's opinion is also illuminating. During the commencement of the suit, *Brady* died. *Patton* continued the suit against his estate, but *Brady*'s executrix argued that, because the suit was in tort, the action abated at *Brady*'s death. In deciding that question, the Court looked to Virginia state law, and found that the cause of action sounded either in assumpsit or under the Virginia trespass statute. *Id.* at 612-15. The Court then denied *Patton*'s action on the merits, finding the tax constitutional. *Id.* at 623. Remarkably, the Court considered the action to have arisen under Virginia state law, but it found jurisdiction under the federal-question statute because “the vital question” in the case was the constitutionality of a federal statute. *Patton*, however, was not long-lived as a standard bearer in federal-jurisdiction law. After *Smith*, the Supreme Court never cited *Patton* again in this area.

This time, Justice Holmes dissented. He characterized the action as being one solely concerned with whether the defendant corporation had breached its fiduciary duty under Missouri law to the plaintiff shareholder.<sup>54</sup> Holmes cited his *American Well Works* rule: “[I]t is the suit, not a question in the suit, that must arise under the law of the United States.”<sup>55</sup> And despite the Court’s earlier ruling in *Hopkins*, which Holmes joined, he concluded that he knew “of no decisions” contrary to that rule and saw “no reason for overruling it now.”<sup>56</sup> Nonetheless, if the Holmes rule was ever the law, the *Hopkins* and *Smith* decisions demonstrate that its vitality was short-lived.

### C. Moore, Gully, and the Move Back Toward Holmes

Even though the Holmes rule did not entirely hold sway, the Court revisited this doctrine twice in the 1930s, and at times, moved away from the expansive language in *Smith* and toward a more Holmesian bright-line approach. The Court rejected jurisdiction in *Moore v. Chesapeake & Ohio Railway* (which does not cite *Smith*), in which a plaintiff switchman was injured on the job, allegedly due to defective equipment.<sup>57</sup> He sued his employer in federal court, and his complaint contained two counts: one explicitly seeking relief under the Federal Employers’ Liability Act and the other seeking relief under the Employers’ Liability Act of Kentucky.<sup>58</sup> The Court found no jurisdiction over the claim invoking the Kentucky statute, even though the statute explicitly incorporated the federal Safety Appliance Acts as the standard of care.<sup>59</sup>

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<sup>54</sup> *Smith*, 255 U.S. at 214 (Holmes, J., dissenting).

<sup>55</sup> *Id.* at 214-15. In Holmes’s view, the cause of action arose under Missouri law. Holmes continues:

If the Missouri law authorizes or forbids the investment according to the determination of this Court upon a point under the Constitution or Acts of Congress, still that point is material only because the Missouri law saw fit to make it so. The whole foundation of the duty is Missouri law, which at its sole will incorporated the other law as it might incorporate a document.

*Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 291 U.S. 205, 213 (1934).

<sup>58</sup> *Id.* at 208.

<sup>59</sup> *Id.* at 213 (holding that count “cannot be regarded as setting up a claim which lay outside the purview of the state statute”); see also *id.* at 214-15 (noting “it does not follow that a suit brought under the state statute which defined liability to employees who are injured while engaged in intrastate commerce, and brings within the purview of the statute a breach of the duty imposed by federal statute, should be regarded as a

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The Court continued along similar lines in *Gully v. First National Bank*,<sup>60</sup> in which a state tax collector sued a national bank in Mississippi state court for taxes allegedly due. The bank removed the action to federal court, arguing that the case necessarily implicated the federal statute giving states permission to tax national banks. In the bank's view, the state could not enforce the tax without relying on the statute. The Supreme Court unanimously rejected this argument on the ground that nothing in the complaint relied upon federal law; the federal statute would come up only in defense, if at all.<sup>61</sup> The opinion is most notable for the attempt of its author, Justice Cardozo, to derive a new principle from the confusing decisions that had come before:

What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.<sup>62</sup>

Justice Cardozo, in his mellifluous way, was attempting to articulate the notion that the *importance* of the federal issue to the case should guide federal courts' decisions as to whether they ought to exercise

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suit arising under the laws of the United States and cognizable in the federal court in the absence of diversity of citizenship"). The issue was relevant because if jurisdiction over the count had been based on the federal-question statute, venue would have been improper under the statute. Because the state-law claim did not arise under federal law, jurisdiction was appropriate based on diversity, and the venue issue presented no concern.

<sup>60</sup> 299 U.S. 109, 114-18 (1936).

<sup>61</sup> *Id.* at 116. Professor Cohen correctly noted that the opinion could have relied solely on the well-pleaded complaint rule without delving further into more general notions of jurisdiction policy. Cohen, *supra* note 33, at 903-04.

<sup>62</sup> *Gully*, 299 U.S. at 117-18.

their jurisdiction.<sup>63</sup> Although Professor Cohen later referred to this passage as “an opaque mysticism which, thirty years later, is as impenetrable as when the opinion was written,”<sup>64</sup> there is something intuitive about Justice Cardozo’s approach, and, as discussed below, the approach in *Gully* underlies *Grable*. But, despite the appeal of Justice Cardozo’s discussion, examination of the Court’s attempts to define the boundaries of jurisdiction over state-law claims with embedded federal questions reveals a mishmash of case law that provides little substantive guidance.

#### D. A Fresh Look: Franchise Tax Board and Merrell Dow

After the flurry of activity in the first decades of the twentieth century, the Court said little on the topic of embedded federal questions for nearly fifty years. In 1983, the Court dipped its toe back into the water by approvingly citing *Smith* in *Franchise Tax Board of California v. Construction Laborers Vacation Trust*.<sup>65</sup> This extremely complicated case ultimately turned on whether federal jurisdiction existed over declaratory-judgment actions. Entering that thicket is beyond the scope of this Article, but the case is nevertheless important for our purposes because Justice Brennan, writing for a unanimous Court, reaffirmed the vitality of *Smith*. Noting that “the phrase ‘arising under’ masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system,”<sup>66</sup> the Court cited the Holmes rule (“a suit arises under the law that creates the cause of action”) as the “most familiar definition” of the phrase “arising under.” But the Court quickly added that it is “more useful for describing the vast majority of cases that come within the district courts’ original jurisdiction than it is for describing which cases are beyond district court jurisdiction.” The court then cited *Smith* and *Hopkins* as *exceptions* to the Holmes rule.<sup>67</sup>

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<sup>63</sup> One strange aspect of Justice Cardozo’s formulation is that both considerations seem to contradict the well-pleaded complaint rule. For instance, whether the federal issue is “basic” or “collateral,” or whether the dispute is “necessary” or “merely possible” is difficult to determine from the face of the complaint; a defendant could simply admit the allegation implicating the federal question in its answer, and no such litigation over the federal question would ensue. This is a common criticism of the well-pleaded complaint rule — that it channels cases in which there will be no litigation over federal questions into federal court, and cases in which the sole issue litigated is a federal question into state court. See Doernberg, *supra* note 19, at 650-52.

<sup>64</sup> Cohen, *supra* note 33, at 905.

<sup>65</sup> 463 U.S. 1, 9 (1983).

<sup>66</sup> *Id.* at 8.

<sup>67</sup> *Id.* at 8-9. Justice Brennan also cited Judge Friendly for this proposition. See T.B.

It was in this context that in 1986 the Court confronted directly the embedded-federal-question problem in *Merrell Dow Pharmaceuticals Inc. v. Thompson*.<sup>68</sup> The plaintiffs alleged that their children were born with multiple deformities caused by the defendant's drug, Bendectin, a morning-sickness remedy. The plaintiffs sued in Ohio state court under theories of negligence, breach of warranty, strict liability, fraud, and gross negligence. Count IV of the complaint stated that Bendectin was "misbranded" in violation of the Food, Drug and Cosmetic Act ("FDCA") because the label did not include adequate warnings of these side effects.<sup>69</sup> The plaintiffs alleged that this violation "constitutes a rebuttable presumption of negligence" and that "violation of said federal statutes directly and proximately caused the injuries suffered."<sup>70</sup> Merrell Dow removed the case on federal-question grounds, and the district court retained jurisdiction, relying on *Smith*. The district court then granted Merrell Dow's motion to dismiss the complaint on *forum non conveniens* grounds.<sup>71</sup> The Sixth Circuit reversed, rejecting jurisdiction because the plaintiffs' claims did not "depend[] necessarily on a substantial question of federal law."<sup>72</sup>

The Supreme Court affirmed in a 5–4 decision. Writing for the majority, Justice Stevens began by invoking the Holmes rule, noting that "the vast majority of cases brought under the general federal-question jurisdiction of the federal court are those in which federal law creates the cause of action."<sup>73</sup> The Court added that determining whether jurisdiction exists "require[s] sensitive judgments about congressional intent, judicial power, and the federal system."<sup>74</sup> Then, following Justice Brennan's lead in *Franchise Tax Board*, Justice Stevens recognized that the Holmes rule has exceptions, in cases like *Smith*.<sup>75</sup> But the plaintiffs' claim did not fall within the exception because Congress did not intend a private federal remedy for

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Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) ("It has come to be realized that Mr. Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended. Even though the claim is created by state law, a case may 'arise under' a law of the United States if the complaint discloses a need for determining the meaning or application of such a law.").

<sup>68</sup> 478 U.S. 804, 808-09 (1986).

<sup>69</sup> *Id.* at 805.

<sup>70</sup> *Id.* at 806.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 807 (citing *Thompson v. Merrell Dow Pharms.*, 766 F.2d 1005, 1006 (6th Cir. 1985)).

<sup>73</sup> *Id.* at 808.

<sup>74</sup> *Id.* at 810.

<sup>75</sup> *Id.* at 809 n.5.



violations of the FDCA.<sup>76</sup> *Merrell Dow* was therefore a *Smith* case and not an *American Well Works* case. It would therefore “flout congressional intent” to allow access to federal courts under the federal-question statute when it could not be obtained directly under the statute — arguably reading the *Smith* exception out of the doctrine altogether.<sup>77</sup>

The Court then rejected the defendants’ contention that jurisdiction was proper because the case involved a substantial, disputed question, citing the “long-settled understanding” that the mere presence of a federal question in a state common law action does not automatically warrant federal-court attention.<sup>78</sup> The Court also rejected the defendants’ argument that uniformity of interpretation of the federal statute justified jurisdiction, dismissing that argument on the ground that it was really a masked claim of preemption, and that, in any event, the Supreme Court had power to review the judgment.<sup>79</sup> Finally, the court rejected a more general plea that the statutory-interpretation issue should be resolved by a federal court, stating that it did not believe “the question whether a particular claim arises under federal law depends on the novelty of the federal issue.”<sup>80</sup> Accordingly, the judgment was affirmed.

Justice Brennan, who wrote the unanimous opinion of the Court in *Franchise Tax Board*, dissented, along with three other justices. Noting that the “continuing vitality of *Smith* is beyond challenge,”<sup>81</sup> the dissenters believed there was “no question that there is federal jurisdiction” over the claim involving the FDCA.<sup>82</sup> The only issue in Count IV was whether the defendants had misbranded the drug under the FDCA, and the assumption that Congress had not created a private cause of action under the FDCA was not dispositive. Rather, the lack of a private federal cause of action should not bar federal jurisdiction “unless the reasons Congress withholds a federal remedy are also reasons for withholding federal jurisdiction.”<sup>83</sup> The dissenters noted

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<sup>76</sup> *Id.* at 811.

<sup>77</sup> *Id.* at 812.

<sup>78</sup> *Id.* at 813.

<sup>79</sup> *Id.* at 816.

<sup>80</sup> *Id.* at 817.

<sup>81</sup> *Id.* at 820; *see also id.* at 821 n.1 (explaining view that *Smith* and *Moore* are contradictory and that *Moore*, being both wrong and ignored generally, should be overturned).

<sup>82</sup> *Id.* at 822.

<sup>83</sup> *Id.* at 825 (Brennan, J., dissenting).

that the state itself placed the federal question at the center of the claim, by making it an element of a negligence per se action.<sup>84</sup>

In any event, the closely divided *Merrell Dow* decision failed to provide clarity. The decision engendered a circuit split and significant confusion regarding whether federal jurisdiction could ever lie over a claim grounded in “state law.” A plurality of circuits read *Merrell Dow* as essentially endorsing Justice Holmes’s *American Well Works* rule requiring that the cause of action arise from federal law.<sup>85</sup> Other circuit courts did not so find, holding that the essential lesson of *Smith* remained good law, and often retaining jurisdiction over state-law claims implicating federal questions.<sup>86</sup> Confusion reigned.<sup>87</sup>

#### E. Trying Again: Grable and Empire HealthChoice

Two decades after *Merrell Dow*, the Supreme Court recognized the circuit split and confronted the issue again in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*.<sup>88</sup> In *Grable* a unanimous Court put an end to the idea, endorsed by the majority of the circuits, that there was no federal jurisdiction over a state-law claim containing a federal question. The Court reaffirmed *Smith*, holding that in some cases, a federal question embedded in a state-law claim would open the doors to the federal courthouse. But district courts have not rigorously applied the *Grable* Court’s more fine-tuned test for deciding whether a federal court could exercise jurisdiction. Instead, federal district courts applying *Grable* often have done little more than recite the *Grable* test, and then apply Holmes’s *American Well Works* rule.

*Grable* arose from a dispute over real property in Michigan. The IRS seized property from Grable & Sons Metal Products, Inc. to satisfy a tax delinquency. The IRS then sold the property to Darue Engineering & Manufacturing. As required by statute, the IRS informed Grable of its intention to sell the property and provided such notice by certified mail, which Grable indisputably received.<sup>89</sup> Although Grable had a

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<sup>84</sup> *Id.* at 828.

<sup>85</sup> See *Nicodemus v. Union Pac. Corp.*, 318 F.3d 1231, 1238 (10th Cir. 2003); *Zubi v. AT&T Corp.*, 219 F.3d 220, 223 n.5 (3d Cir. 2000); *Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994).

<sup>86</sup> See *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996).

<sup>87</sup> An excellent description of the circuit courts’ various interpretations of *Merrell Dow* can be found in Pozner, *supra* note 5, at 554-70.

<sup>88</sup> *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 308 (2005).

<sup>89</sup> *Id.* at 311.

statutory right to redeem the property within 180 days of sale, it did not do so, and the IRS issued a quitclaim deed to Darue. Five years after the sale, Grable brought a quiet-title action in Michigan state court, claiming that the notice the IRS provided him of the pending sale was technically insufficient under the statute. Although the IRS had provided actual notice to Grable via mail, the relevant statute requires that written notice be “given by the Secretary to the owner of the property [or] left at his usual place of abode or business.”<sup>90</sup> Because the IRS allegedly failed to provide notice in the statutorily prescribed manner, Grable contended that the sale was invalid.<sup>91</sup>

Darue removed the action to the Western District of Michigan, arguing that Grable’s state quiet-title action posed a significant federal question: what is the required form of notice under federal tax regulations? The district court agreed, accepted jurisdiction, and granted Darue’s motion for summary judgment on the merits, holding that the IRS’s substantial compliance with the statute was sufficient.<sup>92</sup> Grable appealed to the Sixth Circuit, which affirmed.<sup>93</sup>

Grable then appealed to the Supreme Court, which granted certiorari “on the jurisdictional question alone . . . to resolve a split within the Court of Appeals on whether [*Merrell Dow*] always requires a federal cause of action as a condition for exercising federal question jurisdiction.”<sup>94</sup> In framing the question so broadly, the Supreme Court announced that it was explicitly revisiting *American Well Works* and *Smith*. From the Court’s answer, this much is now clear: in unanimously affirming the Sixth Circuit’s decision, the Supreme Court proclaimed again that Justice Holmes’s rule still is not the law. A federal cause of action is not a necessary condition for establishing jurisdiction under the general federal-question statute.<sup>95</sup>

The Court began by noting that it has “recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over

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<sup>90</sup> 26 U.S.C. § 6335(a)(998) (2006).

<sup>91</sup> *Grable*, 545 U.S. at 311.

<sup>92</sup> *Id.* (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 207 F. Supp. 2d 694 (W.D. Mich. 2002)).

<sup>93</sup> *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 377 F.3d 592, 593-94 (6th Cir. 2004).

<sup>94</sup> *Grable*, 545 U.S. at 311-12.

<sup>95</sup> *Id.* at 312. The Supreme Court did not revisit *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 507 (1900), which established that, in rare cases, a federal cause of action is not sufficient to establish federal-question jurisdiction. The Court references *Shoshone Mining* in a footnote as “an extremely rare exception to the sufficiency of a federal right of action,” but says nothing more about the jurisdictional issue. *Grable*, 545 U.S. at 317 n.5.

state-law claims that implicate significant federal issues.”<sup>96</sup> After that endorsement, the Court added: “The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.”<sup>97</sup>

Following this explanation of the rationale for the doctrine, the Court invoked, but then cautiously backed away from *Smith*, before developing its own new standard. First, the Court cited *Smith* as the classic example of such a case properly within federal jurisdiction, quoting the *Smith* Court’s statement that federal jurisdiction might exist over a state-law claim as long as “it appears from the [complaint] that the right to relief depends upon the construction or application of federal law.”<sup>98</sup> Immediately after quoting this language, however, the Court hedged, noting that the “*Smith* statement has been subject to some trimming to fit earlier and later cases recognizing the vitality of the basic doctrine, but shying away from the expansive view that mere need to apply federal law in a state-law claim will suffice to open the ‘arising under’ door.”<sup>99</sup> Instead of fully embracing the quoted *Smith* language, the Court departed along the lines of Justice Cardozo’s *Gully* formulation, noting that “federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.”<sup>100</sup>

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<sup>96</sup> *Grable*, 545 U.S. at 312.

<sup>97</sup> *Id.* It is unclear if the Court is adding to its catalogue of contradictory statements about the relative quality of federal and state courts in this pronouncement. See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1142 (1988). The Court lists three reasons for preferring federal courts in cases such as these: experience, solicitude, and hope of uniformity. *Grable*, 545 U.S. at 312. The notion of experience can be tied to the federal courts’ supposed expertise in applying federal law, and a hope of uniformity contemplates that the federal courts might hammer out a consensus on the meaning of federal law. The Court’s use of the word “solicitude” is curious, however. Webster’s defines “solicitude” as “the state or quality of being solicitous,” which it defines most directly as “very careful.” WEBSTER’S NEW COLLEGE DICTIONARY 1075 (3d ed. 2005). The Court does not make any broad statements about the quality of the state courts versus the federal, but here the Court may be saying that certain questions of federal law are so important, that the state courts cannot be trusted to answer them.

<sup>98</sup> *Grable*, 545 U.S. at 313 (quoting *Smith v. Kan. City Title & Trust*, 255 U.S. 180, 199 (1921)).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

The Court then developed the *Gully* thread doctrinally, noting that “even when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto.”<sup>101</sup> Thus, a federal court could hear the case “only if federal jurisdiction is consistent with the congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331.”<sup>102</sup> The Court continued, holding that “the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction.”<sup>103</sup> It is this veto which, I argue below, gives rise to a new abstention doctrine.<sup>104</sup> Finally, the Court acknowledged that any jurisdictional judgments must be made on a case-by-case basis, guided by a tripartite test: (1) does a state-law claim necessarily raise a federal issue; (2) is the federal issue raised actually disputed and substantial; and (3) can a federal forum entertain the case without disturbing the balance of federal and state responsibilities.<sup>105</sup>

The Court then applied this new framework to the facts. The Court saw no problem under steps one and two of the new test, finding that the case necessarily raised a federal issue, actually disputed and substantial: Grable had stated in its complaint that its action was premised on the IRS’s failure to comply with federal regulations, and the Court noted that “it appears to be the only legal or factual issue contested in the case.”<sup>106</sup> In further support of the federal nature of the issue, the Court found that the “Government has a strong interest in the ‘prompt and certain collection of delinquent taxes’ . . . and the ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice.”<sup>107</sup> The Court found that the case surmounted the third hurdle of its test with equal ease, remarking that “because it will be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor.”<sup>108</sup>

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<sup>101</sup> *Id.* at 313.

<sup>102</sup> *Id.* at 313-14.

<sup>103</sup> *Id.* at 314.

<sup>104</sup> *See infra* Part III.A.2.

<sup>105</sup> *Grable*, 545 U.S. at 314.

<sup>106</sup> *Id.* at 315.

<sup>107</sup> *Id.* (quoting *United States v. Rodgers*, 461 U.S. 677, 709 (1983)).

<sup>108</sup> *Id.*

Finally, the Court gamely attempted to reconcile its holding with *Merrell Dow*. The Court explained that *Merrell Dow* did not, as some circuits had concluded, require a federal cause of action to establish federal-question jurisdiction. Rather, *Merrell Dow* anticipated a more flexible test and reaffirmed that federal jurisdiction was appropriate in *Smith*. Moreover, in *Grable*, the Court claimed it was not overruling *Merrell Dow*, but was merely crystallizing the factors important to the *Merrell Dow* outcome denying jurisdiction. In *Grable*, as in *Merrell Dow*, the Court remained concerned about flooding federal courts with “garden variety state tort law” claims premised on the violation of a federal statute, standard, or regulation.<sup>109</sup> Furthermore, the Court reaffirmed the *Merrell Dow* meditation on the existence of a federal cause of action being an important clue to Congress’s intentions regarding jurisdiction; the lack thereof indicated that Congress did not intend certain cases to be brought in federal court.<sup>110</sup>

Even under this analysis, *Grable* avoided remand. The Court characterized Congress’s failure to provide a private right of action in this case as “ambivalence” toward the jurisdictional question, and it determined that the facts of *Grable* were sufficiently unique to have little effect on general litigation strategy.<sup>111</sup> As such, the Court found “no good reason to shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of the state-law title claim.”<sup>112</sup>

In 2006, the Court reaffirmed the *Grable* holding in *Empire HealthChoice Assurance, Inc. v. McVeigh*.<sup>113</sup> The case involved the Federal Employees Health Benefit Act of 1959, which allows the federal government to contract with private insurance carriers to provide insurance to federal employees. The act contains a preemption clause dealing with “coverage or benefits” afforded under health-care plans,<sup>114</sup> but has no jurisdictional provision for cases in which a plan

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<sup>109</sup> In that case, the major concern was the “horde of original filings and removal cases raising other state claims with embedded federal issues.” *Id.* at 318.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 319-20 (opining that “jurisdiction over actions like *Grable*’s would not materially affect, or threaten to affect, the normal currents of litigation”).

<sup>112</sup> *Id.* Justice Thomas added a brief concurrence. He recognized the apparent lack of clarity in the majority’s analysis, but concurred in the result because neither party had asked the Court to adopt Justice Holmes’s federal-cause-of-action test. Justice Thomas stated his view that the Holmes test is both clear and covers the “vast majority” of cases, suggesting that the effort to deal with cases like *Smith* and *Grable* “may not be worth the effort it entails,” and that he might be willing to rethink the entire doctrine in an appropriate case. *Id.* at 320-22 (Thomas, J., concurring).

<sup>113</sup> *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 681 (2006).

<sup>114</sup> 5 U.S.C. § 8902(m)(1) (2006).

covers a beneficiary's medical costs after an injury, and the beneficiary later recovers some or all of those costs in a tort action against the alleged tortfeasor.<sup>115</sup> In this case, a plan beneficiary suffered injuries, the insurance company paid out, and the beneficiary later recovered medical costs from the tortfeasor in a settlement. The insurance company sued in federal court for reimbursement of those costs, contending the beneficiary breached the reimbursement provisions of the plan.<sup>116</sup>

The insurance company contended that federal jurisdiction existed under *Grable*, but the Supreme Court affirmed the Second Circuit's holding in finding no federal-question jurisdiction.<sup>117</sup> Referring to the class of cases that might attain jurisdiction under *Grable* as a "special and small category,"<sup>118</sup> the Court held that this case was "poles apart from *Grable*."<sup>119</sup> The Court offered several distinctions from *Grable*, none of which quite support the "poles apart" rhetoric. First, the Court stated that *Grable* involved the actions of a federal agency, while this case involved a suit between two private parties. But *Grable*, too, was an action between two private parties that similarly implicated a federal provision. Second, the Court asserted that *Grable* presented a "pure issue of law," whereas this case was fact-bound. While this may be true, *Grable* could also have implicated factual issues; it is hard to imagine that such a finding would have rendered the federal question no longer worthy of federal jurisdiction.<sup>120</sup> Most compellingly, however, the Court noted that the issue was nonstatutory. Indeed, there was really no federal question in the case; rather, it revolved only around the interpretation of the contract, not the federal statute. As such, there was no need for federal jurisdiction.<sup>121</sup> Aside from the facts, *Empire* presents two important conclusions: (1) the *Grable* test is not going anywhere, and (2) the cases achieving jurisdiction under *Grable* fall into a "slim category," though how slim remains a mystery.<sup>122</sup>

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<sup>115</sup> See *McVeigh*, 547 U.S. at 683.

<sup>116</sup> *Id.* at 687-88.

<sup>117</sup> *Id.* at 701. The Second Circuit's opinion in the case was issued before *Grable*. See *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 142 (2d Cir. 2005).

<sup>118</sup> See *McVeigh*, 547 U.S. at 699.

<sup>119</sup> *Id.* at 681.

<sup>120</sup> *Id.* at 700-01.

<sup>121</sup> *Id.* at 701.

<sup>122</sup> *Id.* Joined by three other justices, Justice Breyer dissented, contending "[t]here is little about this case that is not federal." *Id.* at 702 (Breyer, J., dissenting). Justice Breyer did not directly address *Grable*, however, because he found jurisdiction under

## II. THE FIRST THREE YEARS OF A POST-GRABLE WORLD

Consistent with the *Empire* Court's view that *Grable* jurisdiction should only be found in a "slim category" of cases, in the three years since *Grable* came down, federal courts analyzing state-law claims with embedded federal questions found a lack of federal subject-matter jurisdiction approximately eighty-five percent of the time.<sup>123</sup> Such a result is likely comforting to those who might have feared that a tidal wave of cases would overwhelm the federal courts in the wake of *Grable*'s flexible approach, which is undoubtedly more permissive than some circuits' prior interpretations of *Merrell Dow* which endorsed the Holmes rule.<sup>124</sup> Others may argue that despite the *Empire* Court's language, *Grable* was intended to be far more of a welcome mat to the federal courts and that district courts have not been accepting enough cases demanding federal interpretations of federal questions. In this section, I will offer a brief survey of federal courts' applications of *Grable*, describing the types of cases that have surmounted the *Grable* hurdles and those most likely to be dismissed or remanded.

In sum, the first three years of *Grable* case law reveal: (1) that a significant number of cases are being dismissed or remanded with very little reasoning provided by the district courts, and (2) that a significant number of questions of federal law will be decided by state courts, notwithstanding *Grable*'s stated intention that federal courts decide important federal questions embedded in state-law claims. The current state of *Grable* jurisprudence should not raise eyebrows simply because the number of cases in which jurisdiction is rejected vastly outnumbers the cases in which federal courts retain jurisdiction. But

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federal common law. *Id.* at 706-07.

<sup>123</sup> This observation is based on my reading of all cases reported on LexisNexis in the three years following the *Grable* decision. Based on my research, federal courts engaged in substantive application of the *Grable* opinion 233 times during this period and retained jurisdiction in 36 of those cases, or approximately fifteen percent. I include this rudimentary figure to illustrate that courts reject jurisdiction in the vast majority of these cases. But there are obvious problems with the statistic itself, the most obvious of which is that in many cases, there are no reported opinions. Indeed, it is possible that many district courts simply rule on these motions in the margin — whether they retain jurisdiction or not. As I discuss below, because there is no appellate review of district court decisions to remand cases removed on the basis of *Grable*, a great many of these decisions may simply be made without opinion at all, suggesting that my figure overstates the likelihood that a court might retain jurisdiction in these cases. While this statistic lacks the rigor of serious empirical work, the general observation that district courts have been stingy in accepting cases in which parties have invoked federal jurisdiction under *Grable* holds true.

<sup>124</sup> See Sherry, *supra* note 14, at 115.



the disparity between cases in which jurisdiction is rejected versus those in which it is accepted suggests that the Court's aspirations of taking advantage of the benefits of a federal forum are not often being fulfilled.<sup>125</sup> Instead, we should be concerned about the cursory nature of courts' application of *Grable* — applications so cursory that they prevent common-law development of the test and risk forgoing the benefits of federal jurisdiction that the Supreme Court emphasized in *Grable*. The early case law demonstrates that the problem with *Grable* is not its flexibility, per se, but that district courts are not exercising their discretion in a rigorous way.

A. *The Case Law: Retaining and Rejecting Jurisdiction Under Grable*

In the three years following the *Grable* decision, federal courts substantively applying the *Grable* standard rejected jurisdiction in the vast majority of cases. This, in a sense, corroborates the many district courts who have remarked that *Grable* did not create a new rule, but merely reaffirmed *Merrell Dow*.<sup>126</sup> While this would be news to the numerous circuit courts whose *Merrell Dow* case law *Grable* overturned, district courts remain hostile to claims of subject-matter jurisdiction over state-law claims.<sup>127</sup>

1. Cases in Which Courts Have Retained Jurisdiction

Before discussing the cases where federal jurisdiction has been rejected, however, I will first review the few cases in which courts have accepted jurisdiction in the post-*Grable* era. These cases fall into certain identifiable categories. First, courts have tended to retain jurisdiction on the rare occasions when, like *Grable*, the federal question is dispositive and is the *only* question before the court.<sup>128</sup>

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<sup>125</sup> Statistics are also likely skewed by the newness of the *Grable* test and attempts by parties with borderline cases to test its limits in federal courts. *See supra* note 120.

<sup>126</sup> *See, e.g.,* *Merchant v. Hueser*, No. 06-4079-CV-C-NKL, 2006 U.S. Dist. LEXIS 54252, at \*12-13 (W.D. La. Aug. 4, 2006) (holding that *Grable* did not “materially alter” holding in *Merrell Dow*); *Smith v. AIG*, No. 2:05-CV-1065-MEF, 2006 U.S. Dist. LEXIS 8560, at \*9 (M.D. Ala. Feb. 10, 2006) (“[T]he *Grable* decision did not announce new rule, but merely applied existing law.”).

<sup>127</sup> *See, e.g.,* *Cantu v. Bay Area Healthcare Grp., Ltd.*, No. V-05-95, 2007 U.S. Dist. LEXIS 22468, at \*7 (S.D. Tex. Mar. 28, 2007) (acknowledging that attaining jurisdiction under *Grable* is “uphill battle”).

<sup>128</sup> *See, e.g.,* *San Juan v. Corporacion Para El Fomento Economico de la Ciudad Capital*, 415 F.3d 145, 148 n.6 (1st Cir. 2005) (noting that case “turns entirely on its adherence to the intricate and detailed set of federal regulatory requirements, and the funds at issue are federal grant monies”); *Koresko v. Murphy*, 464 F. Supp. 2d 463,

Second, courts have retained jurisdiction over cases that implicate the operation of a federal regulatory system,<sup>129</sup> such as the interpretation of a federal tax law.<sup>130</sup> Courts need not stretch to keep jurisdiction in such cases, because in *Grable* the Supreme Court emphasized the importance of uniform interpretation of federal tax laws and the minimal impact of such jurisdiction on state-court business.<sup>131</sup> Courts have been willing to apply this rationale to a few other areas of unique federal interest, such as to cases implicating Federal Energy Regulatory Commission regulations,<sup>132</sup> telecommunications regulations,<sup>133</sup> and regulations involving railroad rights of way.<sup>134</sup> Yet, despite the *Grable* holding, arguing that a claim requires interpretation of an important

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469 (E.D. Pa. 2006) (noting federal issue is “outcome-determinative”); *cf. Merchant*, 2006 U.S. Dist. LEXIS 54252, at \*12-13 (citing among reasons for rejecting jurisdiction that federal question was not outcome determinative); *Glorvigen v. Cirrus Corp.*, No. 05-2137, 2006 U.S. Dist. LEXIS 8741, at \*8 (D. Minn. Feb. 16, 2006) (holding dubiously that “the federal issue must be dispositive” in order for jurisdiction to lie under *Grable*).

<sup>129</sup> See, e.g., *Rose v. SLM Fin. Corp.*, No. 3:05CV445, 2007 U.S. Dist. LEXIS 14646, at \*12 (W.D.N.C. Feb. 28, 2007) (keeping jurisdiction over state-law claim implicating Truth in Lending Act: “Where a federal regulatory scheme requires private parties to undertake certain actions in order to comply with the law, the federal courts have a serious interest in examining the scope of the liability that might arise as a result”); see also *Rentrop v. Trustmark Int’l Bank*, No. 1:07CV0919, 2008 U.S. Dist. LEXIS 13852, at \*5 (S.D. Miss. Feb. 21, 2008) (keeping jurisdiction over case when issues are “intertwined” with National Flood Insurance Act).

<sup>130</sup> See *Chirik v. T.D. Banknorth N.A.*, No. 06-04866, 2008 U.S. Dist. LEXIS 3939, at \*15 (E.D. Pa. Jan. 18, 2008) (retaining jurisdiction because “this case is the rare state contract and tort action, like *Grable* was the rare state quiet title action, that calls for the exercise of federal jurisdiction because substantial and disputed issues of federal tax law are at issue”); *Bowers v. J&M Discount Towing, L.L.C.*, 472 F. Supp. 2d 1248, 1268-71 (D.N.M. 2006).

<sup>131</sup> *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314-15 (2005).

<sup>132</sup> See *Guardian Pipeline L.L.C. v. 259.49 Acres of Land*, No. 08-C-0028, 2008 U.S. Dist. LEXIS 35818, at \*31 (E.D. Wis. Apr. 11, 2008); *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, No. 06-CV-0053, 2007 U.S. Dist. LEXIS 24038, at \*80 (N.D. Iowa Mar. 30, 2007); *Metro Hydroelec. Co. v. Metro Parks, Serving Summit Cnty.*, 443 F. Supp. 2d 938, 941 (N.D. Ohio 2006); *California ex rel. Lockyer v. Powerex Corp.*, CIV-S-05-01216, 2006 U.S. Dist. LEXIS 19634, at \*10-13 (E.D. Cal. Apr. 14, 2006).

<sup>133</sup> *Broder v. Cablevision Sys.*, 418 F.3d 187, 195-96 (2d Cir. 2005) (affirming jurisdiction when case dealt with “the complex federal regulatory scheme applicable to cable television rates”); *AT&T Commc’ns v. Qwest Corp.*, No. 2:06:CV:00783, 2007 U.S. Dist. LEXIS 11095, at \*5 (D. Utah Feb. 13, 2007). *But see Baraga Tel. Co. v. Am. Cellular Corp.*, No. 2:05-CV-242, 2006 U.S. Dist. LEXIS 46983, at \* 21-23 (W.D. Mich. July 12, 2006).

<sup>134</sup> *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1236-37 (10th Cir. 2006).

federal regulatory scheme will not ensure jurisdiction; the court may not consider the particular issue or federal interest sufficiently substantial or important.<sup>135</sup>

## 2. Cases in Which Jurisdiction Has Been Rejected

Outside these narrow categories of cases, courts have generally not retained jurisdiction of state-law claims containing federal questions under *Grable*. Indeed, numerous courts remain as hostile to accepting jurisdiction as they were under *Merrell Dow*.<sup>136</sup> Frequently, courts

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<sup>135</sup> For instance, despite that federal jurisdiction in *Grable* was premised on the necessity of interpreting a federal tax provision, invocation of the Internal Revenue Code is not enough to ensure federal jurisdiction. In a series of cases shortly after the Supreme Court issued *Grable*, numerous defendants attempted to remove cases alleging that they had marketed a tax-shelter investment strategy that turned out to be illegal, subjecting plaintiffs to a series of penalties and other damages. The defendants in these cases, typically banks and law firms, contended that the case would necessarily require assessing whether the tax-shelter strategy was legal under federal law. Despite defendants' contentions that these cases would necessarily require interpretation of the federal tax laws, most courts have rejected jurisdiction, often on the ground that accepting such jurisdiction would open the door to too many cases in federal court. See *Snook v. Deutsche Bank AG*, 410 F. Supp. 2d 519, 523 (S.D. Tex. 2006) ("Permitting the Deutsche Defendants to litigate this case in federal court would open the federal courts to garden variety malpractice, breach of duty, and similar state law claim in which the allegation is that the defendant gave fraudulent or negligent advice based on an unreasonable or otherwise faulty interpretation of federal law."); *Acker v. AIG Int'l, Inc.*, 398 F. Supp. 2d 1239, 1242-43 (S.D. Fla. 2005); *Sheridan v. New Vista, L.L.C.*, 406 F. Supp. 2d 789, 795 (W.D. Mich. 2005) ("The potential for shifting the division of labor from state to federal courts is much greater in this case because if federal jurisdiction exists here, any malpractice, breach of fiduciary duty, or similar state law claim alleging an unreasonable interpretation of federal law, be it tax, securities, ERISA, etc. would invoke federal question jurisdiction."); *Cantwell v. Deutsche Bank Secs., Inc.*, No. 3:05-CV-1378, 2005 U.S. Dist. LEXIS 20597, at \*18-19 (N.D. Tex. Sept. 21, 2005). *But see* *Becnel v. KPMG, LLP*, 387 F. Supp. 2d 984, 986 (W.D. Ark. 2005) (retaining jurisdiction in similar case because "Plaintiffs' claims rest on unsettled areas of federal law exclusively requiring adjudication by a federal court, and they require a construction or interpretation of federal law for their resolution").

<sup>136</sup> See *Bar J Sand & Gravel, Inc. v. W. Mobile N.M., Inc.*, No. CIV 05-800 JB/WPL, 2005 U.S. Dist. LEXIS 39142, at \*36-37 (D.N.M. Sept. 29, 2005) (noting that "the Supreme Court in *Grable* did not intend to revolutionize federal question doctrine" and that "*Grable* did not toss the proverbial baby — in this case, the well-pleaded complaint rule — out with the bathwater"); see also *Gillenwater v. Burlington N. & Santa Fe Ry.*, 481 F. Supp. 2d 998, 1004 (E.D. Mo. 2007); *Merchant v. Hueser*, No. 06-4079-CV-C-NKL, 2006 U.S. Dist. LEXIS 54252, at \*12-13 (W.D. La. Aug. 4, 2006) (holding that *Grable* did not "materially alter" holding in *Merrell Dow*); *Smith v. AIG*, No. 2:05-CV-1065-MEF, 2006 U.S. Dist. LEXIS 8560, at \*9 (M.D. Ala. Feb. 10, 2006) ("[T]he *Grable* decision did not announce a new rule, but merely applied existing law."); *Hulbert v. Wells Fargo Bank, N.A.*, No. 3:05cv265/RV, 2005 U.S. Dist. LEXIS

remand or dismiss these cases with little to no explanation at all, simply citing *Grable* and then rejecting jurisdiction under a kind of gestalt theory mixing and matching the *Grable* steps.<sup>137</sup> For the most part, however, district courts remand or dismiss under *Grable* (albeit often talismanically and without analysis) in a few definable situations: (1) when a federal question is present in the case, but a procedural argument prevents jurisdiction; (2) when the federal question is deemed not substantial or important enough to warrant federal jurisdiction (under the second prong of *Grable*); and (3) when a substantial federal question is present, but jurisdiction must be denied due to the impact on the current division of labor between the federal and state courts under the third step of *Grable*. I will address each of these in turn.

First, federal jurisdiction is often rejected, despite the presence of a federal question, for straightforward procedural reasons — usually because the federal question does not appear on the face of the plaintiff's complaint, or the federal question would arise in the case only by way of defense.<sup>138</sup> These cases arguably invoke the first prong of the *Grable* test, which requires that a federal issue be “actually

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42778, at \*8-9 (N.D. Fla. Nov. 10, 2005).

<sup>137</sup> See, e.g., *Hylak v. Bieszk*, No. 1:07-cv-421, 2007 U.S. Dist. LEXIS 81653, at \*18-19 (W.D. Mich. Nov. 2, 2007) (holding that plaintiff's “broad allegation” that federal statute was implicated was “insufficient” without discussing *Grable* steps); see also *Hemberger v. Mansfield Twp. Bd. of Educ.*, No. 07-3805 (MLC), 2007 U.S. Dist. LEXIS 81512, at \*4-6 (D.N.J. Nov. 1, 2007); *Wexler v. United Air Lines, Inc.*, 496 F. Supp. 2d 150, 153 (D.D.C. 2007); *Julianites Against Shakedown Tactics v. TEJRR*, No. 05-CV-2353 (WMC), 2007 U.S. Dist. LEXIS 86853, at \*8-9 (S.D. Cal. Apr. 30, 2007); *Wong v. Cmty. Health Ctr. La Clinica*, No. CV-07-5004-FVS, 2007 U.S. Dist. LEXIS 31198, at \*9-11 (E.D. Wash. Apr. 27, 2007); *Protect Our Water & Env'tl. Rights v. Imperial Irrigation Dist.*, No. CIV. S-06-2073 LKK/EFB, 2007 U.S. Dist. LEXIS 8471, at \*13 (E.D. Cal. Jan. 18, 2007); *Martinez v. Del Taco*, No. S-05-1418 WBS PAN, 2006 U.S. Dist. LEXIS 5563, at \*11-12 (E.D. Cal. Feb. 14, 2006).

<sup>138</sup> See *Doe v. Archdiocese of Denver*, 413 F. Supp. 2d 1187, 1192 (D. Colo. 2006) (rejecting on well-pleaded complaint grounds removal of negligent supervision claim because plaintiff's claim violated separation of church and state); *Kentucky v. China Tobacco Anyang Cigarette Factory*, 383 F. Supp. 2d 917, 919-20 (E.D. Ky. 2005) (rejecting, on well-pleaded complaint rule grounds, *Grable* jurisdiction when defendant argued that regulations under which plaintiff asserted claims violated federal antitrust law); see also, e.g., *Virginia v. Supportkids, Inc.*, No. 3:08-CV-153, 2008 U.S. Dist. LEXIS 33474, at \*7-9 (E.D. Va. Apr. 23, 2007); *Shah v. Palmetto Health Alliance*, No. 3:06-2283-CMC, 2006 U.S. Dist. LEXIS 81224, at \*11-12 (D.S.C. Nov. 3, 2006); *Jambon v. State Farm*, No. 06-5661 SECTION B(1), 2006 U.S. Dist. LEXIS 72661, at \*5-6 (E.D. La. Oct. 4, 2006); *In re Fedex Ground Package Sys.*, No. 3:05-MD-527 RM (MDL-1700), 2006 U.S. Dist. LEXIS 42346, at \*22-23 (N.D. Ind. Jan. 13, 2006).

disputed” in a case in order for federal jurisdiction to exist.<sup>139</sup> Generally, however, these cases are rejected by federal courts on the basis of the well-pleaded complaint rule or the rule prohibiting federal jurisdiction based on a federal defense.<sup>140</sup> Many cases also have been remanded or dismissed, even though a federal question exists as part of a state-law claim because it is only one theory in support of that claim.<sup>141</sup> *Grable* is ultimately less pertinent in cases like this, where

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<sup>139</sup> The “actually disputed” requirement is puzzling because, most of the time, the jurisdictional question is presented before any real dispute on the merits exists — indeed, a defendant may make an objection to federal subject-matter jurisdiction before filing a responsive pleading. FED. R. CIV. P. 12(b). Often, a defendant could choose not to controvert a federal question presented in the complaint at all by defending on totally unrelated grounds, such as, say, the statute of limitations or lack of causation. That the Supreme Court would require a federal question be “actually disputed” in a case in order to resolve a jurisdictional dispute — which typically occurs at the early stages of litigation — is bizarre. Professors Chadbourn and Levin recognized this problem long ago in their criticism of the bar on federal defense removal, noting that it is impossible to determine whether there will really be a controversy of federal law in the early stages of a case. Chadbourn & Levin, *supra* note 20, at 660-61.

<sup>140</sup> The propriety of both of these rules has been hotly contested. See Chadbourn & Levin, *supra* note 20, at 673 (calling federal-defense rule “short-sighted” and “parochial”); Collins, *supra* note 20, at 719-20 (arguing that Supreme Court was wrong in arguing that Congress intended to eliminate removal based on federal defense); Doernberg, *supra* note 19, at 650.

<sup>141</sup> A federal question that constitutes only one “theory” behind a state-law claim is insufficient to support federal jurisdiction. See *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 806-09 (1988); *Broder v. Cablevision Sys.*, 418 F.3d 187, 195 (2d Cir. 2005). Courts have been quick to reject jurisdiction under *Grable* when the federal question in the case appears as only one of several theories supporting a state-law claim of negligence or fraud. For instance, if violation of a federal regulation constitutes only one of several theories under a single claim of state-law negligence, courts have been quick to reject federal jurisdiction under this rule. See, e.g., *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold*, 524 F.3d 1090, 1102 (9th Cir. 2008); *Beechwood Dev. Grp., Inc. v. Konersman*, 517 F. Supp. 2d 770, 774-75 (D.S.C. 2007); *Utah v. Eli Lilly & Co.*, 509 F. Supp. 2d 1016, 1022 (D. Utah 2007); *Collins v. Pontikes*, 447 F. Supp. 2d 895, 902 (N.D. Ill. 2006); *Caggiano v. Pfizer, Inc.*, 384 F. Supp. 2d 689, 690-91 (S.D.N.Y. 2005); *Cantwell v. Deutsche Bank Sec., Inc.*, No. 3:05-CV-1378-D, 2005 U.S. Dist. LEXIS 20597, at \*12-13 (N.D. Tex. Sept. 21, 2005). Notably, courts in these cases may be going too far. For instance, it is possible to conceive of a federal question that would pass the *Grable* test if it were the only claim before the court, but not if it were lumped in among several theories supporting a single state-law claim. To reject jurisdiction in the latter scenario but not the former under this rule would elevate form over substance.

The Second Circuit, per District Judge Sand, takes a more precise approach, but it also has problems. The Second Circuit’s test asks whether “at least one federal aspect of [a plaintiff’s] complaint is a logically separate claim, rather than merely a separate theory that is part of the same claim as a state-law theory.” *Broder*, 418 F.3d at 194; see also *EIJ v. UPS*, 233 F. App’x. 600, 602 n.2 (9th Cir. 2007). The answer is

separate procedural rules govern, despite creative attempts to use *Grable* to circumvent them.

Second, a significant number of cases are rejected under *Grable* because the court does not deem the federal question involved “substantial” enough.<sup>142</sup> Undoubtedly, the Supreme Court was aware that it was issuing a very flexible mandate when defining this portion of the *Grable* test. Importance and substantiality are in the eye of the beholder, and the *Grable* test makes the federal district judge the beholder.<sup>143</sup> In some cases, district courts have engaged in thoughtful analyses of whether a question happens to be “substantial” in the

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informed, in part, by the relief sought — if that relief (such as a declaratory judgment that the defendant violated the federal provision) is unavailable without addressing the federal question, then the federal “claim” is logically separate. This approach relegates to the background the question of the relative importance of the federal issue in the case and whether an important question of federal law must be answered. Ignoring such a question in deference to the artificial distinction between a theory and a separate claim is untenable, and rejecting jurisdiction on such grounds is an elevation of form over substance.

An interesting middle-ground set of cases involves state RICO claims, which require two predicate acts for liability. When some of the predicate acts implicate federal questions, but liability could be found under two separate predicate acts which do not contain federal questions, a question arises: does the *Christianson* rule bar federal jurisdiction under *Grable*? On the one hand, the predicate acts are very similar to stand-alone theories of liability — answering the federal question is necessary to find guilt of the predicate act. But the federal questions are not necessary to RICO liability because one could find liability only under two state-law predicate acts. Thus far courts have found that jurisdiction is barred in these cases under the *Christianson* rule. See *Fairfax Fin. Holdings Ltd. v. SAC Capital Mgmt.*, No. 06-cv-4197 (DMC), 2007 U.S. Dist. LEXIS 39214, at \*9-11 (D.N.J. May 15, 2007).

Some cases go beyond even the general rule, however, that a federal “theory” in support of a state-law claim is not sufficient to support federal-question jurisdiction. See *Miss. Veterans Purchase Bd. v. State Farm Fire Ins. Co.*, 492 F. Supp. 2d 579, 588-89 (S.D. Miss. 2007) (rejecting jurisdiction when federal question applied to only some of claims in case). In *New York v. Dell, Inc.*, 514 F. Supp. 2d 397 (N.D.N.Y. 2007), the district court remanded the case even when there were federal causes of action because those claims “are fully actionable under the state law asserted.” *Id.* at 401. In this case, the court actually remanded a case that warranted jurisdiction under Justice Holmes’s *American Well Works* test!

<sup>142</sup> See *Seruntine v. State Farm*, 444 F. Supp. 2d 698, 703 (E.D. La. 2006) (“Since *Grable* was decided, federal courts have repeatedly rebuffed attempts to peg federal jurisdiction on its holding, often because the federal issue allegedly implicated is not ‘disputed and substantial.’”).

<sup>143</sup> *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 570-71 (6th Cir. 2007) (en banc) (noting inherent subjectivity of this factor). Sometimes a court’s interpretation of what is an important interest to the federal government is baffling, such as when one court found that regulation of adulterated meat was an insufficiently important federal interest. See *McCormick v. Excel Corp.*, 413 F. Supp. 2d 967, 970 (E.D. Wis. 2006).

context of the litigation itself, or in general.<sup>144</sup> But in many cases, courts have taken the full measure of discretion given to them and asserted, with little apparent basis, that the federal question is not substantial.<sup>145</sup>

Third, many cases are rejected under *Grable's* third step regarding the division of labor between the federal and state courts. In these cases, the district court acknowledges that a substantial federal question exists and is actually disputed, a question significant enough to warrant federal jurisdiction, but because accepting jurisdiction over the case would allow too many cases to be transferred from state to federal court, jurisdiction must be denied. A discussion about this test's status as a new abstention doctrine follows in the next section.<sup>146</sup> For now, however, it is striking to note the prevalence of opinions in which district courts dismiss or remand a case under this third step of the *Grable* test with little to no explanation at all.<sup>147</sup> In these cases,

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<sup>144</sup> See *supra* Part II.A.1.

<sup>145</sup> See, e.g., *Mikulski v. Centerior Energy Corp.*, 435 F.3d 666, 676 (2006) (remanding when case would require "only insubstantial analysis or interpretation of federal law"); *Mathis v. Gibson*, No. 7:08-1778-HMH, 2008 U.S. Dist. LEXIS 43886, at \*6 (D.S.C. June 3, 2008); *Ho v. Colony Ins. Co.*, No. 07-6990 SECTION: I/4, 2008 U.S. Dist. LEXIS 2647, at \*18 (E.D. La. Jan. 14, 2008) ("federal implications are peripheral"); *Von Essen v. C.R. Bard, Inc.* No. CV 07-1880ML, 2007 U.S. Dist. LEXIS 82298, at \*12-13 (D.R.I. Nov. 6, 2007); *Chen v. United Way*, No. C 07-02785 WHA, 2007 U.S. Dist. LEXIS 61367, at \*13 (N.D. Cal. Aug. 13, 2007) (rejecting jurisdiction when federal question is "secondary"); *De Valle v. Sierra Cascade Nursery*, No. 2:06-CV-2274-GEB-DAD, 2007 U.S. Dist. LEXIS 8145, at \*5-6 (E.D. Cal. Jan. 24, 2007); *Corre v. Steltenkamp*, No. 06-30-DLB, 2006 U.S. Dist. LEXIS 66868, at \*6-8 (E.D. Ky. Aug. 16, 2006) (rejecting jurisdiction even though federal regulations referenced in complaint because reference was only "passing"); *Alaska v. Eli Lilly & Co.*, No. 3:06-cv-88 TMB, 2006 U.S. Dist. LEXIS 52783, at \*9 (D. Alaska July 28, 2006) (saying simply, "The Court finds no substantial federal question in this matter at this time"); *Cole v. Long John Silvers Rests., Inc.*, 388 F. Supp. 2d 644, 650 (D.S.C. 2005).

In another odd and unwarranted gloss on the *Grable* opinion, some courts have held that the federal issue in the case must be "dispositive" in order for jurisdiction to lie. See *Glorvigen v. Cirrus Design Corp.*, No. 05-2137 (PAM/RLE), 2006 U.S. Dist. LEXIS 8741, at \*8 (D. Minn. Feb. 16, 2006). The Supreme Court did not say this in *Grable*, and of course, it is virtually impossible (unless there is only one disputed issue in a case) to know what will be "dispositive" from the face of the complaint.

<sup>146</sup> See *infra* Part III.A.2.

<sup>147</sup> See, e.g., *Berthelot v. Boh Bros. Constr. Co.*, No. 05-4182 SECTION "K"(2), 2006 U.S. Dist. LEXIS 51603, at \*32-33 (E.D. La. June 1, 2006) (holding, without additional explanation, that "[t]here is no overarching federal concern as this case is brought making the need for a federal forum to decide the matter of little importance and would upset federal-state division of responsibilities"); see also *Gates v. Ohio Sav. Bank*, No. 1:07cv3581, 2008 U.S. Dist. LEXIS 27717, at \*12 (N.D. Ohio Apr. 4, 2008); *C&H Constr. of Miss. L.L.C. v. Lakeshore Eng'g Servs.*, No. 1:07CV700, 2007 U.S. Dist. LEXIS 62627, at \*6-7 (S.D. Miss. Aug. 24, 2007); *De Pacheco v. Martinez*, 515 F.

courts do little more than quote *Grable* and predict a litigation explosion in the federal courts, unhelpfully citing clichés such as “open[ing] the floodgates to litigating all manner of traditional state law claims,”<sup>148</sup> allowing a “horde” of federal cases,<sup>149</sup> or refusing to “open a Pandora’s Box and usher into federal court a new wave of litigation.”<sup>150</sup> Courts have been especially likely to do this when they

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Supp. 2d 773, 787 (S.D. Tex. 2007); *Colbert v. Union Pac. R.R.*, 485 F. Supp. 2d 1236, 1246 (D. Kan. 2007); *Jones v. Bay Area Healthcare Grp.*, No. C-05-557, 2007 U.S. Dist. LEXIS 27179, at \*5-7 (S.D. Tex. Apr. 12, 2007); *Evans v. Courtesy Chevrolet*, 423 F. Supp. 2d 669, 672 (S.D. Tex. 2006); *Rackley v. Cincinnati*, No. 1:06cv104, 2006 U.S. Dist. LEXIS 12831, at \*5-7 (S.D. Ohio Mar. 8, 2006); *Hinton v. Landmark Dodge*, No. 05-0850-CV-ODS, 2006 U.S. Dist. LEXIS 10453, at \*3-5 (W.D. Mo. Feb. 23, 2006).

<sup>148</sup> *Elmira Teachers Ass’n v. Elmira City Sch. Dist.*, No. 05-CV-6513 CJS, 2006 U.S. Dist. LEXIS 3893, at \*17-18 (W.D.N.Y. Jan. 27, 2006) (expressing concern that accepting jurisdiction over federal tax question in retirement plan would cause flood of federal courts); *Acker v. AIG Int’l*, 398 F. Supp. 2d 1239, 1243 n.2 (S.D. Fla. 2005) (articulating only fear of opening “proverbial floodgates”); see *Kantha v. Pac. Life Ins. Co.*, No. 06-0905, 2006 U.S. Dist. LEXIS 63285, at \*7 (D.N.J. Sept. 6, 2006); see also *Cantu v. Bay Area Healthcare Grp. Ltd.*, No. V-05-95, 2007 U.S. Dist. LEXIS 22468, at \*12 (S.D. Tex. Mar. 28, 2007) (expressing fear of causing “sea-change”); *Peters v. Union Pac. R.R.*, No. 06-512-CV-W-NKL, 2006 U.S. Dist. LEXIS 72667, at \*18 (W.D. Mo. Oct. 5, 2006) (citing “floodgates”); *Akins v. Radiator Specialty Co.*, No. 3:05-451, 2006 U.S. Dist. LEXIS 71076, at \*22 (W.D. Pa. Sept. 29, 2006) (noting concern that keeping jurisdiction over case alleging violation of federal product-safety standard would “potentially flood our federal courts”); *Hoehn Family LLC v. PriceWaterhouseCoopers LLP*, No. 07-0069-CV-W-DW, 2007 U.S. Dist. LEXIS 23422, at \*6-7 (W.D. Mo. Mar. 30, 2006) (citing floodgates).

<sup>149</sup> See *Zahora v. Precision Airmotive Corp.*, No. 06-CV-3520, 2007 U.S. Dist. LEXIS 17155, at \*8-9 (E.D. Pa. Mar. 8, 2007).

<sup>150</sup> See *Buis v. Wells Fargo Bank*, 401 F. Supp. 2d 612, 618 (N.D. Tex. 2005). In this case, which was apparently so troublesome that the district court felt obliged to cite both Pandora’s Box and a “wave” of litigation, the court rejected jurisdiction over a wrongful-foreclosure action in which the plaintiff alleged a violation of HUD regulations. The court feared that allowing jurisdiction over cases that alleged violations of HUD regulations would result in the introduction of many foreclosure cases into the federal courts. See also *Homecomings Fin. LLC v. Patterson*, No. 1:08-CV-0455-DFH-WTL, 2008 U.S. Dist. LEXIS 37946, at \*8 (S.D. Ind. May 8, 2008) (rejecting action against foreclosure even though complaint “anticipated” disputed issue in case under Truth in Lending Act on ground that “the doors of the federal courts would be newly opened to a huge volume of lawsuits that have always been the bread-and-butter work of the state courts”); *Leggette v. Wash. Mut. Bank*, No. 3:03-CV-2909-D, 2005 U.S. Dist. LEXIS 24405, at \*17-19 (N.D. Tex. Oct. 19, 2005).

The district judge from *Buis* deployed the same mixed metaphor in *Jericho Systems Corp. v. Booz Allen Hamilton, Inc.*, No. 3:07-CV-2009-L, 2007 U.S. Dist. LEXIS 81495 (N.D. Tex. Oct. 31, 2007). In that case, without even explaining defendant’s contention that the removed case belongs in federal court, the district court stated simply that “nothing has been presented to the Court by the parties that Congress has expressed intent to have cases like this, which are ordinarily handled by state courts,



perceive either a new legal theory or cases arising out of a large litigation-inducing event (such as Hurricane Katrina),<sup>151</sup> perhaps as a defensive measure against the potential impact on their dockets.<sup>152</sup> Yet rarely do courts offer any support for these observations, such as a prediction of how many cases would likely inundate federal dockets; rather, they simply assert that the effect of accepting jurisdiction would be overwhelming.<sup>153</sup>

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transferred to or filed in federal court.” *Id.* at \*9. With that *ipse dixit* and the invocation of Pandora’s Box, the court’s *Grable* analysis was complete.

<sup>151</sup> Hurricane Katrina spawned a significant number of suits between plaintiffs affected by the disaster and insurance companies who allegedly were not paying as promised on plaintiffs’ policies. The defendant insurance companies attempted to remove these cases to federal court, alleging that the complaints implicated substantial federal questions under the National Flood Insurance Act or Federal Emergency Management Agency regulations. Courts generally held that these issues, even if referenced as part of plaintiffs’ state-law claims in the complaint, were insufficient to warrant federal jurisdiction under *Grable*, often citing “step three.” See *J&P Drugs, Inc. v. Cont’l Cas. Ins. Co.*, No. 06-5623 SECTION “N” (3), 2007 U.S. Dist. LEXIS 9076, at \*9-11 (E.D. La. Feb. 7, 2007); *Seruntine v. State Farm*, 444 F. Supp. 2d 698, 703 (E.D. La. 2006); *Dobson v. Allstate Ins. Co.*, No. 06-252 SECTION “R” (5), 2006 U.S. Dist. LEXIS 55832, at \*41 (E.D. La. July 21, 2006) (rejecting jurisdiction on ground that case involved “mere tangential relationship to a federal policy”); *Berthelot v. Boh Bros. Constr. Co.*, No. 05-4182 SECTION “K” (2), 2006 U.S. Dist. LEXIS 51603, at \*32-33 (E.D. La. June 1, 2006); *Landry v. State Farm Fire & Cas. Ins. Co.*, 428 F. Supp. 2d 531, 535 n.1 (E.D. La. 2006). These cases may represent a desire on the part of the district courts to preempt a series of similar cases arising from a similar incident.

<sup>152</sup> Courts have been especially concerned about plane-crash cases in which complaints allege that defendants have violated FAA regulations. Leaving aside for the moment the reality that regulation of aviation is a quintessential federal interest and the potential importance of uniform interpretation of those regulations, courts have consistently justified, at least in part, refusing jurisdiction over these cases under *Grable*’s step three. These cases cite, for example, the “tremendous” number of cases that would be viable in federal court. See, e.g., *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 912 (7th Cir. 2007); *Johnson v. Precision Airmotive LLC*, No. 4:07CV1695 CDP, 2007 U.S. Dist LEXIS 89264, at \*9 (E.D. Mo. Dec. 4, 2007); *McCarty v. Precision Airmotive Corp.*, No. 8:06-CV-1391, 2006 U.S. Dist. LEXIS 65770, at \*7 (M.D. Fla. Sept. 14, 2006); *Sarantino v. Am. Airlines, Inc.*, No. 4:05MD1702 JCH, 2005 U.S. Dist. LEXIS 43009, at \*27-28 (E.D. Mo. Sept. 29, 2005); *Wandel v. Am. Airlines, Inc.*, No. 4:05MD1702 JCH, 2005 U.S. Dist. LEXIS 43007, at \*29 (E.D. Mo. Sept. 28, 2005).

<sup>153</sup> See *California v. H&R Block*, No. C06-2058 SC, 2006 U.S. Dist. LEXIS 69472, at \*13-14 (N.D. Cal. Sept. 18, 2006) (noting concern for “disruptive portent” of accepting jurisdiction over state enforcement action even though complaint alleged that defendants violated Federal Truth in Lending Act. It is unclear how federal jurisdiction over such case gives rise to such “portent”). Although, for reasons I have discussed, see *supra* note 117, a statistical analysis of the number of cases that might be shifted into federal court by a particular permissive *Grable* decision would be fraught with problems, courts could elaborate why they might perceive an opening of the floodgates from accepting jurisdiction in a particular case.

### 3. Analyzing Courts' Approaches to *Grable's* "Step Three"

Although it is common for district courts to dismiss or remand cases under the third step of the *Grable* test in cursory fashion, there has been some debate among some district courts that have taken the Supreme Court's approach seriously and examined closely the question of whether acceptance of jurisdiction over a particular case will disrupt jurisdiction too much. In these cases, however, a court retains almost limitless discretion depending on how it characterizes the federal question supposedly at issue in the case. When a court focuses on the specificity of the federal question presented by a case and the federal interest it represents, it tends to find that the case surmounts the step three hurdle.<sup>154</sup> Construing the federal question narrowly means that few cases will involve that specific question, and accepting jurisdiction in the particular case will not open the floodgates to hundreds of similar cases. Indeed, this is how the Supreme Court analyzed the federal question in *Grable*, when it focused on the particular tax-notice provision in the case, rather than extrapolating acceptance of jurisdiction in that case to all state-law-quiet-title actions.

By contrast, if the district court construes the federal question more broadly, then reason dictates that retaining jurisdiction *will* open those floodgates. Consequently, the court will dismiss or remand the case under step three, and the party seeking jurisdiction will be out of luck.<sup>155</sup> For instance, the Supreme Court in *Grable* could have

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<sup>154</sup> See *Hayes v. Am. Airlines, Inc.*, No. 04-CV-3231 (CBA) (JMA), 2005 U.S. Dist. LEXIS 41992, at \*11-12 (E.D.N.Y. Sept. 27, 2005) (viewing class action involving whether refunds due plaintiffs from defendant airline were federally mandated refunds as issue involving federal question itself, not breach-of-contract actions in general); see also *Nicholson v. Countrywide Home Loans*, No. 1:07CV3288, 2007 U.S. Dist LEXIS 91936, at \*4-5 (N.D. Ohio Dec. 13, 2008) (focusing sparse negligence analysis on fact that duty allegedly breached arose out of federal statute); *Chirik v. T.D. BankNorth N.A.*, No. 06-04866, 2008 U.S. Dist. LEXIS 3939, at \*11 (E.D. Pa. Jan. 18, 2008); *Koresko v. Murphy*, 464 F. Supp. 2d 463, 469 (E.D. Pa. 2006); *Lawhorn v. Consol. Biscuit Co.*, No. 3:06CV01570, 2006 U.S. Dist. LEXIS 76048, at \*5-6 (N.D. Ohio Oct. 19, 2006). (focusing on interpretation of NLRB regulation rather than whole of employment or labor law).

<sup>155</sup> See *Hoehn Family LLC v. PriceWaterhouseCoopers LLP*, No. 07-0069-CV-10-DW, 2007 U.S. Dist. LEXIS 23422, at \*6-7 (W.D. Mo. Mar. 30, 2007) (holding, in case where complaint alleges that defendant accounts knowingly violated IRS regulations, that "[t]he state courts are clearly well-suited to hear these cases. To convert a malpractice or fraud case into a federal claim every time a plaintiff alleges a professional unreasonably interpreted federal law would open the proverbial floodgates"); *Peters v. Union Pac. R.R.*, No. 06-512-CV-W-NKL, 2006 U.S. Dist. LEXIS 72667, at \*18 (W.D. Mo. Oct. 5, 2006) (rejecting jurisdiction in dispute arising from railroad-crossing

construed the issue broadly, as a mine-run quiet-title case, and reasoned that laying out the welcome mat to such cases would invite in all quiet-title actions, no matter what the substance. Had the Court taken this approach, it could have concluded that step-three analysis barred jurisdiction.<sup>156</sup>

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accident and allegation in complaint that railroad crossing at issue did not comply with federal regulations: “While bringing railroad crossing cases into the federal court system would have a small impact on the division of labor between the state and federal court systems, the same argument that Defendants rely on to justify federal question jurisdiction here is applicable to virtually every case where violation of a federal regulation is raised as evidence to determine the appropriate standard of care in a state tort action”); *Maletis v. Deutsche Bank Secs., Inc.*, No. CV-05-820-ST, 2005 U.S. Dist. LEXIS 21444, at \*26-28 (D. Or. Sept. 13, 2005).

For instance, in *Zahora v. Precision Airmotive Corp.*, No. 06-CV-3520, 2007 U.S. Dist. LEXIS 17155, at \*9-10 (E.D. Pa. Mar. 8, 2007), plaintiff alleged that the defendant violated FAA regulations in a state-law tort case arising out of a plane crash. Rather than assessing the case in terms of the FAA regulation itself, the district court remanded the case under *Grable* step three, expressing its concern over accepting jurisdiction not only over this case but cases involving “other areas of extensive federal regulation, such as food and drug law.” *Id.* at \*9.

In *Pruitt v. Honda Corp.*, No. 3:06-0128, 2006 U.S. Dist. LEXIS 19505 (M.D. Tenn. Mar. 28, 2006) the court analyzed the jurisdictional question only under step three of *Grable*. That case involved a car crash. The plaintiffs sought a declaratory judgment regarding the parties’ rights and responsibilities under an insurance contract that implicated obligations under several federal statutes. Skipping the first two steps of the *Grable* analysis, finding that the case’s jurisdictional impact over the federal-state division of labor is the “focal point” of *Grable* the court viewed the case not as one dealing with the specific regulations in play but one dealing with “contract” cases in general: “Recognizing a substantial federal question when a violation of federal law is identified as the source of a contractual duty would severely impact the number of cases that could be removed from state to federal court.” *Id.* at \*16-17.

In *Pacific Gas & Elec. Co. v. Ariz. Elec. Power Coop., Inc.*, 479 F. Supp. 2d 1113 (E.D. Cal. 2007), the court extrapolated the effect of accepting jurisdiction over this case, involving violations of required Federal Power Act provisions in a utility contract, to all breach-of-contract actions, stating:

This balance would be upset drastically if state contract claims could become a matter of substantial federal interest by the simple expedient of incorporating by reference the terms of a federal law or regulation. The Court believes such a dramatic shift would distort the division of judicial labor assumed by Congress under section 1331.

*Id.* at 1124.

<sup>156</sup> In an extremely broad view of step-three analysis, one court extrapolated from the federal question in the case (involving historical preservation) to any issue involving “minor issues of federal law.” *W. Hartford Initiative v. Town of W. Hartford*, No. 3:06-CV-739 (RNC), 2006 U.S. Dist. LEXIS 58221, at \*25-26 (D. Conn. Aug. 18, 2006).

B. *An Illustration: Pharmaceutical-Pricing Litigation*

One illustration of these competing modes of analysis, and both the possibilities and potential for abuse of the *Grable* test, is the dispute over whether federal jurisdiction exists in cases against pharmaceutical companies regarding drug pricing. This litigation, which has spawned hundreds of federal and state cases nationwide and a multidistrict litigation (“MDL”) in the District of Massachusetts, arises out of the alleged scheme by pharmaceutical manufacturers to fraudulently inflate prices of many drugs by misstating the “average wholesale price” (“AWP”) and “wholesaler acquisition costs” (“WAC”) of their drugs in industry publications. In essence, insurers — including federal and state governments under Medicare and Medicaid — historically have reimbursed doctors for drugs prescribed according to AWP and WAC figures reported by the pharmaceutical companies. Under Medicare and Medicaid, pursuant to a series of complicated regulations and contracts between drug manufacturers and state governments, state governments reimburse medical providers for prescribed drugs, and the drug manufacturers reimburse the states. Numerous state governments brought cases against the drug companies alleging that the companies overstated AWP, WAC, and other prices, causing the states to reimburse medical providers at inflated prices and thereby defrauding the state Medicaid systems.<sup>157</sup> In many of these cases, the states sued the drug manufacturers in state court alleging solely “state law” fraud, contract, racketeering, or consumer-protection claims, and the drug manufacturers removed the cases to federal court, asserting jurisdiction under *Grable*.

District courts have split over whether jurisdiction exists in these cases under *Grable*. Although the allegations and elements of the various claims differ somewhat from case to case, the defendant drug manufacturers generally have argued that these state-law claims implicate important federal questions under the Medicare and Medicaid statutes and regulations. In particular, the defendants have asserted that, in order to assess the states’ central claim that the defendants misreported figures such as AWP and WAC, courts will have to determine how the federal provisions define those terms. In

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<sup>157</sup> The states contended that drug manufacturers used these inflated reimbursements to medical providers to induce them to prescribe their drugs. In other words, the alleged scheme allowed the doctors to provide the drugs at a low price, while the pharmaceutical manufacturers reported prices that caused the states to reimburse the doctors at an inflated price. The state plaintiffs theorized that doctors looking to profit would thereby be incentivized to prescribe the drugs with the biggest “spread” between what they paid and what they were reimbursed.

defendants' view, "despite Plaintiff's efforts to cast the case as solely involving issues of state law, the claims are unavoidably intertwined with significant questions of interpretation of the federal Medicaid statute."<sup>158</sup>

Judge Saris, the district judge in the MDL,<sup>159</sup> has written an opinion accepting jurisdiction under *Grable* in a case involving similar claims by the state of Arizona.<sup>160</sup> In it, she writes, "I again conclude that the meaning of AWP in the federal Medicare statute is a substantial federal issue that properly belongs in federal court. The government has a strong national interest in prohibiting fraud upon Medicare beneficiaries because fraudulent acts threaten Medicare's integrity."<sup>161</sup> Noting that "once the meaning of AWP is determined, it can be applied to the many pending similar pharmaceutical drug pricing cases in the Medicare context," which "directly impacts the viability and effectiveness of the federal Medicare program," the court held that "Arizona's state-law claims . . . based on the meaning of AWP in the federal statute therefore raise a substantial federal issue."<sup>162</sup> The court went on to note that the issue was "actually disputed," as "[t]he determination of the actual meaning of AWP under the Medicare statute has been hotly disputed in the multi-district litigation and is a crucial component of plaintiff's theory of liability."<sup>163</sup>

The court then turned to the third step of *Grable*, and held that accepting jurisdiction would not unduly burden the federal system, noting that "'raising Arizona' from state to federal jurisdiction is unlikely to upset any balance."<sup>164</sup> The court based its conclusion on several observations: (1) given the substantial number of similar cases already pending in federal courts, "granting federal jurisdiction in this case does not open the door to a horde: the horde has already stormed the border";<sup>165</sup> (2) state and federal courts have both long heard claims under the Medicare statute; and (3) the issue itself is of great national importance despite the fact that Congress did not provide a federal cause of action under the Medicare statute: "While the presence of a federal cause of action is a welcome mat, its absence is not a

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<sup>158</sup> Florida v. Alpharma Inc., 457 F. Supp. 2d 65, 72 (D. Mass. 2006).

<sup>159</sup> In the interest of full disclosure, it bears mention that I clerked for Judge Saris in 2005–2006.

<sup>160</sup> Arizona v. Abbott Labs, Inc., 457 F. Supp. 2d 77, 80 (D. Mass. 2006).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 81.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 82.

deadbolt.”<sup>166</sup> In all, the court found that “the issue of the meaning of AWP under the federal Medicare statute has national significance. A federal forum provides experience, solicitude and uniformity on this important federal issue.”<sup>167</sup> As the court noted in an earlier opinion in the MDL, it construed the federal question narrowly, focusing on the particulars of the Medicare and Medicaid statutes, not fraud or consumer-protection statutes as a whole. Focusing on that particular issue served to both minimize the potential impact on federal and state dockets and maximize the importance of the issue to the particular federal regulatory scheme.

Most judges dealing with similar drug-pricing cases outside the MDL have taken the opposite approach and not found federal jurisdiction.<sup>168</sup> The leading opinion rejecting jurisdiction in a drug-pricing case was written by Judge Crabb of the Western District of Wisconsin.<sup>169</sup> In it, Judge Crabb agreed with defendants that “plaintiff’s claims present a substantial and disputed question of federal law,” because “a court will have to determine the meaning of the phrase ‘average wholesale price’ as it appears in the Medicare statute and its implementing regulations.”<sup>170</sup> But the court rejected jurisdiction under *Grable*’s third step. It held that “there is no strong federal interest in the present case” because “[s]tates and the federal government have an interest in securing an interpretation of the Medicare statute and regulations.”<sup>171</sup> In my view, this assessment makes little sense; the fact that both the federal and state governments have an interest does not mean that the federal interest is negated. In theory, while the states have an interest in “an interpretation,” as the court maintains, that interest would be advanced by a uniform reading

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 81-82; *see also* *Cnty. of Santa Clara v. Astra USA, Inc.*, 401 F. Supp. 2d 1022, 1029 (N.D. Cal. 2005), *aff’d*, 540 F.3d 1094, 1100 n.5 (9th Cir. 2008).

<sup>168</sup> Typically, these cases are removed to the district court embracing the state court in which the case was filed, and district courts assess the motion to remand before the Judicial Panel on Multidistrict Litigation transfers the case to the MDL. Most courts have rejected Judge Saris’s assessments on all three of the *Grable* steps. *See Hawaii v. Abbott Labs., Inc.*, 469 F. Supp. 2d 842, 851-53 (D. Haw. 2006); *Missouri v. Mylan Labs., Inc.*, No. 4:06CV603HEA, 2006 U.S. Dist. LEXIS 32570, at \*8-10 (E.D. Mo. May 23, 2006); *Texas v. Abbott Labs., Inc.*, No. A-05-CA-897-LY, 2005 U.S. Dist. LEXIS 42434, at \*8-11 (W.D. Tex. Dec. 5, 2005); *Minnesota v. Pharmacia Corp.*, No. 05-1394, 2005 U.S. Dist. LEXIS 27638, at \*8-11 (D. Minn. Oct. 24, 2005); *Pennsylvania v. TAP Pharm. Prods., Inc.*, 415 F. Supp. 2d 516, 525-27 (E.D. Pa. 2005).

<sup>169</sup> *Wisconsin v. Abbott Labs., Inc.*, 390 F. Supp. 2d 815, 822-24 (W.D. Wis. 2005).

<sup>170</sup> *Id.* at 823.

<sup>171</sup> *Id.*

provided by the federal government. This would minimize inconsistency and facilitate more efficient administration of Medicare and Medicaid.

But Judge Crabb reasoned that:

[T]he present case is one of many that have been filed by states across the country concerning pharmaceutical companies' alleged fraud in price-setting. Shifting all of these cases (*not to mention other state-law claims grounded in alleged violations of federal law*) in to federal court would work a significant disruption in the division of labor between federal and state courts.<sup>172</sup>

The court found the case “analogous” to negligence claims alleging a duty of care supplied by a federal regulation. As courts have held in such negligence actions, Judge Crabb concluded that accepting the case could result in a litigation flood and potentially disrupt the federal-state balance.

The dispute between these two courts dealing with the same issue illustrates how *Grable's* step three can operate differently depending on whether one views the federal question involved narrowly or broadly. Judge Saris focused in on the specific issues in the case and saw no risk that the federal-state balance would be disrupted, whereas Judge Crabb extrapolated from the particular federal question to “other state-law claims grounded in alleged violations of federal law” and saw a federalism risk. Judge Saris is more persuasive in this debate because there is no reason for a court to wield an axe when it can use the scalpel of case-by-case analysis. Particularly in cases like these, where both courts agree that there is a substantial and disputed question of federal law, a court should look only at that particular question and decide whether the interest in a federal-court decision warrants jurisdiction. Not only is this what happened in *Grable*, but it also makes sense in the context of cases involving issues like the AWP controversy, in which the MDL approach confirms the utility of a

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<sup>172</sup> *Id.* (emphasis added). The court also states, parenthetically, that “I am aware that many average wholesale price cases have been removed to federal court. However, most of these cases were transferred before the Court emphasized the importance of preserving the balance between the state and federal systems in *Grable*.” *Id.* This is a bizarre comparison because the Supreme Court's view prior to *Grable* was deemed by most courts as more restrictive of federal jurisdiction over state-law claims with a federal question. Moreover, the fact that many cases have already been transferred without the federal courts being overwhelmed or the state courts being eviscerated, suggests that the fears noted in *Grable* of opening the floodgates are unlikely in this instance.

uniform, nationwide response to the problem.<sup>173</sup> Judge Crabb's analysis proves too much: every *Grable* case presents a question of federal law embedded in a state-law claim; under her broad approach there could be no *Grable* jurisdiction at all, because accepting jurisdiction over any such case could open the floodgates.

Nevertheless, my review of the universe of *Grable* cases has demonstrated that Judge Crabb's mode of analysis is far more prevalent.<sup>174</sup> Many more courts engage in even spottier reasoning. As a result, a significant number of substantial federal questions — which involve problems of a national scope — will be determined by state courts. Even acknowledging state courts' power and competence to answer questions of federal law, having state courts decide these questions forgoes the substantial benefits of a federal forum outlined by the Supreme Court in *Grable*. Given the reality of how the *Grable* test has been applied, and the fact that *Grable* is likely to be with us for a long time, I now turn to two suggestions that might allow for additional federal-court decisions resolving the kinds of complex federal questions currently being addressed by the state courts.

### III. TWO PROPOSED PALLIATIVES

Two things are clear from *Grable's* aftermath: (1) many district courts have offered virtually no reasoning underlying their remands or dismissals under step three, creating perhaps an irresistible opportunity to get rid of cases that may involve substantial federal questions; and (2) many federal questions are being answered by state courts, depriving the system of the advantages of answers to federal questions by a federal forum. Admittedly, I begin from the presumption that there *are* significant advantages to having a federal court address federal questions, including “the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues” the Supreme Court recognized in *Grable*.<sup>175</sup> This, of course, is a

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<sup>173</sup> Professor Redish persuasively explains that the federal interest in the outcome of a case may warrant federal jurisdiction along these lines. See Redish, *Federal Jurisdiction*, *supra* note 19, at 1791-93. Indeed, the federal government has an interest in even purely state-law actions incorporating federal standards simply by virtue of the fact that federal law is being interpreted and applied. As Professor Redish argues, it is overly simplistic to assume that simply because the federal government did not create a private right of action under a federal statute, it loses all interest in that statute's application.

<sup>174</sup> See *supra* Part II.B.

<sup>175</sup> *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005).



controversial proposition.<sup>176</sup> In a concession to the shortness of life, this Article does not take sides on first principles, but assumes, as the Court did, that there are often advantages to a federal court taking on federal questions.<sup>177</sup>

Acknowledging that the *Grable* test, which the Supreme Court adopted unanimously, and reaffirmed in *Empire HealthChoice*, is here to stay, I offer two palliatives, which I believe would work well together, but could also work independently. First, to address the problem of standardless remands under step three of *Grable*, I argue that courts of appeals should review *Grable* decisions. Appellate review would perhaps create a rational and predictable common law that fleshes out the type of federal questions that would in fact displace too many cases from state to federal courts. The quickest route to this solution might be to amend the removal statute, which currently forbids appellate review of remand decisions.<sup>178</sup> But an easier and more immediately adoptable route could be to start acknowledging that, at bottom, such decisions are choices to abstain from jurisdiction, which federal appellate courts are already permitted to review under current Supreme Court doctrine. Second, in response to the reality that state courts necessarily must decide significant federal questions but acknowledging that there are benefits to federal-court consideration of such questions, I propose adopting a “reverse certification” procedure; this would allow state courts to certify questions of federal law to federal courts, modeled on the state-law certification system, which federal courts have implemented

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<sup>176</sup> Without providing a pages-long string cite, one favorite is Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 83-85. See also Redish, *Federal Jurisdiction*, *supra* note 19, at 1772 (outlining many tensions and factors involved in this debate). One recent fine article examines the arguably overlooked costs of systems prioritizing courts’ opining on their “native law.” See Nash, *supra* note 24, at 1914.

<sup>177</sup> See, e.g., Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between State and Federal Courts*, 104 COLUM. L. REV. 1211, 1241 (2004) [hereinafter *Allocating Cases*] (discussing “federal interest in having novel or open federal questions resolved in federal courts”). An excellent short summary of these advantages can be found at Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 333-35 (1988). See also Chemerinsky & Kramer, *supra* note 176, at 80-94. My intent is to be agnostic about the effect of this position on particular types of cases. As Professor Althouse has noted, arguing for greater or lesser federal jurisdiction can result in different political consequences based on the composition of federal and state benches at any given time. See Althouse, *supra* note 18, at 1039.

<sup>178</sup> 28 U.S.C. § 1447(d) (2006) (stating that only orders remanding civil rights cases are subject to appellate review).

profitably. Such a process would allow state courts hearing cases with federal questions to seek the advice of a federal tribunal. Neither of these solutions is schematically perfect; state courts will and should decide many federal questions.<sup>179</sup> And neither solution is without doctrinal, political, and prudential roadblocks. But they represent an advance over the haphazard framework that currently exists in the wake of *Grable* and present the possibility of better achieving the Supreme Court's aim of taking full advantage of a federal forum in appropriate cases.

A. *Recognize Grable's Third Step as an Abstention Doctrine to Allow Appellate Review*

As the sample of cases in the three years following *Grable* has demonstrated, district courts' jurisdictional analysis under the decision is wildly unpredictable. As detailed above, most litigants attempting to invoke federal-question jurisdiction over state-law claims are likely to be removed from federal court, usually on a motion to remand. Often the district court's explanation of such a decision is obscure or non-existent. This is particularly true if, as often occurs, a court invokes parade-of-horribles rhetoric when applying step three of the *Grable* test. But images of the slippery slope, opening the floodgates, or loosening the lid on Pandora's Box are not a substitute for reason-giving.<sup>180</sup>

The problem is exacerbated by the fact that most *Grable* decisions occur on motions to remand cases that defendants have removed from state courts. Remand orders are unreviewable by statute under 28 U.S.C. § 1447(d), meaning a district court may remand a case, invoking that Pandora's Box-style rhetoric without concern for appellate review. As a result, district courts and litigants are left with little guidance from higher authority on how to apply *Grable*, and there is no check on decisions offering minimal reasoning. Without

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<sup>179</sup> See generally Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 621 (1981) (noting importance, responsibility, and ability of state courts to decide federal questions).

<sup>180</sup> Beyond this, docket control does not provide a compelling justification for rejecting jurisdiction. As Professor Redish has noted, "The federal government cannot shirk its responsibility to assure that the federal courts perform their designated role any more than it can ignore its other essential obligations." See Redish, *Federal Jurisdiction*, *supra* note 19, at 1786. Nevertheless, these concerns are real. Chemerinsky & Kramer, *supra* note 176, at 94-95; see also Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 552 (1989) [hereinafter *Revisionist Theory*] ("The lower federal courts should not be flooded with cases that do not really require the prestige or resources of the federal bench.").

casting aspersions on district courts in general, one could see how this framework might create a temptation for a district judge confronting an already overwhelming docket to refuse jurisdiction. Indeed, the Supreme Court explicitly recognized such concerns in *Grable* itself.<sup>181</sup> Whether a particular claim “belongs” in federal or state court is often in the eye of the beholder. Additional appellate review would provide clearer parameters for decision making.

While I agree with scholars like Professor Shapiro who argue the exercise of discretion in jurisdictional matters has a long tradition,<sup>182</sup> and I disagree with those who argue that the third step of *Grable* should be eliminated,<sup>183</sup> recent practice demonstrates that district courts have been exercising so much discretion that virtually no substantive predictability is provided to litigants. Jurisdiction over important questions of federal law is often refused with no explanation. Even Professor Shapiro, who considers some “fuzziness” in jurisdictional analysis both inevitable and advisable,<sup>184</sup> has noted that allowing broad discretion is not inconsistent with providing

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<sup>181</sup> *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318 (2005); Freer, *supra* note 16, at 335 (noting that “the Court in *Grable* opened the door to a variety of factors, including the interests of the federal and state judicial systems”).

<sup>182</sup> Shapiro, *supra* note 13, at 570; *see also* Schwarzer & Wheeler, *supra* note 16, at 692. Judge Schwarzer and Dr. Wheeler provide a particularly poignant assessment of the inevitable messiness of jurisdiction:

Any attempt to find certainty is likely to founder on the complexities discussed in this Article: the vast historic and fluctuating overlap of jurisdiction, civil and criminal, between the systems; the need to respond to the unpredictable demands of society; and the pervasive effect of the forum choices of prosecutors and private litigants. The decisions that drive this process are therefore inescapably pragmatic and ad hoc.

Professor Cohen similarly notes:

What is surprising is the continuing belief that there is, or should be, a single, all-purpose, neutral analytical concept which marks out federal question jurisdiction. A frank recognition of the pragmatic nature of the decision-making process would help throw light on the factors, which actually induce decision. It would, moreover, reduce the danger that a judge would be beguiled by one of the numerous analytical tests into reaching an indefensible result.

Cohen, *supra* note 33, at 907.

<sup>183</sup> *See* McFarland, *supra* note 3, at 34; Preis, *supra* note 14, at 194. *See generally* Rory Ryan, *It's Just Not Worth Searching for Welcome Mats With a Kaleidoscope and a Broken Compass*, 75 TENN. L. REV. 659 (2008) (arguing that third step of *Grable's* test should be eliminated in favor of clearer “rule”).

<sup>184</sup> Shapiro, *supra* note 13, at 562.

detailed standards and guidance in how to exercise such discretion.<sup>185</sup> As Professor Burbank has noted, “discretion is an instrument of power.”<sup>186</sup> Because a party’s access to the proper forum is critical, district courts should not have unfettered discretion to remand a case without appellate review.

Currently, though, appellate review in most of these cases is barred by the federal removal statute, which prevents review of remand orders.<sup>187</sup> One way to solve that problem would be for Congress to amend the statute to allow such review, but Congress has shown little interest in that route.<sup>188</sup> Setting aside for the moment the prospects for legislative change, I believe intrepid appellate courts could engage in such appellate review now under existing Supreme Court precedent. The key is to recognize that remand orders under the third step of *Grable* are, for all practical purposes, *abstention decisions*, rather than remands for lack of subject-matter jurisdiction. The label matters because, while remand orders are not appealable by statute, under the Supreme Court’s decision in *Quackenbush v. Allstate Insurance Co.*, abstention decisions are reviewable by federal courts of appeals.<sup>189</sup>

### 1. The Nature of Federal Abstention Doctrines

In the last half-century, a variety of practices have come under the broad heading of “abstention doctrines,” but remands under step three of *Grable* fit comfortably among them.<sup>190</sup> Although there is some support for the notion that a federal court is required to exercise all of the jurisdiction Congress has granted it, it has become accepted that

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<sup>185</sup> *Id.* at 547. Professor Shapiro also agrees that “nothing in our history or traditions permits a court to interpret a normal grant of jurisdiction as conferring unbridled authority to hear cases simply at its pleasure.” *Id.* at 575. There should be criteria limiting discretion, and that such criteria should be “capable of being articulated and openly applied by the courts, evaluated by critics of the courts’ work, and reviewed by the legislative branch.” *Id.* at 578.

<sup>186</sup> Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1470 (1987).

<sup>187</sup> 28 U.S.C. § 1447(d) (2006).

<sup>188</sup> Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1742-43 (2004) (noting possibilities for Court and Congress to cooperate on procedural change, but also that relations between these two bodies are fraught with tension).

<sup>189</sup> *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 713 (1996).

<sup>190</sup> Shapiro, *supra* note 13, at 547 (describing aptly abstention doctrines as court’s “decision not to proceed in traditional equitable principles, in principles of federalism and comity, or in principles of separation of powers”); *see also* Friedman, *A Different Dialogue*, *supra* note 18, at 18 (“In abstention cases, federal courts decline to exercise congressionally bestowed jurisdiction in deference to ongoing state proceedings.”).

courts may sometimes abstain from exercising jurisdiction, most typically when exercising jurisdiction presents some threat to federalism.<sup>191</sup> Professor Wright's 1959 umbrella justification for these doctrines remains the clearest: "In some cases where jurisdiction is granted it should not be exercised in order to avoid unnecessary conflict with important state functions or a needless prediction as to matters on which the states speak with final authority."<sup>192</sup>

While it is beyond the scope of this Article fully to survey and assess the panoply of abstention doctrines, it is worth reviewing briefly some of the major abstention cases as a predicate for my argument that step three of *Grable* should be placed among them.<sup>193</sup> As Professor Friedman has noted, however, "[t]he abstention doctrines defy strict categorization, so it is not surprising that courts and commentators define the categories in different terms, and that the categories change

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<sup>191</sup> The support for the idea that federal courts are required to exercise all of the jurisdiction granted to them comes from no less than Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). Professor Shapiro, however, has demonstrated that in reality "the scope of judicial discretion in jurisdictional matters is remarkably broad and far-reaching," and that there are many "situations in which the federal courts have effectively been free to choose whether or not to exercise or assume jurisdiction." Shapiro, *supra* note 13, at 546.

There is a rich debate over whether such discretion *should* exist. Compare Redish, *Abstention*, *supra* note 13 (arguing against discretionary abstention), with Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985) (arguing in favor of broad application of abstention doctrines). The reality is that the abstention doctrines, like *Grable*, are a fact of life.

<sup>192</sup> Charles Alan Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815, 815 (1959). Looking backwards, but accurately predicting the future, Professor Wright wrote, "There are a variety of circumstances in which it has been held that a federal court should refrain from exercising its jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs." *Id.* at 819.

As numerous authors have observed, the Supreme Court's pronouncements in this area have a schizophrenic quality to them. When the Court endorses abstention, it preaches parity between federal and state courts, but when the Court rejects abstention, it is because state courts are somehow inadequate to the task at hand. Professor Friedman refers to the Supreme Court's penchant for inconsistency in this area as "selective amnesia." Friedman, *Revisionist Theory*, *supra* note 180, at 538. Professor Fallon has noted more broadly that, "[t]he law of judicial federalism — an important subset of the standard federal courts curriculum — is wracked by internal contradictions." Fallon, *supra* note 97, at 1142; *see also* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 244-45 (1988) (noting that "the Court's statements about parity have been totally inconsistent and irreconcilable"). Nevertheless, the fact remains that numerous abstention doctrines are alive and well in the federal courts.

<sup>193</sup> Professor Friedman provides an excellent and thorough survey of these doctrines. *See generally* Friedman, *Revisionist Theory*, *supra* note 180.

over time.”<sup>194</sup> Nevertheless, the doctrines share a similar flavor: the exercise of discretion to forgo federal jurisdiction because of an overriding consideration that state-court jurisdiction is more appropriate. Historically, in such cases, courts have found that concerns of federalism and comity outweigh the need for a federal forum in the particular case.<sup>195</sup>

For instance, in *Railroad Commission v. Pullman Co.*,<sup>196</sup> the Supreme Court endorsed a practice (commonly referred to as *Pullman* abstention) of delaying decision on the constitutionality of state laws before the state first had the opportunity to interpret the statute at issue. The Court reasoned that federal courts, as “outsiders” to the state system in Justice Frankfurter’s parlance, might not have to strike down a state’s law if the state is given the chance to interpret it and that interpretation avoids the constitutional question.<sup>197</sup> That is, the court could avert the potential friction that might result from striking down the state’s law by invoking “a doctrine of abstention appropriate to our federal system whereby the federal courts, exercising a wise discretion, restrain their authority because of scrupulous regard for the rightful independence of the state governments and the smooth working of the federal judiciary.”<sup>198</sup> Deference to these concerns could best be achieved through the district court’s “staying its hands.”<sup>199</sup>

In another set of cases, the Supreme Court has endorsed abstention when parallel or similar proceedings were pending in state courts, thus avoiding the tension of federal courts perceived to be seizing control of a matter that state courts already handle. For instance, in *Younger v. Harris*,<sup>200</sup> the Court held that absent extraordinary circumstances, a federal court could not enjoin a pending state prosecution. Writing for the Court, Justice Black explained that “the

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<sup>194</sup> *Id.* at 535 n.20.

<sup>195</sup> Professor Redish persuasively notes the oddness of assuming that the state courts actually are somehow “insulted” by the fact that some cases wind up in federal instead of state courts. Setting aside for a moment the pressures state judges feel on their dockets, the notion that state-court judges are somehow insulted by the position that some cases belong in federal court is silly and could easily work the other way. See Redish, *Federal Jurisdiction*, *supra* note 19, at 1827-28. Professor Wells has noted the relative power of comity as a justification for the Court’s decisions in this area. See Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 105 (1998). *But see* Nash, *supra* note 23, at 1911-14 (discussing possible costs of “friction” between state and federal judiciaries).

<sup>196</sup> 312 U.S. 496, 499-500 (1941).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 501 (internal citations omitted).

<sup>199</sup> *Id.*

<sup>200</sup> 401 U.S. 37, 44 (1971).

national government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the [s]tates.”<sup>201</sup> So even if the statute under which a defendant was being prosecuted offended the U.S. Constitution, a federal court could not intercede into a state court proceeding, despite the existence of federal jurisdiction.<sup>202</sup> The Court later extended the *Younger* doctrine to all pending civil enforcement actions by the states and state administrative actions.<sup>203</sup> The Supreme Court also, albeit imprecisely, extended the *Younger* principle to cases between two private litigants when the issue involved could be raised in a pending state proceeding.<sup>204</sup> Other federal abstention doctrines, although difficult to categorize and sometimes essentially ad hoc, are also based on Professor Wright’s notion of disclaiming jurisdiction “in order to avoid unnecessary conflict” with the states. These doctrines are more like *Pullman* than *Younger*. As anyone who has struggled with the topic of abstention knows, the *Younger* doctrines have the appeal of clear rules, while *Pullman* and many of the other abstention cases are softer, vesting more discretion in district judges to decide when to apply them. For instance, in *Burford v. Sun Oil Co.*, the Supreme Court has countenanced abstention in cases involving review of decisions by state administrative agencies when they “clearly involve basic problems of [state] policy,”<sup>205</sup> or when state appeal of an administrative order is “an integral part of the regulatory process” of the state.<sup>206</sup> The Supreme Court has also held that in some cases involving parallel state and federal proceedings, “exceptional

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 43; see also *Samuels v. Mackell*, 401 U.S. 66, 69 (1971) (presenting companion case to *Younger*, extending its holding to cases seeking declaratory relief when state criminal proceedings are pending).

<sup>203</sup> See, e.g., *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (requiring abstention in face of pending attachment procedure against welfare recipient allegedly guilty of fraud); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607 (1975) (requiring abstention in favor of pending state nuisance action against adult theater).

<sup>204</sup> *Pennzoil Co. v. Texaco Co.*, 481 U.S. 1, 17 (1987); see also Friedman, *Revisionist Theory*, *supra* note 180, at 558 (summarizing *Younger* doctrine: “a federal court generally will not exercise jurisdiction over a case, criminal or civil, in which the federal defendant has begun a state proceeding, or begins one shortly after the federal court proceeding is initiated”).

<sup>205</sup> 319 U.S. 315, 332 (1943) (abstaining in challenge to state grant of oil-drilling rights).

<sup>206</sup> *Ala. Pub. Serv. Comm’n v. S. Ry. Co.*, 341 U.S. 341, 348 (1951) (involving appeal of decision of state regulatory agency rejecting federal plaintiff’s ability to cease operating branch of intrastate rail system).

circumstances” warrant abstention.<sup>207</sup> Along these lines, in *Louisiana Power & Light Co. v. City of Thibodaux*,<sup>208</sup> the Court required abstention in an eminent-domain action removed on the basis of diversity. The Court reasoned that eminent domain is “a matter close to the political interests of a State” and, therefore, abstention was necessary to preserve “harmonious federal-state relations.”<sup>209</sup> Perhaps recognizing the squishiness of the precedent this case might set, Justice Frankfurter acknowledged and rejected the argument that district courts would use the holding to “shuffle off responsibility” and get rid of cases indiscriminately: “Procedures for effective judicial administration presuppose a federal judiciary composed of judges well-equipped and of sturdy character in whom may safely be vested, as is already, a wide range of judicial discretion, subject to appropriate review on appeal.”<sup>210</sup>

## 2. *Grable* Abstention

*Grable*’s step three contains the same sort of flexibility Justice Frankfurter observed about the doctrine in *Thibodaux*. But while Justice Frankfurter took comfort in the availability of appellate review, decisions under step three of *Grable* are usually unreviewable. The

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<sup>207</sup> *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). *Colorado River* involved a determination of various Indian tribes’ water rights. The federal defendants sued initially, but later moved to dismiss on the ground that the federal action would be duplicative of a later-filed state proceeding. In holding that abstention was appropriate, the Court noted numerous factors, the most important of which was the apparent desire of Congress that suits against the United States dealing with water rights occur in state courts. The Court based this notion on the fact that the McCarran Amendment (the federal statute at issue) provided for state-court jurisdiction over such suits. *Id.* at 819. The dissenters took strong issue with that; as Justice Stevens wrote in dissent, “there is no basis for concluding that Congress intended that [a]mendment to impair the private citizen’s right to assert a federal claim in a federal court.” *Id.* at 827 (Stevens, J., dissenting). Justice Stevens’s observation is germane to the *Grable* opinion and how district courts have been interpreting it. *Grable*, following *Merrell Dow*, took it as strong evidence of congressional favoritism for state-court jurisdiction whenever Congress failed to explicitly provide a federal forum for vindication of a right under a federal statute — whether or not Congress had anything to say directly on the question. Of course, the Court fails to note that Congress is legislating in the shadow of general federal-question jurisdiction, meaning that it is at least tenuous to assume that Congressional silence here meant it wanted resolution of all claims under the statute to occur in state court, even when they involved substantial federal questions.

<sup>208</sup> 360 U.S. 25, 28-29 (1959).

<sup>209</sup> *Id.* at 29. Justice Frankfurter, writing for the Court, noted that abstention doctrines “reflect a deeper policy derived from our federalism.” *Id.* at 28.

<sup>210</sup> *Id.* at 29.



removal statute states that “[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.”<sup>211</sup> As the Supreme Court has noted, this is a “broad restriction[] on the power of federal appellate courts to review district court orders remanding removed cases to state courts.”<sup>212</sup> Nevertheless, the Supreme Court has interpreted this restriction somewhat narrowly, holding that the bar to appellate review applies only to “remands based on [the] grounds specified in § 1447(c).”<sup>213</sup> Indeed, since the Court first addressed the question in the 1976 case, *Thermtron Products, Inc. v. Hermansdorfer*,<sup>214</sup> it has repeatedly held that the bar on appellate review extends only to the specific grounds for remand in § 1447(c).<sup>215</sup> In particular, the current version of § 1447(c) isolates two grounds for motions to remand: lack of subject matter jurisdiction or “any defect other than lack of subject matter jurisdiction.”<sup>216</sup> As such, the Supreme Court has limited the bar on appellate review to remands based on “lack of subject matter jurisdiction or defects in removal procedure.”<sup>217</sup> Indeed, the Court recently unanimously reaffirmed this holding in *Carlsbad Technology v. HIF Bio, Inc.*<sup>218</sup>

In *Quackenbush v. Allstate Insurance Co.*, the Supreme Court addressed the question of whether § 1447(d) bars appellate review of a

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<sup>211</sup> 28 U.S.C. § 1447(d) (2006). The statute contains an explicit exception for cases removed under 28 U.S.C. § 1443, which involves civil rights cases and are generally not at issue in *Grable* cases.

<sup>212</sup> *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); see also *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2415 (2007) (“The authority of appellate courts to review district-court orders remanding removal cases to state court is substantially limited by [§ 1447(d)].”).

<sup>213</sup> *Things Remembered*, 516 U.S. at 127 (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976)).

<sup>214</sup> 423 U.S. 336, 339-42 (1976) (reviewing district-court remand order based on overloaded docket).

<sup>215</sup> See, e.g., *Powerex*, 127 S. Ct. at 2415 (“ . . . we have interpreted § 1447(d) to cover less than its words alone suggest”); *Osborn v. Haley*, 549 U.S. 225, 240 (2007) (holding that § 1447(c) confine[s] § 1447(d)’s scope); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 641 (2006) (holding that “force of the bar is not subject to any statutory exception that might cover this case”). Despite the repeated invocations of *Thermtron*, however, in all of the cases, the Court found the remand orders unreviewable under § 1447(d) because they purportedly lacked subject matter jurisdiction.

<sup>216</sup> 28 U.S.C. § 1447(c) (2006).

<sup>217</sup> *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996).

<sup>218</sup> 129 S. Ct. 1862, 1865-66 (2009). Several justices again, however, expressed a willingness to revisit *Thermtron* in an appropriate case, suggesting that its holding may be in doubt.

decision by a district court to remand a case pursuant to an abstention doctrine, and it held the statute presented no such bar.<sup>219</sup> In the case, which involved a district court's application of *Burford* abstention to a question of California state insurance law being addressed in a simultaneous proceeding in California state court, the Court offered little analysis on the § 1447(d) question. Citing *Thermtron*, the Court said, simply, that, "The District Court's abstention-based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure."<sup>220</sup> And with that, the Court found "no affirmative bar to appellate review of the District Court's remand order."<sup>221</sup> The Court's lack of analysis here is hardly surprising, given the nature of an abstention doctrine, which is premised on "the question whether the federal court should decline to exercise its jurisdiction in the interest of comity and federalism."<sup>222</sup> In *HIF Bio*, the Court reaffirmed the *Quackenbush* distinction, stating that "[t]his Court's precedent makes clear that whether a court has subject-matter jurisdiction over a claim is distinct from whether a court chooses to exercise that jurisdiction."<sup>223</sup>

Since *Quackenbush*, courts have taken it as given that remand orders based on abstention doctrines are reviewable.<sup>224</sup> The next question, then, is whether a remand under *Grable* can properly be thought of as an abstention doctrine. The seemingly obvious roadblock is that the Supreme Court characterized *Grable* as a jurisdictional test — that is, if a case does not surmount the three *Grable* hurdles, then subject-matter jurisdiction simply does not exist. One could argue, then, that § 1447(d)'s bar to appellate review would apply to any *Grable* remand decision; a view bolstered by the Supreme Court's recent decision in *Powerex v. Reliant Energy Services*, which held that for remand orders in which "the District Court relied upon a ground that is colorably

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<sup>219</sup> *Quackenbush*, 517 U.S. at 712-13.

<sup>220</sup> *Id.* at 712.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 714; see also 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3739 (4th ed. 2008) ("The abstention doctrine is not premised on a lack of subject matter jurisdiction or procedural defects in the removal, but rather on concerns about comity and deference to state judicial power.").

<sup>223</sup> *Carlsbad Tech.*, 129 S. Ct. at 1865-66.

<sup>224</sup> See, e.g., *Wallace v. La. Citizens Prop. Ins. Co.*, 444 F.3d 697, 700-01 (5th Cir. 2006) (holding that "we . . . have jurisdiction to review the remand order if it was premised on abstention").

characterized as subject-matter jurisdiction, appellate review is barred by § 1447(d).<sup>225</sup>

Although the *Powerex* doctrine seems applicable, analysis of district court opinions under *Grable* reveals that both the test itself and the way it is being applied look more like an abstention-based approach than a jurisdictional doctrine. No courts have yet described it as one, but the third step of *Grable* is indeed a classic abstention doctrine, in the tradition of what Professor Shapiro describes as a court's "decision not to proceed in traditional equitable principles, in principles of federalism and comity, or in principles of separation of powers."<sup>226</sup> Upon reaching the third step of *Grable* analysis, a court has already determined that a state-law claim necessarily raises a federal issue, actually disputed and substantial.<sup>227</sup> And, as noted in Part I, prior to *Merrell Dow*, and under *Smith*, the existence of a necessary, substantial, and actually disputed federal question would have been sufficient to confer federal jurisdiction. But *Grable* calls upon the federal court to make a further determination, to wit, whether "a federal forum may entertain [the claim] without disturbing any congressionally approved balance of federal and state judicial responsibilities."<sup>228</sup> Indeed, the *Grable* Court defined this analysis as a "possible veto."<sup>229</sup> As shown here, district courts have used the full measure of discretion possible to dismiss or remand cases under the third step of *Grable*, invoking various reasons for doing so, or, in many cases, no reasons at all.<sup>230</sup> A federal court's decision, then, to reject jurisdiction over an admittedly substantial federal question in deference to the general balance of business between the state and

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<sup>225</sup> *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2418 (2007).

<sup>226</sup> Shapiro, *supra* note 13, at 547.

<sup>227</sup> *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005); see, e.g., *Pruitt v. Honda of Am. Manuf., Inc.*, No. 3:06-0128, 2006 U.S. Dist. LEXIS 19505, at \*10 (M.D. Tenn. Mar. 28, 2006) (noting that "division of labor between the federal and state courts is the focal point" of *Grable* analysis); *Legette v. Wash. Mut. Bank*, No. 3:03-CV-2909-D, 2005 U.S. Dist. LEXIS 24405, at \*9-10 (N.D. Tex. Oct. 19, 2005) (remanding under step three even though "dispute rests entirely on the correct interpretation of three government regulations" and "[f]ederal issues appear . . . to be the only questions contested in the case").

<sup>228</sup> *Grable*, 545 U.S. at 314.

<sup>229</sup> *Id.* at 313-14 ("But even when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331.").

<sup>230</sup> See *supra* Part II.

federal courts falls squarely within the abstention tradition and should therefore be subject to appellate scrutiny.<sup>231</sup>

Recognizing decisions to remand under step three of *Grable* as decisions to abstain, and treating them accordingly, would open the way for appellate review of such decisions, offering several potential advantages.<sup>232</sup> Perhaps the most obvious advantage would be a general

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<sup>231</sup> See, e.g., *New York v. Dell, Inc.*, 514 F. Supp. 2d 397, 401 (N.D.N.Y. 2007) (“The principles of comity and federalism also prevent the exercise of federal jurisdiction over this case.”); *Akins v. Radiator Specialty Co.*, No. 3:05-451, 2006 U.S. Dist. LEXIS 71076, at \*23 (W.D. Pa. Sept. 29, 2006) (suggesting that finding federal jurisdiction or preemption in products-liability cases would “indicate a thread of distrust” of state courts’ ability to handle those cases). Some of these cases even express the bizarre and untenable proposition that it is “unacceptable” for federal courts to “pass[] on matters of state law, in a case in which diversity jurisdiction is not apparent.” *Fagin v. Gilmartin*, No. 03-2631 (SRC), 2007 U.S. Dist. LEXIS 7256, at \*14 (D.N.J. Feb. 1, 2007). It is probably no accident that the opinion in this case cites no authority for this proposition. See also *Hirschbach v. NVE Bank*, 496 F. Supp. 2d 451, 456 (D.N.J. 2007) (referring to district court’s ability to “pass[] on matters of state law” as “unacceptable — and unauthorized”).

These cases also call to mind Professor Wright’s view that “The federal courts should be admonished that abstention is to be used only to serve the purposes of federalism and not merely for the convenience of the federal courts.” Wright, *supra* note 192, at 826.

<sup>232</sup> One forceful critique of using *Quackenbush* to allow appellate review of “abstention” decisions under *Grable* is that, under the second half of the *Quackenbush* opinion, a federal court may not dismiss under an abstention doctrine an action for damages because “federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996). As Professor Burbank has noted, although the Court’s decision only addresses *Burford* abstention, the Court’s language “may represent a knowing wink in the direction of, rather than an effort to honor, separation of powers.” Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power — A Case Study*, 75 NOTRE DAME L. REV. 1291, 1295 n.18 (2000).

This raises the question, can dismissals under *Grable* step three in damages cases properly be treated as abstention decisions, given the holding in *Quackenbush*. My view is that they can and should be. The Supreme Court created a new abstention doctrine in step three of *Grable* and simply did not anticipate the potential contradiction with *Quackenbush*, probably because the Court believed it was defining the contours of the federal-question statute, rather than dealing in abstention. Intention aside, though, the Court formally imported abstention principles into the doctrine, creating significant tension with *Quackenbush*.

If forced to deal with the tension, something would have to give. The Court today might conclude that the language of the *Quackenbush* holding goes too far in restricting its holding to equity cases. The fact that the Court limited its holding to *Burford* abstention means this is at least formally still an open question. Additionally, as Professor Shapiro has shown, albeit before *Quackenbush*, discretionary doctrines similar to abstention have long been applied by courts of “law.” Shapiro, *supra* note 13, at 551-52. Moreover, as Professor Wells has noted, the equity-based justification

development of the doctrine in order to provide district courts more guidance. This has already occurred in limited instances where cases originally brought in federal court have been reviewed on appeal, in contrast to the more common situation in which cases are filed in state court and then removed by defendants and remanded without possibility for review.<sup>233</sup> Perhaps even more significantly, with greater opportunity for review in the courts of appeals, there will be a greater likelihood of circuit splits on particular questions, increasing the chances for review and refinement of the *Grable* doctrine by the Supreme Court. In this era of the high Court taking very few cases, chances that the Court would revisit this issue again are admittedly low, but they are certainly higher in a world where courts of appeals are able to develop this area of the law. Further, if it becomes clear that state courts are addressing particularly important federal questions in certain areas or in connection with broad-based torts

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for abstention had lessened significantly in importance prior to *Quackenbush*. Wells, *supra* note 191, at 1108. To the extent that a court acting in a “legal” as opposed to an “equitable” capacity is forbidden to apply an abstention doctrine, therefore, relies on a tenuous distinction between law and equity. *See also* Daniel Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1898-99 (2004) (arguing that Court’s *Quackenbush* formulation “has little to recommend it”).

Citing Professor Shapiro, Justice Kennedy recognized as much is his concurrence when he posited that there very well could be damages actions in which abstention was warranted based on the possible affront to federalism and comity such a case might present. *Quackenbush*, 517 U.S. at 733-34. Justice Scalia, writing separately to respond to Justice Kennedy, questioned whether there could ever be a case when Congress decided federal jurisdiction was warranted in which abstention would be appropriate. *Id.* at 732. But the *Grable* doctrine presents just such an instance, when subject matter jurisdiction over admittedly substantial federal questions is rejected because of the potential impact on federalism and the balance of power between state and federal courts. *Grable*, 545 U.S. at 314.

Whether this explanation, and Justice Kennedy’s concurrence, would give an appellate court adequate cover to review an appeal of a damages action under step three of *Grable* is unclear. I believe it would, and in any event, a circuit split on the question might require the Supreme Court to address the issue. At the very least, *Quackenbush*’s holding would present no bar to appellate review of *Grable*-based abstention decisions in cases where the plaintiff seeks equitable or discretionary relief.

<sup>233</sup> *See, e.g.,* Mikulski v. Centerior Energy Corp., 501 F.3d 555 (6th Cir. 2007) (en banc) (reviewing case filed in first instance in federal court); Bennett v. Sw. Airlines Co., 484 F.3d 907 (7th Cir. 2007) (remanding case involving purportedly state-law claims arising out of air crash); Eastman v. Marine Mech. Corp., 438 F.3d 544 (6th Cir. 2006) (remanding retaliatory-discharge action brought under Ohio law for lack of subject matter jurisdiction). *But see* Broder v. Cablevision Sys., 418 F.3d 187 (2d Cir. 2005) (affirming jurisdiction when case dealt with “the complex federal regulatory scheme applicable to cable television rates”).

implicating federal law, an even greater need, and perhaps potential, for Supreme Court review will emerge.

### 3. Some Objections and Responses

There are, however, several other potent objections to consideration of the third step of *Grable* as an abstention doctrine, two of which I will address here.

*Delay:* The strongest objection from a practical perspective is the concern that adding an additional layer of appellate review will only cause additional delay for litigants, a concern that is more pronounced in the removal context because crafty defendants may remove cases that have no business being in federal court only to slow cases' progress in state courts.<sup>234</sup> Allowing those defendants the right to appeal remand orders would only exacerbate the problem. Proponents of this view have a point: litigation moves slowly enough as it is, without another layer of appellate review.<sup>235</sup> But those concerns could be mitigated. Courts of appeals could fast-track *Grable* appeals, much in same way those courts often expedite other appeals. Fast-tracking these cases would work well because of the limited record involved. Jurisdiction is generally determined from the pleadings alone, so courts will not need to expend significant resources combing through a dense record. Moreover, if appellate review results in more detailed doctrinal development in this area, there will soon be a substantial body of common law to aid in deciding these cases, making many cases easier to resolve.<sup>236</sup> Finally, as appellate courts continue to further develop the doctrine, courts could more often wield the stick

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<sup>234</sup> See WRIGHT ET AL., *supra* note 221, § 3740 (noting that: “[i]n general, the purpose of the ban [on review] is to spare the parties interruption of the litigation and undue delay in reaching the merits of the dispute, solely to contest a decision disallowing removal”). Or, as has been noted by Professor Purcell in the corporate diversity context, such delays might pressure plaintiffs, acting with limited resources, to accept discounted settlements. See EDWARD A. PURCELL, JR., *LITIGATION & INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958*, at 45–47 (1992).

<sup>235</sup> It is also worth noting that in the years since *Quackenbush* explicitly allowed appeals of abstention decisions, the business of the federal courts has not ground to a halt.

<sup>236</sup> Another possible approach would be a discretionary appeal system similar to the interlocutory appeal of decisions on certification of class actions under Federal Rule of Civil Procedure 23(f). Under that system, the losing party in a class-certification ruling may ask the district court for the opportunity to appeal the decision, and the appellate court may decide whether to take on the appeal. Although I prefer an appeal as of right, in order to develop the doctrine more fully, a discretionary appeal process might be a more acceptable middle ground were Congress or the courts to get serious about reviewing *Grable* decisions.

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of awarding the other side's attorney's fees against parties who remove cases under *Grable* without any basis.<sup>237</sup>

*Shift in district court strategy:* Another powerful objection is that, in order to avoid appellate review of the step-three remand decision, district courts might simply remand cases citing only the second step of *Grable*, which involves the substantiality of the federal question. Setting aside for the moment whether remand on this ground could be considered an abstention doctrine (it is a much tougher case),<sup>238</sup> and also setting aside whether strategic avoidance of jurisdiction is a realistic conception of how district courts operate, this objection does have some force. Given that a district court could sidestep appellate review of a remand order by remanding cases based on a determination that the federal question is not substantial enough, the current problems with *Grable* could persist — cases involving significant federal questions could still be remanded to state court with no opportunity for the parties to appeal the remand. Therefore, recognizing *Grable*'s third step as a new abstention doctrine may not be a complete solution. If one takes seriously the advantages federal courts possess in answering questions of federal law, then there needs to be an additional palliative. I take up one such possibility in the next section.

#### B. Allow States to Certify Certain Federal Questions to Federal Courts

One component of a solution to the district courts' hostility to embedded-federal-question cases might be a process through which state courts could certify questions of federal law to federal courts. This process would function similarly to the process adopted in most states by which federal courts may certify state-law questions to state

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<sup>237</sup> Attorneys' fees and costs may be awarded under 28 U.S.C. § 1447(c). The Supreme Court has recently held that such an award is inappropriate unless the removal lacked an objectively reasonable basis. See *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Courts, however, have been loath to award attorneys' fees in *Grable* cases because of the complexity and uncertainty of the doctrine. See, e.g., *In re Average Wholesale Price Litig.*, 457 F. Supp. 2d 65, 76 (D. Mass. 2006) (declining to award fees because "the Court was required to grapple with *Grable*"). As appellate courts further develop the doctrine, however, attorneys' fees may become a more viable deterrent against removal in cases contradicting that doctrine.

<sup>238</sup> The case is tougher because substantiality of the federal question is a question of opening the door to a federal court, as opposed to being pushed out of it based on other considerations such as federalism. Moreover, despite the lack of the word "substantial" in the "arising under" clause of either Article III or the federal-question statute, there is a longstanding historical basis for requiring that the question be substantial or important going all the way back to *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 201 (1921).

courts.<sup>239</sup> If part of the problem created by the wide-ranging discretion afforded district judges to decline jurisdiction under *Grable* is that important federal questions are left to state tribunals, that problem could be mitigated by actually allowing federal courts to answer those embedded questions, while keeping the entire case in state courts. Parties would benefit from federal-court expertise in federal law, and the system would achieve increased uniformity as to the interpretation of federal law, consequently increasing predictability as to the substantive law as well. In this section, I will sketch the outline of a model of federal certification, noting in more detail the possible advantages. Then, I will assess some of the possible objections to such a proposal, including what I perceive to be the most difficult obstacle: the possibility that such a system would allow federal courts to issue advisory opinions in violation of Article III. Ultimately, I do not find this, or other objections persuasive. Rather, a process that allows federal courts to answer federal questions presented in state-law claims will go a long way toward a more rational allocation of jurisdiction among the federal and state courts. This suggestion, of course, is potentially applicable beyond the *Grable* context and presents numerous interesting questions about the relationship between the federal and state courts. I offer the outline of how a certification approach might work here as both a solution to the *Grable* problem and as a prelude to future development.<sup>240</sup>

### 1. The Process

As I have noted throughout this Article, and as has been amply detailed elsewhere,<sup>241</sup> our current array of jurisdictional rules allocates many cases to state court that turn on the resolution of federal questions. Along with the vast majority of embedded federal-question claims remanded or dismissed under *Grable*, many federal questions wind up in state courts because the well-pleaded complaint rule bars

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<sup>239</sup> *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997); *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976); *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) (noting that certification “save[s] time, energy, and resources and helps build a cooperative judicial federalism”).

<sup>240</sup> One such interesting question is what action would be necessary to implement such a scheme. State legislatures would likely need to authorize state courts to certify questions, but it is unclear whether federal legislative action would be necessary. One could argue that the general federal-question statute would suffice to allow federal courts to accept certified questions from state court, but this seems problematic.

<sup>241</sup> See, e.g., Bator, *supra* note 179, at 620-21 (arguing that state courts have long had proper role to play in interpreting and applying federal law).



jurisdiction when the federal issues in the case come up only by way of defense. There is of course nothing constitutionally suspect about state courts answering questions of federal law, especially given that they are bound by the Supremacy Clause.<sup>242</sup> Furthermore, there may be benefits to having state courts opine on questions of federal law, just as there are benefits to federal courts opining on issues of state law in diversity cases.<sup>243</sup> But, as the *Grable* Court noted, significant benefits to federal courts interpreting questions of federal law include national law being applied uniformly (or as close as possible to uniformly) and the expertise that comes with federal courts answering questions of federal law.

Most states allow federal courts to certify to the highest court of the state unresolved questions of state law presented in cases before a federal court.<sup>244</sup> The certification device, which has gained prominence only in the last thirty years, has offered the federal courts a more streamlined alternative to abstaining from deciding such state questions under *Railroad Commission of Texas v. Pullman*.<sup>245</sup> Both federal and state judges have been generally enthusiastic in their adoption and use of the certification procedure.<sup>246</sup> But, so far, there is

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<sup>242</sup> Indeed, as Professor Stolz noted, having state courts answer questions of federal law has long been a central component of our federal judicial scheme, if less so after the 1875 passage of the general federal-question statute. Preble Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 949-50 (1976). As Professor Redish has noted, though, just because a state court may decide a question of federal law does not mean its doing so is preferable to a federal court. See Redish, *Federal Jurisdiction*, *supra* note 19, at 1788.

<sup>243</sup> See David Shapiro, *Federal Diversity Jurisdiction: A Survey and Proposal*, 91 HARV. L. REV. 317, 325 (1977) (suggesting that “the free flow of ideas between the two court systems” is beneficial in development of state law).

<sup>244</sup> See generally 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4248 (3d ed. 2007) (cataloguing various state-certification statutes).

<sup>245</sup> 312 U.S. 496 (1941). Professor Field was prescient when she suggested that “certification may be a satisfactory answer to the abstention dilemma.” Martha A. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 609 (1977); see also Field, *supra* note 15, at 698 (noting benefits of certification over *Pullman* abstention); Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 316 (1994) (noting, and expressing reservations about, expansion of doctrine).

<sup>246</sup> John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 457 (1988) (noting that federal and state judges surveyed about certification “indicated overwhelming judicial support for the certification process”); see also, e.g., Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1301 (2003) (“I believe that whenever there is a question of state law that is even possibly in doubt, the federal courts should send the question to the highest court in the state, and let the highest court of the state decide the issue as it wishes.”).

no reciprocal ability for state courts to certify questions of *federal* law to a federal court.<sup>247</sup>

Although some commentators have suggested this idea in passing, no one has yet refined exactly what such a federal certification process would look like.<sup>248</sup> The lengthiest exposition of such a process comes from a lecture Judge Bruce Selya of the First Circuit Court of Appeals gave in 1995 criticizing certification of state-law questions to state courts.<sup>249</sup> In his lecture, Judge Selya suggests that such a process would face intractable problems, in particular the Article III prohibition on advisory opinions.<sup>250</sup> I will address this and Judge Selya's other concerns below, but Judge Selya did not consider in depth the possibility of a federal certification process or how it might work.

Here is how such a process *should* work, in my view. The highest court of a state, in determining that an unresolved question of federal statutory law would be outcome determinative in a particular case, should be able to certify that question to the U.S. Court of Appeals for the circuit in which the state is situated. The relevant court of appeals could then decide, based on a process defined by its own local rules, whether or not to accept jurisdiction over the particular question.<sup>251</sup> If

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<sup>247</sup> See Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 160 (2003) ("No state court at any level, however, enjoys the opportunity to certify difficult questions of federal law to a federal court.").

<sup>248</sup> For instance, Professor Miller has suggested in a footnote that a "purely theoretical option . . . would be to allow state courts routinely to certify putative substantial federal questions to a federal court." Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1820 n.211 (1998). Professor Meltzer, in an article discussing the impact of the Supreme Court's recent sovereign-immunity jurisprudence on intellectual property regulation, also hypothesizes in a footnote that if states wound up deciding significant intellectual property questions, Congress could create a "new mechanism by which litigants in state court could seek certification of issues of federal law directly to the Court of Appeals for the Federal Circuit." Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1356 n.93 (2001). Judge Jon O. Newman has also proposed a process by which state cases with federal issues might be appealed to federal courts, and federal diversity cases to state courts. He calls this "reciprocal routing." Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 774-76 (1989).

<sup>249</sup> Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 677-78 (1995).

<sup>250</sup> *Id.* at 684-85.

<sup>251</sup> There are several possibilities for how this might be done, ranging from leaving the decision to the Chief Judge of the Circuit ranging all the way to voting by an en banc panel of the entire court. While some judges might object to lodging such power in the Chief Judge, at the same time, it might create significant burdens on a court for all of the judges to vote on every certified question, particularly in some of the larger

the court elects to accept the question, then a three-judge panel could resolve it in the normal course, accepting briefing and hearing oral argument if necessary.<sup>252</sup> Once the question is answered, the case would proceed apace in the state court from which the question came. Just as in a federal proceeding in which a court of appeals certifies a question to a state court, appeal to the U.S. Supreme Court may not result from the answer to the certified question, but only from the final resolution of the case by the state-court system.<sup>253</sup>

Although one could envision an argument that any federal certification process should be to only the U.S. Supreme Court, the courts of appeals would be superior tribunals for certification. First, in recent years, the Supreme Court has not shown any inclination to increase the size of its docket, and given that there are fifty states that might be certifying questions, all of the reasons scholars have posited that Supreme Court review of final state judgments is inadequate to vindicate federal interests would apply here.<sup>254</sup> Second, the courts of

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circuits, such as the Ninth as opposed to the First. Each circuit could devise its own system through its local rules. One other possibility might be to have a rotating three-judge committee within the circuit that could handle certified questions. When the three judges agreed that a question should or should not be certified, that decision would control, but when one judge dissented, the question could be submitted to the entire court for consideration.

<sup>252</sup> I assume that, because panel decisions are generally binding unless reversed by the court en banc, see, for example, *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610-11 (3d Cir. 2002); *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986); *Brewster v. Comm'r*, 607 F.2d 1369, 1373 (D.C. Cir. 1979) (per curiam), that a losing party before the Court of Appeals could petition for rehearing en banc.

<sup>253</sup> Prohibiting interlocutory appeal to the Supreme Court makes sense in practical terms, as the resultant delay could add to an already lengthened litigation process. Moreover, on *appeal* it makes sense for the Supreme Court to review the entirety of the case, a slightly different posture from certification, which merely asks for the answer to a legal question, which, albeit pertinent in a live dispute, does not call for any holistic assessment of the case or review of factual findings.

<sup>254</sup> See Stolz, *supra* note 242, at 964 (noting, even three decades ago, when Court was hearing more cases than it does today, that “given the pressure on the Court’s docket of cases from federal courts, there is no longer room for supervising the application of federal law in state courts except in an occasional and almost random manner. Thus, it is impossible to argue, as might have been done earlier, that discretionary appellate review by the Supreme Court will protect the federal interest in the uniform application of federal law by state courts”). More recently, Professor Friedman has noted that “no one can plausibly argue” that Supreme Court review of state decisions is adequate to support federal interests. Friedman, *Allocating Cases*, *supra* note 177, at 1219. Moreover, the Supreme Court’s dismal history with respect to certification of questions from courts of appeals suggests it would not be the proper destination for questions certified by state courts. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-five Years After the Judges’ Bill*, 100 COLUM. L. REV.

appeals possess special advantages in dealing with states within their geographic boundaries. The judges of the particular circuits are usually intimately familiar with their home states and the surrounding states, in part due to their experiences on the court of appeals. Moreover, certification of these questions to the federal circuit courts would achieve uniformity within the circuits,<sup>255</sup> more closely approximating the usual development of federal law, with differences among the circuits potentially resolvable by the Supreme Court in a case either within federal jurisdiction or appealed from a final state-court judgment.

## 2. Potential Benefits of Reverse Certification

Certification from federal to state courts has been effective, suggesting that the process in reverse would be successful as well.<sup>256</sup> Indeed, such a “reverse” certification process offers numerous benefits similar to those provided by the existing process. As noted, the *Grable* Court acknowledged that there are significant advantages simply to

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1643, 1710-12 (2000).

<sup>255</sup> This also provides a reason why a federal certification process should not be to district courts. As the opinion of one district judge does not bind any others, the opinion of the court of appeals would be binding and authoritative.

<sup>256</sup> See, e.g., *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 408 (2d Cir. 2008) (Katzmann, J., dissenting) (“On many occasions, we have greatly benefited from certifying significant state-law questions to the New York Court of Appeals.”); Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 *FORDHAM L. REV.* 373, 418-19 (2000) (“The New York experience has shown beyond dispute that inter-jurisdictional certification is beneficial to state and federal courts and litigants. . . . Widespread experience has mooted the question whether the procedure works; clearly it does.”); J. Michael Medina, *The Interjurisdictional Certification of Questions of Law Experience: Federal, State and Oklahoma — Should Arkansas Follow?*, 45 *ARK. L. REV.* 99, 103 n.21 (1992) (collecting positive commentary); Note, *New York’s Certification Procedure: Was It Worth the Wait?*, 63 *ST. JOHN’S L. REV.* 539, 555 (1989) (“Acting as a proverbial lifeboat in a turbulent legal sea, certification ensures that both federal and state courts, as well as the concerned parties, reach terra firma.”).

That said, although the majority of the literature on certification has been positive, that opinion is not unanimous. Several commentators have criticized the process as ungainly and providing courts with an opportunity to duck their responsibility to interpret the law. See Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 *U. MIAMI L. REV.* 717, 731 (1969); Selya, *supra* note 249, at 681; Yonover, *supra* note 245, at 312. But the balance of the empirical evidence appears to support the conclusion that the “problems associated with certification probably have been overstated, while the promised benefits of the process in a federal-state context has been substantially achieved in those cases in which certification was tried.” Corr & Robbins, *supra* note 246, at 457-58; see also Friedman, *Allocating Cases*, *supra* note 177, at 1254-56.

having a federal court resolve questions of federal law, just as there are advantages to having a state court answer questions of state law.<sup>257</sup> Furthermore, allowing the federal courts of appeals to answer federal questions within state-law claims would increase the level of uniformity in interpretation of federal law. When the circuit court opines on a particular question, its opinion would become binding law throughout the circuit, gaining even greater uniformity than might be had through resolving such claims on a case-by-case basis in the federal district courts.

Certification to federal courts would also bring with it the concomitant realization of the advantages of federal expertise in matters of federal law. This is especially true with respect to questions regarding the interpretation of federal statutes. Because statutory interpretation is such a large part of the work of federal judges, there are significant benefits proceeding from the federal courts' specialized knowledge of both federal approaches to statutory interpretation and the federal legislative process.<sup>258</sup> This advantage of specialized knowledge may be enhanced when it comes to particular circuits' facility with certain federal statutes.

Certification of federal questions could also improve comity between the federal and state systems. Currently, when a state resolves a question of federal law, there is a potential for friction between the courts; not necessarily because the state court "got it wrong," but because reasonable minds frequently disagree on difficult legal questions.<sup>259</sup> These disagreements often manifest themselves in the infamous "parity" debate, the arguably unresolvable conflict over whether federal courts are better than state courts or vice versa.<sup>260</sup> One

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<sup>257</sup> See Calabresi, *supra* note 246, at 1308.

<sup>258</sup> See, e.g., Chemerinsky & Kramer, *supra* note 176, at 85 (" . . . federal courts are comparatively more skilled than state courts interpreting and applying federal law, and are more likely correctly to divine Congress' intent in enacting legislation . . .").

<sup>259</sup> See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) (noting that "federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court"); *Barnes-Wallace v. City of San Diego*, 471 F.3d 1038, 1040 (9th Cir. 2006); *Sealed v. Sealed*, 332 F.3d 51, 59 (2d Cir. 2003); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 509 (7th Cir. 1998); *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 302 (3d Cir. 1995) (Becker, J., dissenting); *Cuesnongle v. Ramos*, 835 F.2d 1486, 1493 (1st Cir. 1987) ("One invaluable attribute of the certification process . . . is that it presents the rare occasion when courts of different systems can talk to one another about common problems."); see also Redish, *Federal Jurisdiction*, *supra* note 19, at 1773 (noting benefits of dialogue between state and federal systems, referring to it as "intersystemic cross-pollination").

<sup>260</sup> Chemerinsky, *supra* note 192, at 236 (noting that "parity" debate is

thing that most scholars, judges, and litigants could agree upon is that federal courts are competent to answer questions of federal law, and that state courts are competent with respect to state law.<sup>261</sup> As Professor Friedman has outlined in an enlightening article, we can take advantage of this general agreement by utilizing more multijurisdictional approaches to resolving questions implicating both state and federal laws.<sup>262</sup> In my proposed certification process, it is therefore likely that instead of the state and federal courts competing for turf, both courts may be able to apply their particular expertise to relevant aspects of a given case, eliminating any further need for meditations on the “parity” of federal and state courts (or lack thereof). Moreover, allowing reverse certification might eliminate many lengthy and costly jurisdictional disputes that currently frustrate efficient litigation of suits involving both federal and state law.<sup>263</sup> For instance, rather than engage in a drawn-out dispute over whether a case should be removed to a federal court, defendants seeking faster resolution of a case might prefer its residing in state court with the critical question of federal law being resolved in a federal court on certification.

In a way, a federal certification process might provide a middle-ground solution to the *Grable* problem, no matter how you view the district courts’ current application of the doctrine. If one views the district courts as too readily withholding federal jurisdiction, then at least the advantages of a federal forum could be achieved in many cases on certification. Or, if one believes that in most cases, the district courts are getting it right, but that some federal judges are asserting jurisdiction over cases when they should not, perhaps those judges will be more willing to cede cases to state courts if a federal forum is available for federal questions on certification. With respect to

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“permanently stalemated”). Compare Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing for preeminence of federal courts), with Bator, *supra* note 179 (arguing that state courts effectively apply federal law). Whether parity can be determined or not, Professor Redish persuasively argues that the competency of state courts to handle federal questions does not alone warrant the elimination of an otherwise statutorily authorized federal forum. See Redish, *Federal Jurisdiction*, *supra* note 19, at 1788.

<sup>261</sup> See, e.g., Calabresi, *supra* note 246, at 1308 (noting benefits that would arise if “each set of courts would do what it knows and does best”); Friedman, *Allocating Cases*, *supra* note 177, at 1236 (noting that it is generally “better for a sovereign’s own courts to resolve novel or unsettled questions regarding that sovereign’s laws”); Pushaw, Jr., *supra* note 16, at 1517 (calling it “bedrock tenet” of federal-jurisdiction law that federal courts should be responsible for federal law, and state courts for state law).

<sup>262</sup> Friedman, *Allocating Cases*, *supra* note 177, at 1214.

<sup>263</sup> *Id.* at 1246.

predictability, adding a federal certification system should reduce the incentive to forum shop, because parties will be able to predict which forum will answer which questions, regardless of which forum holds jurisdiction over the entire case.

### 3. Objections and Rejoinders

Despite these potential advantages, there are some legitimate objections to a federal question certification system. Some of these objections are unpersuasive, given the possible benefits of this procedure. For instance, there are obvious risks of delay and adding to the work of the circuit courts, but such delays need not be an insuperable obstacle — indeed it has not proved a significant barrier to effectiveness of the current procedure of certifying state-law questions to state courts.<sup>264</sup> Moreover, courts of appeals will be answering isolated questions of law, so their review should not take terribly long compared with their usual burden of resolving the entirety of an appeal on a complex factual record. There may even be an incentive on the part of the courts of appeals to respond to certified questions expeditiously in hopes that they will benefit from similar treatment when certifying their own questions to the states. While one could imagine resistance on the part of already overburdened federal courts to adding an additional obligation, both the discretion to refuse to answer some questions and the potential for reciprocity with the state courts to which they send questions could mitigate that opposition. Despite an initial delay, federal certification may make the litigation at issue more efficient overall, providing a certain answer to a question which might otherwise provoke additional litigation, and which would set precedent aiding future litigants.

Arguably, the most significant obstacle to a federal certification system is the contention that such a system would run afoul of the prohibition on advisory opinions, by allowing federal courts to opine on matters outside the boundaries of an Article III case.<sup>265</sup> Indeed,

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<sup>264</sup> See *Arizonans*, 520 U.S. at 76 (noting that certification “allows a federal court faced with a novel state-law question to put the question directly to the State’s highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response”); *Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1060-61 (6th Cir. 1994); William G. Bassler & Michael Potenza, *Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure*, 29 SETON HALL L. REV. 491, 504-05 (1998); Kaye & Weissman, *supra* note 256, at 397 (noting that “one of primary objections to the concept of certification — undue delay — has not been a problem in New York”).

<sup>265</sup> See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 48 (5th ed. 2007) (“The core of Article III’s limitation on federal judicial power is that federal courts cannot issue

Judge Selya voiced this concern in his 1995 speech pillorying certification in general.<sup>266</sup> Although the contours of the rule against advisory opinions are somewhat murky, there is no doubt that it is one of the bedrock policies of federal jurisdiction.<sup>267</sup> Overall, a federal certification system should cause little concern along these lines. The opinions rendered by the federal courts under this model would hardly be advisory: they would not be hypothetical or unrelated to particular disputes. To the contrary, as with federal questions certified from state courts,<sup>268</sup> they would be outcome-determinative questions in ongoing litigation.<sup>269</sup>

A more apt analogy for the proposed certified federal question would be a declaratory judgment, not an advisory opinion. When issuing a declaratory judgment — similar to when answering a certified question — the court resolves a discrete issue that is in actual, not theoretical, dispute. In the declaratory-judgment context, any argument that addressing such questions is improper has been rejected. In 1928, the Supreme Court initially believed that the declaratory judgment was barred by the case-or-controversy requirement of Article III.<sup>270</sup> But the Supreme Court abruptly changed

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advisory opinions.”); CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 65 (5th ed. 1994) (“... the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions . . .”).

<sup>266</sup> Selya, *supra* note 249, at 685.

<sup>267</sup> See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 79-82 (5th ed. 2003); see also James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction*, 54 *RUTGERS L. REV.* 1, 78 (2001); Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any “Dear John” Letters: Advisory Opinions in Historical Perspective*, 87 *GEO. L.J.* 473, 478 (1998).

<sup>268</sup> See, e.g., *Story v. Randy’s Auto-Sales*, 589 F.3d 873, 879 (7th Cir. 2009) (“Before we certify this question, however, we must first ascertain whether the issue is outcome-determinative.”); *White Plains Coat & Apron Co. v. Cintas Corp.*, 460 F.3d 281, 285 (2d Cir. 2006) (“Certification is proper when . . . we are confronted with a dispositive complex question of New York common law for which no New York authority can be found.”).

<sup>269</sup> See *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968) (noting that Article III’s prohibition on advisory opinions “recognizes that such suits are often not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests”); see also Wright, *supra* note 192, at 65 (noting that rule against advisory opinions “recognizes the risk that comes from passing on abstract questions rather than limiting decisions to concrete cases in which a question is precisely framed by a clash of genuine adversary argument exploring every aspect of the issue”).

<sup>270</sup> Andrew D. Bradt, “*Much to Gain and Nothing to Lose*”: *Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 *ARK. L. REV.* 767, 774-76



its mind in 1933, perhaps in response to growing acceptance of declaratory relief on the state level, increased agitation for a federal declaratory-judgment statute, and the efforts of Yale Law School professor Edwin Borchard.<sup>271</sup> Unanimously, in *Nashville, Chattanooga & St. Louis Railway v. Wallace*, the Court held it had jurisdiction over a declaratory judgment action originally brought (and denied) in Tennessee state court.<sup>272</sup> Noting that the Court was “concerned, not with form, but with substance,”<sup>273</sup> Justice Stone wrote that jurisdiction existed to review a declaratory judgment “so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below.”<sup>274</sup> Soon thereafter, Congress passed the federal Declaratory Judgments Act.<sup>275</sup> The Supreme Court affirmed the constitutionality of declaratory relief in 1937,<sup>276</sup> finding jurisdiction whenever an action for declaratory relief was “admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”<sup>277</sup> In a later case, the Court noted again the difference between a declaratory judgment and an advisory opinion: “Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”<sup>278</sup> The same test ought to be the lodestar for whether a court of appeals accepts a certified federal question from a state court. If there is a substantial controversy which turns on an unresolved question of federal law, the federal court ought to exercise its expertise and answer the question.<sup>279</sup>

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(2006); see also Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529, 560 (1988). Indeed, in *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289 (1928), Justice Brandeis wrote for a unanimous Court, holding that there was no federal jurisdiction to grant a declaratory judgment, on grounds that to do so was “beyond the power conferred upon the federal judiciary.”

<sup>271</sup> Bradt, *supra* note 270, at 779.

<sup>272</sup> 288 U.S. 249, 264 (1933).

<sup>273</sup> *Id.* at 259.

<sup>274</sup> *Id.* at 264.

<sup>275</sup> Bradt, *supra* note 270, at 780.

<sup>276</sup> *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 244 (1937).

<sup>277</sup> *Id.* at 238.

<sup>278</sup> *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

<sup>279</sup> This, actually, is the standard for whether a court, placing any jurisdictional concerns aside, should ever award a party a declaratory judgment. Edwin Borchard,

Doing so would not implicate the primary concerns underlying the ban on advisory opinions. Professor Chemerinsky notes three such concerns: (1) keeping courts out of the legislative process, (2) preventing instances when courts are asked to rule on statutes which ultimately may not be passed, and (3) ensuring that the cases presented to the courts are real disputes and not hypothetical legal questions.<sup>280</sup> Unlike cases where the parties are not adverse,<sup>281</sup> or that would result in a nonbinding recommendation,<sup>282</sup> certified federal questions would resolve a live dispute and should not fall afoul of the prohibition on advisory opinions.

There are numerous other checks on a potential flood of requests for certified questions from state courts. Like state courts in the current system, federal courts will retain the authority to decline to answer certified questions. Moreover, just as current doctrine requires that a certified question of state law be dispositive, the same would be true of certified federal questions. This requirement that the question be outcome determinative should minimize the ability of state courts to certify questions to federal courts in order simply to avoid answering difficult questions of state law necessary to resolve the case.

In sum, important federal questions are now being decided in state courts, thanks in significant part to the district courts' restrictive interpretation of *Grable*. Adopting a process in which state courts could certify questions of federal law to federal courts offers the advantages of a federal court deciding questions of federal law: uniformity, expertise, lack of hostility toward federal rights. Moreover, such a process would yield the increased comity that arises from the two systems collaborating with one another to solve complex problems, as well as the predictability of knowing in advance which court is likely to answer which questions at the outset of litigation regardless of where jurisdiction lies.

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the patron saint of American declaratory relief, believed that a judge should decline a request for a declaratory judgment if that relief would not "terminate the uncertainty or controversy giving rise to the proceeding [and] . . . serve a useful purpose in stabilizing legal relations." EDWIN BORCHARD, *DECLARATORY JUDGMENTS* 296 (2d ed. 1941). The Supreme Court recently noted that it "agree[d], for all practical purposes, with Professor Borchard" on this score. See *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995).

<sup>280</sup> CHEMERINSKY, *supra* note 265, at 49.

<sup>281</sup> See, e.g., *Muskrat v. United States*, 219 U.S. 346 (1911).

<sup>282</sup> See, e.g., *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948).

## CONCLUSION

In the years since the Supreme Court's promulgation of the *Grable* test, it has become clear that the test's potential for ensuring increased federal-court attention to difficult and important federal questions is not being realized. Indeed, federal district courts often refuse to answer questions that are admittedly substantial and important if doing so would somehow alter the balance of power between federal and state courts. It has become similarly clear that district courts often do not engage in rigorous analysis in coming to this conclusion, leaving litigants to guess why they have been kicked out of federal court. The unanimity of the Supreme Court's opinion in *Grable* suggests that the test will have a long life, but the disappointments of its early application need not.

In this Article, I have proposed two independent but complementary solutions to the problems perpetuated by *Grable*. In order to ensure development of a common law of *Grable* jurisdiction and to counter standardless remands, I have argued that decisions to remand cases removed to federal court on *Grable* grounds should be subject to appellate review. Recognizing the difficulties in amending the removal statute to allow such a result, I suggest an alternative route: considering the third step of the *Grable* test, which allows courts to decline jurisdiction over a case if keeping it will change the balance of business among the federal and state courts, to be a new abstention doctrine. Because decisions by district courts to abstain from hearing a removed case are subject to appellate review, conceiving of *Grable*'s third step as an abstention doctrine would facilitate appellate oversight of district courts.

An independent, though complementary, means of fulfilling *Grable*'s promise of ensuring federal-court resolution of important federal questions would be to consider a federal-question certification process, the outlines of which I have sketched out in this Article. Such a process would allow a state court facing an important and dispositive federal question to certify that question to the federal court of appeals for the geographical region in which the state court sits. Like state courts that receive certified questions of state law from federal courts today, the federal appellate court would then have discretion to decide whether to answer the certified question. Through this process, a federal court's experience and expertise would be brought to bear on important questions of federal law, with minimal cost in court resources.

*Grable* and its application in the district courts suggest that the imprecision of deciding which cases belong in federal and state court

will not end anytime soon, nor will there be a profound reexamination of the doctrine of federal-question jurisdiction. The two relatively modest proposals outlined here may help enhance the clarity of that doctrine and better achieve *Grable's* goal of animating the “commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.”<sup>283</sup>

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<sup>283</sup> *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005).