

2012

## Clarity and Clarification: *Grable* Federal Questions in the Eyes of Their Beholders

Elizabeth Y. McCuskey  
*Thomas Jefferson School of Law, emcuskey@tjssl.edu*

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

---

### Recommended Citation

Elizabeth Y. McCuskey, *Clarity and Clarification: Grable Federal Questions in the Eyes of Their Beholders*, 91 Neb. L. Rev. (2013)

Available at: <https://digitalcommons.unl.edu/nlr/vol91/iss2/4>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

# Clarity and Clarification: *Grable* Federal Questions in the Eyes of Their Beholders

## TABLE OF CONTENTS

|  |     |
|--|-----|
| I. Introduction .....  | 388 |
| II. Clarity, Clarification, and <i>Grable</i> Federal-Question<br>Jurisdiction ..... | 390 |
| A. Canonization of Clarity .....   | 391 |
| B. Clarification and Implementation .....  | 395 |
| C. <i>Grable</i> as Clarification .....  | 398 |
| 1. Evolution of the <i>Grable</i> Test .....   | 400 |
| 2. Slimming Doctrinal Application in <i>Empire</i> .....                             | 411 |
| 3. Cinching Jurisdiction with Pragmatism,<br>Presumptions, and Procedure .....       | 415 |
| III. Viewing Clarification and Implementation Through<br><i>Grable</i> .....         | 418 |
| A. Sample of Decisions .....   | 419 |
| 1. Sample and Sources of Decisions .....   | 420 |
| 2. Jurisdictional Sample .....   | 426 |
| B. Submerged Precedent .....   | 427 |
| C. District Court Remand Rates .....   | 430 |
| 1. Westlaw and Docket Remand Rates .....   | 432 |
| Figure 1 .....   | 433 |
| 2. True Remand Rates .....   | 433 |
| Figure 2 .....   | 434 |
| Figure 3 .....   | 434 |
| D. Appellate Implementation .....  | 435 |
| 1. Circuit Clarifications .....  | 436 |

---

© Copyright held by the NEBRASKA LAW REVIEW.

\* Assistant Professor of Law, University of Toledo College of Law. This Article is indebted to guidance from Lee Epstein, Theodore Eisenberg, and the participants at the fourth annual Junior Faculty Federal Courts Workshop, as well as commentary from Sandra Rierson and participants at Thomas Jefferson School of Law's Summer Scholarship Workshop. I am grateful to the NEBRASKA LAW REVIEW's editorial staff for their thoughtful and thorough efforts and to Christine Santos, Noah Wald, Garrett Maugham, and Suzanne Prochazka for their diligent research assistance. I own all remaining errors in this work.

|  |     |
|--|-----|
| Figure 4 .....                                       | 437 |
| 2. Reversal Rates .....                              | 437 |
| Figure 5 .....                                       | 440 |
| IV. Promoting Clarity & Clarification .....          | 440 |
| A. Docket Searches .....                             | 441 |
| B. Explained Decisions .....                         | 445 |
| C. Appellate Review .....                            | 446 |
| 1. Discretionary Circuit Review .....                | 448 |
| 2. Supreme Court Supervisory Review .....            | 449 |
| V. Conclusion .....                                  | 451 |
| Appendix 1 .....                                     | 453 |
| Selection Criteria for Sample District Courts .....  | 453 |
| Appendix 2 .....                                     | 453 |
| Remand Rate Coding Information and Variables ...     | 453 |
| Appendix 3 .....                                     | 455 |
| Circuit Court Publication & Citation Restrictions .. | 455 |
| Appendix 4 .....                                     | 458 |
| Removal Rate in All District Courts .....            | 458 |

## I. INTRODUCTION

Jurists and commentators have repeated for centuries the refrain that *jurisdictional rules should be clear*.<sup>1</sup> Behind this mantra is the idea that clearly designed jurisdictional rules should enable trial courts to apply the law more easily and therefore allow litigants to predict more accurately how trial courts will rule.<sup>2</sup> The mantra's ultimate goal is efficiency—that trial courts not labor too long on jurisdiction and, most important, that litigants can accurately predict the correct forum and choose to spend their money litigating the merits of their claim, rather than where it will be heard. Jurisdictional clarity largely is devoted to sharpening litigants' vision of the proper jurisdiction.

But clarity is not costless. Bright-line jurisdictional rules have the potential to remand the desirable cases with the undesirable ones. In federal-question jurisdictional rules, for example, clarity is somewhat overvalued in theory and underachieved in practice. In theory, the constitutional and statutory bases for federal-question jurisdiction prescribe simply and broadly that jurisdiction exists over "all" actions "arising under" federal law.<sup>3</sup> There exist compelling reasons to have federal courts adjudicate essential federal questions, even if those

1. See, e.g., *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 321 (2005) (Thomas, J., concurring); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916); ZEPHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 312 (1950).

2. E.g., *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010).

3. U.S. CONST. art. III, § 2; 28 U.S.C. § 1331 (2006).

questions happen to arise through state-law claims. Therefore, many theoretically “clear” rules, like Justice Holmes’s proposal that only federal claims “arise under” federal law,<sup>4</sup> would improperly trim the intent of “arising under” jurisdiction and contravene the supposed benefits of the federal forum. In theory, then, important substance and systemic benefits may be unnecessarily sacrificed on the altar of clarity.

In practice, the word “clarity” seems to work much like the word “classy”—if you have to say it, it probably is not true, at least for federal-question jurisdiction. The Supreme Court’s 2005 opinion in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*<sup>5</sup> stands as a recent example. In *Grable*, the unanimous Court endeavored to synthesize the numerous doctrines governing jurisdiction over state-law claims raising federal questions (or “embedded” federal questions), and to resolve a circuit split over whether a federal private right of action must accompany the alleged embedded federal questions.<sup>6</sup> The Court decided that jurisdiction does not, in fact, require an underlying federal right of action, but that a right of action is relevant to determinations of “substantiality” and federalism.<sup>7</sup> *Grable* thus represents the rejection of a bright-line jurisdictional rule in favor of a nuanced, discretionary one, making clear that the jurisdictional waters should remain murky.

*Grable*’s rejection of a bright-line jurisdictional rule raises broader questions about clarity’s role in federal-question jurisdiction doctrine and whether clarity in theory translates into clarity in practice. How have district courts reacted to the Supreme Court’s clarification of doctrine and choice of a flexible rule? Has the clarification offered litigants a clearer picture for predicting jurisdiction?

This Article takes an initial step toward answering those questions by first arguing the clarity debate should focus on how jurisdictional rules appear in the eyes of their beholders and by then examining what *Grable* federal-question jurisdiction looks like from that perspective—as applied in federal court precedents. Part II questions the rationales for jurisdictional clarity and traces the gradual distillation of rules for removal jurisdiction over embedded federal-questions, detailing how *Grable* purported to “clarify” the proper interpretation of *Merrill Dow Pharmaceuticals Inc. v. Thompson*<sup>8</sup> and state a unified jurisdictional rule.

Using *Grable* as an example, the Article then turns to an empirical study on the implementation of *Grable*’s “clarified” rule. The study

---

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

5. 545 U.S. 308 (2005).

6. *Id.* at 311–12, 314.

7. *Id.* at 318.

8. 478 U.S. 804 (1986).

captures a snapshot of how federal district and appellate courts have reacted to the *Grable* Court's attempted clarification and choice of a nuanced rule over a bright-line one. Part III presents that study, examining a sample of decisions before and after *Grable*. The study identifies a mass of district court precedent "submerged" on court dockets, underscoring the possibility that conventional research offers an unrepresentative sample of precedent. Part III then uses those submerged precedents to trace trends in the rates of remand and reversal in the years before and after the Supreme Court announced *Grable*, illustrating the potential influence of clarifying opinions. Part IV builds on these theoretical discussions and empirical observations to describe obstacles currently diverting clarification and to suggest some modest steps that litigants, scholars, courts, and Congress might take to improve the availability of clarifying precedents and thereby enhance predictability.

## II. CLARITY, CLARIFICATION, AND *GRABLE* FEDERAL-QUESTION JURISDICTION

Federal jurisdiction's inherent complexity has generated hundreds of books,<sup>9</sup> countless articles,<sup>10</sup> and nearly innumerable opinions.<sup>11</sup> Yet the incantation that *jurisdictional rules should be clear* permeates the field.

This Article examines clarity's role in federal-question jurisdiction and investigates whether current applications of federal-question jurisdictional rules are serving clarity's underlying purposes. This Article first argues that the pursuit of jurisdictional clarity should proceed from a litigant-centered view of the rules as applied. This Part surveys the origins, justifications, dilemmas, and applications of the mantra that jurisdictional rules should be clear, as well as examines the clarification process for federal-question jurisdiction doctrine.

---

9. *E.g.*, ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* (4th ed. 2003); JOHN F. DILLON, *REMOVAL OF CAUSES FROM STATE COURTS TO FEDERAL COURTS* (3d ed. 1881); HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973); STEVEN D. LAW, *THE JURISDICTION AND POWERS OF THE UNITED STATES COURTS* (1852); JAMES E. PFANDER, *PRINCIPLES OF FEDERAL JURISDICTION* (2006).

10. Including this one. As of February 11, 2012, Westlaw's "Journals and Law Reviews" database contained 343 articles with "federal jurisdiction" in the title. *E.g.*, Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011); 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 (1992); Alfred Russell, *Congress Should Abrogate Federal Jurisdiction over State Corporations*, 7 HARV. L. REV. 16 (1893).

11. *E.g.*, *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011); *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

## A. Canonization of Clarity

There is a long-standing mantra among jurists and commentators that “jurisdictional rules should be clear.”<sup>12</sup> Efficiency and legitimacy concerns underlie this fixation on clarity. That is, the pursuit of clear jurisdictional rules seeks to promote efficiency primarily by allowing parties to spend their resources litigating the merits of their claims instead of which court can hear them, and secondly by allowing judges to determine jurisdiction early, easily, and accurately.<sup>13</sup> The legitimacy goal is less direct, seeking to promote a perception that federal courts are only hearing cases within their powers and are not overreaching with jurisdictional vagaries.<sup>14</sup> These goals thus boil down to predictability for litigants via consistency in judicial application.<sup>15</sup>

Yet there also exists a longstanding debate over clarity versus complexity. This debate takes the form of rules versus standards.<sup>16</sup> These arguments pose diverging answers to the question whether it is more important to have an easy rule or to get the right result in cir-

---

12. *E.g.*, *Grable*, 545 U.S. at 321 (Thomas, J., concurring); *see, e.g.*, *Heckler v. Edwards*, 465 U.S. 870, 877 (1984) (“[L]itigants ought to be able to apply a clear test to determine” whether they have achieved appellate jurisdiction.).

13. As the Court recently summarized in *Hertz Corp. v. Friend*:

Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim’s legal and factual merits. Judicial resources too are at stake. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it. So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.

130 S. Ct. 1181, 1193 (2010) (citations omitted); *see also* *Navarro Savings Ass’n v. Lee*, 446 U.S. 458, 464 n.13 (1980) (quoting David P. Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. CHI. L. REV. 1 (1969)) (“Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources.”); *cf.* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (“[C]ourts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.” (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999))).

14. Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 8–9 (2011).

15. *See Hertz*, 130 S. Ct. at 1193 (citations omitted) (“Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions. Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court.”).

16. *E.g.*, Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on “Arising Under” Jurisdiction*, 82 IND. L.J. 309 (2007); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995); *cf.* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577–80, 590–93 (1988) (formulating the debate as “crystals” versus “mud”).

cumstances where those two values conflict. The clarity/rules side favors bright-lines and ease of application, even at the expense of under-inclusion from a constitutional or ideal perspective.

Diversity jurisdiction's amount-in-controversy requirement offers a fairly neat example of a clarity/rules formulation.<sup>17</sup> The line is brightly drawn at \$75,000.01—a penny less precludes jurisdiction.<sup>18</sup> Even though many interpretive questions have arisen in applying this bright-line rule,<sup>19</sup> the line is drawn; it is quantitative, and it is largely determinative. A less neat example of the clarity/rules formulation is Justice Holmes's dissenting view that federal-question jurisdiction should include only federal claims.<sup>20</sup> This view finds favor among the clarity/rules crowd because it eliminates the complexities of determining whether federal issues, which may be embedded in state-law claims, are "substantial" enough to warrant jurisdiction.<sup>21</sup>

Proponents justify the mantra as "important to conserve litigation and judicial resources and to enhance judicial legitimacy."<sup>22</sup> The supposed savings and enhanced legitimacy "primarily benefit litigants (through the exercised judgment of their lawyers) and judges."<sup>23</sup>

On resource conservation, clear rules are thought to enable litigants to accurately predict the proper forum—or at least to have it adjudicated quickly—and therefore spend their resources litigating the merits of their dispute, rather than which court may hear it.<sup>24</sup>

---

17. See Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 694 (1981) (posing that, although uncertainties exist, "diversity jurisdiction generally is unlike federal question jurisdiction in that many of its basic issues are clear and easy to apply").

18. 28 U.S.C. § 1332(a) (2006).

19. See, e.g., *Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058 (11th Cir. 2010) (adjudicating whether a defendant can establish the amount in controversy requirement based on plaintiff's allegations for unspecified punitive damages); see also, e.g., *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069, 1072 (8th Cir. 2012) (upholding reliance on a stipulation to defeat CAFA jurisdiction despite that the true amount in controversy exceeded \$12 million); *Back Doctors Ltd. v. Metro. Prop. and Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (including un-claimed punitive damages in CAFA amount-in-controversy calculation and holding that, "the estimate of the dispute's stakes advanced by the proponent of federal jurisdiction controls [under CAFA] unless a recovery that large is legally impossible").

20. See, e.g., *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

21. See, e.g., *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 320 (2005) (Thomas, J., concurring) (noting that Justice Thomas would adopt the Holmes Rule if an appropriate case presents itself).

22. *Dodson*, *supra* note 14, at 5; see also *id.* at 7–9, 10 & n.27 (citing examples of Supreme Court opinions urging jurisdictional clarity "in a variety of other contexts").

23. *Id.* at 30.

24. See, e.g., Field, *supra* note 17, at 683 ("One of the first things we teach entering law students is the importance of clarity in rules governing courts' jurisdiction. One reason for jurisdictional rules to be clear and simple is that litigating at length over the proper forum in which to litigate is a poor use of limited judicial

Similarly, clear rules are thought to enable federal courts to determine jurisdiction (or the lack of it) easily and early in the proceedings—*sua sponte* or at a party's urging—and thereby avoid the wasted effort of litigating in federal court, only to have the result undone by a jurisdictional defect unearthed or corrected on appeal.<sup>25</sup>

On legitimacy, the proponents of clear rules argue the public may perceive judicial decisions as more legitimate if made pursuant to a clear jurisdictional authorization and a simple rule less susceptible to strategic manipulation.<sup>26</sup> Others have amply catalogued and critiqued this secondary goal elsewhere.<sup>27</sup>

But not everyone is content to chant the clarity mantra. The complexity/standards proponents argue that bright-line rules, while sometimes expedient, cut too far and can contravene the words of (and

---

resources, expensive to the parties and to the public. It would be better, if a case is filed in an appropriate forum, for it to be able to proceed to the issues on the merits rather than spend time game-playing with jurisdictional doctrines.”); Freer, *supra* note 16, at 342 (“Certainly, jurisdictional prescriptions should be as clear as possible; no litigation seems as wasteful as that aimed at whether the parties are in the right court.”); *see also, e.g.,* Hertz Corp. v. Friend, 130 S. Ct. 1181, 1193 (2010) (“Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims.”); Hoagland v. Sandberg, Phoenix & Von Gontard, P.C., 385 F.3d 737, 739–40 (7th Cir. 2004) (“Jurisdictional rules ought to be simple and precise so that judges and lawyers are spared having to litigate over not the merits of a legal dispute but where and when those merits shall be litigated.”); Long v. Sasser, 91 F.3d 645, 647 (4th Cir. 1996) (“Jurisdictional rules should above all be clear. They are meant to guide parties to their proper forums with a minimum of fuss.”). Similarly, economic theory links the rules/standards dichotomy to the concept of increased transaction costs. *See, e.g.,* Rose, *supra* note 16, at 593–95 (discussing Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985)).

25. *See* Field, *supra* note 17, at 683 (explaining this phenomenon as a primary justification for clear and simple rules); *e.g.,* E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 930 (2d Cir. 1998) (“Nobody’s interest would be served if we by stretching the law found jurisdiction to exist, only to have that position ultimately rejected by the High Court.”).

26. *See* Dodson, *supra* note 14, at 8–9, 45–46. The goal of judicial legitimacy invites the mandate versus discretion debate, waged most prominently by Martin Redish and David Shapiro. Redish has argued that abstention doctrines and exceptions to statutory grants of jurisdiction—both created by judges—are not only bad policy, but also constitute illegitimate lawmaking by the judicial branch. Redish, *supra* note 10, at 1829. Shapiro has advocated in favor of discretion as “desirable in giving room for flexibility, fine-tuning, recognition of difference, and accommodation of unforeseen developments.” David L. Shapiro, *Reflections on the Allocation of Jurisdiction Between State and Federal Courts: A Response to “Reassessing the Allocation of Judicial Business Between State and Federal Courts”*, 78 VA. L. REV. 1839, 1841 (1992) [hereinafter Shapiro, *Reflections*]. Shapiro argues that courts must draw the boundaries of jurisdiction when faced with broad, ambiguous language from Congress. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 565–66 (1985).

27. *See supra* note 25.

intent behind) constitutional and statutory grants of jurisdiction.<sup>28</sup> One of the mantra's most recent and eloquent critics, Scott Dodson, poses that clarity and simplicity are overvalued.<sup>29</sup> Instead, Dodson argues, "the development of jurisdictional doctrine should strive for ways to harness the virtues of both jurisdictional clarity and jurisdictional uncertainty to maximum advantage."<sup>30</sup> Dodson suggests the concept of jurisdictional clarity "itself is inherently complex, uncertain, and difficult"<sup>31</sup> in part because "difficulties in design, implementation, and instrumentalism all erode the ideal of clear and simple jurisdictional rules."<sup>32</sup> Uncertainty has enduring value because it "can provide opportunities for courts to better implement and accommodate the underlying policies in given circumstances."<sup>33</sup>

Dodson's arguments have special appeal for federal-question jurisdiction which, unlike diversity jurisdiction, focuses on the substance of disputes and on ensuring that important questions of federal law benefit from the expertise, independence, and potential for uniformity offered by Article III courts.<sup>34</sup> Federal-question jurisdiction warrants a rule flexible enough to allow courts to reach the right result, even if it takes more effort.

In most jurisdictional doctrine, however, clarity has assumed primacy—at least in theory,<sup>35</sup> rhetoric,<sup>36</sup> and judicial opinions.<sup>37</sup> And, in

28. *See, e.g.*, 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3502 (3d ed. 2008) ("There is a temptation to view questions of federal jurisdiction as if they are simple procedural questions, to be resolved in whatever fashion will best serve the desirable goal of efficient judicial administration. Indeed, settled doctrine in some areas of federal jurisdiction does give some play to such consideration of discretion. But it is critical to remember that the delicate balance of a federal system is at stake, and that expansion of the jurisdiction of the federal courts diminishes the power of the states. Efficiency cannot be the sole or the controlling consideration."). Divining congressional intent, substantiality, or fairness are all examples of "standards"—inquiries that involve complex judgments and weighing factors. *E.g.*, Dodson, *supra* note 14, at 55.

29. *Id.*

30. *Id.*; *see also id.* at 5 ("[T]he inherent complexity and uncertainty in jurisdictional doctrine can be harnessed to forge a better jurisdictional landscape . . .").

31. *Id.* at 14.

32. *Id.* at 49.

33. *Id.* at 53 ("These benefits are particularly true for the area of jurisdiction, in which the courts have a strong claim to expertise."); *see also* Rose, *supra* note 16, at 592–93 (noting criticism of hard-edge rules in other legal contexts).

34. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) (citing AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164–66 (1968)).

35. *See* Field, *supra* note 17, at 683 ("One of the first things we teach entering law students is the importance of clarity in rules governing courts' jurisdiction.")

36. Dodson, *supra* note 14, at 11 ("Thus, the rhetoric urging clarity and simplicity in jurisdictional rules is alive and well in both academic and judicial circles."); *cf.* Rose, *supra* note 16, at 604–10 (exploring implications of the rhetoric of "crystals and mud").

choosing complexity, judges may feel compelled to justify deviation from the mantra.<sup>38</sup> As a testament to how axiomatic the mantra has become, Justice Thomas's concurrence in *Grable* states without citation, "Jurisdictional rules should be clear."<sup>39</sup> He was not the first to do so.<sup>40</sup>

## B. Clarification and Implementation

Despite the goal of providing predictability for litigants, most of the talk about clarity has focused on the design and inherent characteristics of rules as announced, rather than the application of those rules and transparency in the adjudication process.<sup>41</sup> Although litigants use precedent to predict jurisdiction, the debate focuses on a rule's design rather than its implementation process.

The clarity/complexity debate does feature the occasional recognition, based on anecdote, that implementation can muddy even rules with clear design.<sup>42</sup> Yet little attention has been paid to the possibil-

- 
37. *E.g.*, *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (explaining that "significant expenses are incurred just on the preliminary issue of jurisdiction" and advising that "[j]urisdictional rules should avoid these costs whenever possible"); *Lapides v. Bd. of the Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002) ("Motives are difficult to evaluate, while jurisdictional rules should be clear."); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) ("The time of appealability, having jurisdictional consequences, should above all be clear."); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 349 n.26 (1985) (Brennan, J., dissenting) ("[J]urisdictional rules must be clear cut and cannot turn on indefinite notions of 'importance' or 'wide-ranging impact.'"); *Heckler v. Edwards*, 465 U.S. 870, 877 (1984) ("[L]itigants ought to be able to apply a clear test to determine" whether they have achieved appellate jurisdiction.); *Long v. Sasser*, 91 F.3d 645, 647 (4th Cir. 1996) ("Jurisdictional rules should above all be clear. They are meant to guide parties to their proper forums with a minimum of fuss."); *Helm v. Resolution Trust Corp.*, 18 F.3d 446, 447 (7th Cir. 1994) (per curiam) ("Jurisdictional rules should be as clear and mechanical as possible.");
38. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485–86 & n.29 (1985) (rejecting "any talismanic jurisdictional formulas" for personal jurisdiction and justifying the preclusion of "clear-cut jurisdictional rules" because "fair play and substantial justice" necessarily requires complex and discretionary determinations); *cf. Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 821 (1988) (Stevens, J., concurring) (noting "there is no single, precise, all-embracing definition" of "arising under" jurisdiction).
39. *Grable*, 545 U.S. at 321 (Thomas, J., concurring).
40. *See, e.g., Heckler*, 465 U.S. at 877 (stating without citation that "litigants ought to be able to apply a clear test to determine" whether they have achieved appellate jurisdiction); *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987) (stating without citation, "[t]he chief and often the only virtue of a jurisdictional rule is clarity"); *Unique Concepts, Inc. v. Manuel*, 930 F.2d 573, 575 (7th Cir. 1991) (stating without citation that "[j]urisdictional rules should be simple and clear").
41. *See, e.g., Field, supra* note 17, at 694. *But cf. Rose, supra* note 16, at 605–10 (examining behavioral applications of the theory behind rules versus standards).
42. *E.g., Dodson, supra* note 14; *Freer, supra* note 16; John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145 (2006); *see also* Rose,

ity of producing the opposite effect—that implementation could breed clarification of fuzzy rules.<sup>43</sup> And even less attention has been paid to how structural features and procedural rules might obstruct clarification in implementation.

Clarity and clarification are not identical. Clarity often refers to inherent qualities of a rule's design, while clarification necessarily involves a before and an after.<sup>44</sup> A clear rule can become clearer through clarification. Or an unclear rule can become clear through clarification. District courts are on the “front lines” of this process,<sup>45</sup> applying law with greater immediacy and frequency than other courts, and doing so often without the threat of appellate review.<sup>46</sup>

Dodson and others have pointed out that implementation can muddle and complicate even ostensibly clear and simple rules.<sup>47</sup> Implementation, though, seems also to have at least the potential for the opposite effect. A rule that has some (or much) flexibility in its design could become more clear or stable through the interpretive process.<sup>48</sup>

*supra* note 16, at 604 (describing a “cycle” by which clear rules may become muddy).

43. *But see* Dodson, *supra* note 14 (hypothesizing that interpretive flexibility could produce better or more stable rules over time); Rose, *supra* note 16, at 609 (“At least in some instances, there is a great deal more clarity and certainty about a mud rule than a crystal one.”).
44. *See, e.g.*, Atlas Global Group, L.P. v. Grupo Dataflux, 312 F.3d 168, 177 (5th Cir. 2002) (Garza, J., dissenting) (citation omitted) (“Nor is it clear that creating exceptions to our jurisdictional rules would even lead to the conservation of judicial resources. Instead, carving out an exception in one case merely encourages future parties to file more appeals, urging this Court to create more exceptions. . . . [I]n the long run, we may waste many more judicial resources litigating all the potential exceptions to our previously ‘clear’ jurisdictional rules.”), *rev’d*, 541 U.S. 567 (2004).
45. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 584 (2010) (“[D]istrict court judges are on the front line of applying the standards on 12(b)(6) motions.”).
46. Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 977–80 (2008) (arguing that this is why district court opinions matter).
47. Dodson, *supra* note 14, at 5, 19, 40 (“Interpretative gloss may make an otherwise clear and simple rule anything but. And, even if the rule and its interpretative gloss are clear, the application could be complicated or uncertain. Obscurity in these components of implementation can contaminate the whole doctrine.”).
48. *But see* Rory Ryan, *Its Just Not Worth Searching for Welcome Mats with a Kaleidoscope and a Broken Compass*, 75 TENN. L. REV. 659, 662, 670 (2008) (disputing the effectiveness of this process and disputing that “the benefits outweigh the costs imposed by a flexible standard” for embedded federal-question jurisdiction); *id.* at 677 (“The flexible nature of the second-branch standard facilitates excessive delay in the modern litigation environment. Typically, second-branch cases involve a plaintiff suing in state court, trying to keep the case there by asserting only state-created causes of action. Defendants typically prefer a federal forum (or, cynically, desire the opportunity for delay) and therefore remove the case, arguing that the presence of a federal issue satisfies the second branch. There is no judge or judicial scholar acting as a gatekeeper; rather, the defendant creates delay by simply noticing removal.”).

Precedent and a court's explanation in implementing rules thus play an important role in promoting clarity—or at least predictability—through clarification. Dodson argues that “uncertainty can promote stability in doctrine” by accommodating “changing circumstances and norms . . . without disruption or distortion of precedent.”<sup>49</sup> Accumulation of precedent, he poses, may block attempts to reform rules, yet also may make reform unnecessary due to the deliberative and incremental development of doctrine over time.<sup>50</sup> But Dodson also presents the counterargument that implementation can foil jurisdictional clarity because common-law precedent “often takes a long time to develop clear and generally applicable tests” and may cause “path dependence,” through stare decisis, toward undesirably complicated rules.<sup>51</sup>

Regardless, precedent and explanation become essential to the litigant-centric view of clarity, emphasizing predictability, because precedent opinions are what data litigants (through their lawyers) use to make those predictions. The creation of precedent enhances the predictive power for parties and their lawyers.<sup>52</sup> Leaving aside the individual lawyer's and judge's skills, a prediction of the correct jurisdiction is only as good as the data are reliable. So the reasoning of precedent cases factors into the accuracy of any prediction. While Dodson notes that courts offer more reasons for their rules than Congress, courts still offer reasons only rarely.<sup>53</sup> The empirical question arises whether jurisdictional decisions are more often reasoned. At least in decisions to remand for lack of subject-matter jurisdiction, the

---

49. Dodson, *supra* note 14, at 53.

50. *Id.*

51. *Id.* at 27–28.

52. *Cf.* Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988) (emphasizing, in crafting a rule for appellate jurisdiction, the importance of “preservation of operational consistency and predictability in the overall application” of the rule). This theory of resource conservation does not, however, fully account for the strategic value in removing a case, despite an accurate prediction of slim odds for maintaining federal jurisdiction. Empirical studies have shown that defendants fare better in removed cases. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593–95 (1998) (noting that plaintiff win rates are lower in removed cases). And, as Dodson noted, “the amount of wrangling over forum suggests that parties believe in its importance.” Dodson, *supra* note 14, at 51.

53. See David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681 (2007) (finding that a fully-reasoned decision is a relative rarity). Dodson deals with Frederick Schauer's observation that some courts decide some cases without explanation by distinguishing jurisdictional rulings from the particular procedures Schauer uses as illustrations: jury verdicts, rulings on objections, and denials of certiorari. See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 637 (1995). But Dodson does not distinguish jurisdictional rulings from the empirical observations in *Docketology*. Dodson, *supra* note 14, at 28.

order is unappealable.<sup>54</sup> A lack of reasoned elaborations in jurisdictional decisions could prevent the clarification-through-precedent process from taking hold and clarifying murky areas.

If jurisdictional clarity focuses on litigant predictability which, in turn, depends on application and precedent to make those predictions, then the questions become: What does the implementation process look like and can clarification make a difference? To tackle these big questions, I will start by asking them in a small segment of jurisdictional doctrine: state-law claims raising federal issues, also known as “embedded” federal questions.<sup>55</sup>

I chose embedded federal questions for this study because the topic produces a relatively small number of cases, it is an area acknowledged to have fairly complex rules, and the Supreme Court issued a clarification of the rules by resolving a circuit split in its 2005 *Grable* opinion,<sup>56</sup> offering a before-and-after setting in which to study the rule’s implementation. *Grable* presented the Court with, among other things, a choice between a bright-line rule and a flexible standard. The Court’s choice of rule and the district and appellate courts’ implementation of that choice then presents an opportunity to examine both what the implementation process looks like and whether the choice of a flexible rule over a bright line can affect the outcome of jurisdictional decisions.

The remainder of this Part sketches an overview of what the federal-question doctrine landscape looked like before and after *Grable*.

### C. *Grable* as Clarification

Different types of jurisdiction may warrant different levels of clarity. Diversity and appellate jurisdiction, for example, present compelling cases for bright-line rules because they primarily concern the

---

54. 28 U.S.C. § 1447(d) (2006).

55. See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005). Other nicknames for this species of jurisdiction include “hybrid law” claims, “mixed” cases, and “*Grable*” federal questions. See, e.g., Linda R. Hirshman, *Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17, 17–18 (1984) (“hybrid cases”); Preis, *supra* note 42, at 148 (“hybrid”). I have selected “embedded federal question” not only because *Grable* used the phrase, but also because it is, to me, the most descriptive. Like a federal-law fossil encased in state-law amber, the federal question is integral to the state-law claim surrounding it. Cf. *Embed*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/embed?show=0&t=1326664060> (last visited Jan. 22, 2012) (defining “embed,” as “to enclose closely in or as if in a matrix,” using the illustration of “fossils embedded in stone”). To extract the federal question would shatter—or at least fundamentally alter—the amber. Because *Grable* dealt with this precise form of federal question most recently and, for now, most definitively, I use “*Grable* federal question” and “embedded federal question” interchangeably.

56. See *Grable*, 545 U.S. at 312, 318.

parties' characteristics and the time for filing.<sup>57</sup> Thus, their respective purposes are largely differentiated from the subject matter of the dispute. It might make sense in those contexts to draw brighter lines around the *who* and *when* of jurisdiction.

Federal-question jurisdiction, on the other hand, centers entirely on the *what*. That is, *what legal issues* justify summoning the expertise, "experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."<sup>58</sup> Because it pertains to the subjects appropriate for adjudication in federal court, this existential inquiry presents a stronger case for flexibility to achieve the right result, even at the expense of expedience.

The evolution of federal-question doctrine thus reflects the interplay of clarity, complexity, and formalist principles. The Supreme Court at one time embraced the formalist rule confining jurisdiction to federal claims,<sup>59</sup> but maintained that rule for only three years before rejecting it and recognizing jurisdiction over substantial federal issues embedded in state claims.<sup>60</sup> Rather than black-and-white rules, the Supreme Court has looked to "common sense" principles to accommodate the "kaleidoscopic" situations that present issues appropriate and desirable for federal adjudication.<sup>61</sup>

Though portions of the doctrine have been clarified through application over time, the kaleidoscope of common sense approach for many years prevented the formation of a "single, precise, all-embracing" test for embedded federal-question jurisdiction.<sup>62</sup> The 2005 decision in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing* at last intervened. *Grable* serves two primary purposes for embedded federal-question doctrine: first, the opinion weaves strands of doctrine into a unified test and does so unanimously; second, *Grable* resolved a circuit split over whether the alleged federal question must have an accompanying federal right of action.<sup>63</sup> *Grable* thus represents both the moment of clarification for the entire embedded federal-question jurisdictional rule, and the choice between an inherently clear rule for substantiality, versus one affording the flexibility to get it right in each case.<sup>64</sup> In choosing the flexible rule, *Grable* can be seen both as a rejection of formalist principles and as a clarification in federal-question jurisdiction.

---

57. See 28 U.S.C. § 1291 (appellate); 28 U.S.C. § 1332 (diversity); FED. R. APP. P. 4(a).

58. *Grable*, 545 U.S. at 312.

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

60. See *Gully v. First Nat'l Bank*, 299 U.S. 109, 117–18 (1936).

61. *Id.*

62. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 821 (1988) (Stevens, J., concurring).

63. See *Grable*, 545 U.S. at 311–12.

64. See *id.* at 314, 317.

### 1. *Evolution of the Grable Test*

*Grable's* "clarification" can only fully be appreciated in context of the choice facing the Court between varied rules for embedded federal questions. Commentators and jurists rightly have described embedded federal-question doctrine as a "tangled corner."<sup>65</sup> Before attempting to discern the relative clarity and clarifications, it is useful to identify the strands contributing to the knot and briefly trace how they came to entwine and, at times, entangle.

Federal-question jurisdiction allows federal courts to decide questions of federal law to serve several general purposes: (1) to protect federal rights and interests from hostile or inexperienced state courts, (2) to promote comity and federalism, and (3) to enhance uniformity in the interpretation of federal law by jurists with expertise and life-tenure.<sup>66</sup> The doctrine thereby allocates to federal courts those issues that justify calling on "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."<sup>67</sup>

Federal-question jurisdiction emanates from Article III, section 2 of the United States Constitution, which empowers federal courts to adjudicate all cases "arising under" the Constitution, federal laws, and treaties.<sup>68</sup> The Judiciary Act of 1875 created federal district courts and prescribed simply that those district courts have original jurisdiction over all civil actions "arising under" the Constitution, laws, or treaties of the United States.<sup>69</sup> This statutory "arising under" jurisdiction parallels Article III's constitutional "arising under" jurisdiction, but has found more limited application by courts.<sup>70</sup>

Although the constitutional and statutory bases for federal-question jurisdiction have remained unaltered since they were written,<sup>71</sup> the Supreme Court's interpretation of those bases has evolved significantly and inconsistently in the subsequent centuries of federal-question jurisprudence. Specifically, the proclaimed test for when a state-

---

65. *Almond v. Capital Props., Inc.*, 212 F.3d 20, 22 (1st Cir. 2000).

66. *Dodson*, *supra* note 14, at 7 (citing Barry Friedman, *A Revisionist Theory of Ab-stention*, 88 MICH. L. REV. 530, 550-54 (1989)).

67. *Grable*, 545 U.S. at 312 (citing AM. LAW INST., *STUDY OF THE DIVISION OF JURIS-DICTION BETWEEN STATE AND FEDERAL COURTS* 164-66 (1968)).

68. U.S. CONST. art. III, § 2.

69. 28 U.S.C. § 1331 (2006).

70. *See, e.g.*, *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 378-80 (1959) ("The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding."); *see also, e.g.*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494-95 (1983) (explaining that despite nearly identical language, the Court "never has held that statutory 'arising under' jurisdiction is identical to Art. III 'arising under' jurisdiction").

71. *See* U.S. CONST. art. III; 28 U.S.C. § 1331.

law case raises a jurisdictional federal question has morphed and oscillated over time.<sup>72</sup>

*Osborn v. Bank of the United States* represents a convenient pole for marking the most expansive articulation of federal-question jurisdiction: that Congress may confer federal-question jurisdiction over cases with an “ingredient” of federal law.<sup>73</sup> At the opposite pole, Justice Holmes most famously expressed the minimal view of federal-question jurisdiction: that “arising under” jurisdiction includes only those cases brought as federal-law claims.<sup>74</sup> But Justice Holmes dissented in *Smith v. Kansas City Title & Trust Co.*, which stated the Supreme Court’s earliest and most-often-quoted test for jurisdiction over embedded federal questions:

---

72. See *Almond v. Capital Props., Inc.*, 212 F.3d 20, 23 (1st Cir. 2000) (citations omitted) (“The Supreme Court has periodically affirmed [embedded federal-question] jurisdiction in the abstract . . . , occasionally cast doubt upon it, rarely applied it in practice, and left the very scope of the concept unclear. Perhaps the best one can say is that this basis endures in principle but should be applied with caution and various qualifications.”). Compare *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 164 (1997) (citation omitted) (recognizing jurisdiction “if a well-pleaded complaint established that [plaintiffs’] right to relief under state law requires resolution of a substantial question of federal law”), *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921) (extending jurisdiction to cases in which “it appears from the [complaint] 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”), and *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 823 (1824) (holding that Congress may confer federal-question jurisdiction over cases with an “ingredient” of federal law), with *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986) (restricting federal-question jurisdiction to cases in which the federal law implicated confers a right of action), and *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (“A suit arises under the law that creates the cause of action.”). See generally Ryan, *supra* note 48, at 662–70 (outlining the vacillation and changes in the test for embedded federal question since the Holmes Rule and concluding that “[t]he costs associated with such a fuzzy jurisdictional inquiry simply outweigh the benefits”).

73. *Osborn*, 22 U.S. at 823 (holding that Congress may confer federal-question jurisdiction over cases with an “ingredient” of federal law). Judge Friendly contemplated an even more “extreme[.]” maximum model of federal-question jurisdiction, embracing the “full sweep of constitutional power” to include federal defenses in civil and criminal cases and removal power for plaintiff or defendant after assertion of a federal defense or counterclaim. FRIENDLY, *supra* note 9, at 11–13. This hypothetical remained a hypothetical, and Judge Friendly dismissed the idea as “principled but unwise.” *Id.* at 13.

74. *E.g.*, *Smith*, 255 U.S. at 214 (Holmes, J., dissenting); *Am. Well Works*, 241 U.S. at 260 (“A suit arises under the law that creates the cause of action.”). Judge Friendly contemplated an even more “extreme[.]” minimal model of federal-question jurisdiction, eliminating “general federal question jurisdiction” and replacing it with limited exceptions for admiralty, maritime, bankruptcy, patent, and suits against the United States. FRIENDLY, *supra* note 9, at 13. Judge Friendly similarly dismissed this minimum model as “principled but unwise.” *Id.*

The general rule is that, where 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 this provision.<sup>75</sup>

In its 2005 *Grable* opinion, the Supreme Court staked out a position between the two poles of “jurisdiction over federal issues embedded in state-law claims between nondiverse parties,” again rejecting the Holmes prohibition, but also refusing to “open[] federal courts to any state action embracing a point of federal law.”<sup>76</sup> The compromise position articulated in *Grable* wove various doctrinal strands together into a four-element test.<sup>77</sup> When determining jurisdiction over embedded federal questions, the *Grable* test asks, “[D]oes a state-law claim [(1)] necessarily raise a stated federal issue, [(2)] actually disputed and [(3)] substantial, [(4)] which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”<sup>78</sup>

The Supreme Court’s 1986 opinion in *Merrell Dow* set the stage for *Grable*.<sup>79</sup> In *Merrell Dow*, the majority emphasized the importance of a federal right of action accompanying an alleged federal question “cannot be overstated.”<sup>80</sup> During the nineteen years after *Merrell Dow*, the appellate courts split over whether it actually could be overstated—namely, whether *Merrell Dow* “always requires a federal cause of action as a condition for exercising federal-question jurisdic-

---

75. *Smith*, 255 U.S. at 199.

76. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005).

77. *Id.*

78. *Id.*

79. *See, e.g.*, *Wisconsin v. Abbott Labs.*, 390 F. Supp. 2d 815, 820 (W.D. Wis. 2005) (citation omitted) (“Defendants’ argument relies on a recent Supreme Court decision, [*Grable*], but the proper starting point for analysis is a case decided twenty years earlier [*Merrell Dow*].”). Previous authors have deftly handled the detailed history of federal-question jurisdiction, so I have presented only a summary here. *See, e.g.*, Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55 (2008); *see also, e.g.*, Andrew D. Bradt, *Grable on the Ground: Mitigating Unchecked Jurisdictional Discretion*, 44 U.C. DAVIS L. REV. 1153, 1160–76 (2011) (focusing on *Grable* through the history of federal-question jurisdiction).

80. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 812 (1986). As Erwin Chemerinsky succinctly described the state of embedded federal-question jurisdiction under *Merrell Dow*, “a case arises under federal law if it is apparent from the face of the plaintiff’s complaint . . . [that] plaintiff’s cause of action is based on state law [and] that a federal law that creates a cause of action is an essential component of the plaintiff’s claim.” CHEMERINSKY, *supra* note 9, § 5.2, at 288.

tion.”<sup>81</sup> The Supreme Court in *Grable* granted certiorari to address the split.<sup>82</sup>

*Grable* presented a neat and tidy package for resolving the split because the alleged federal question was “the only issue”<sup>83</sup> in the case, which involved a narrow point of tax law relating to form of notice.<sup>84</sup> To satisfy delinquent federal taxes, the IRS seized property owned by Grable & Sons Metal Products, Inc.<sup>85</sup> The seizure necessitated notice under a federal tax law provision.<sup>86</sup> Grable received actual notice by certified mail and the sale went forward.<sup>87</sup> Darue Engineering & Manufacturing bought the property at the sale and received a quitclaim deed from the government.<sup>88</sup> Five years later, Grable brought an action in Michigan state court for quiet title, contending that a faulty form of notice invalidated the quitclaim deed issued to Darue.<sup>89</sup> Specifically, Grable claimed the federal tax law notice provision required personal service and that the service he received by certified mail was improper.<sup>90</sup>

Darue removed the case to federal court, arguing the title’s validity turned on the interpretation of the federal tax law’s notice provision

---

81. *Grable*, 545 U.S. at 311–12; *see also*, *Bracey v. Bd. of Educ. of Bridgeport*, 368 F.3d 108, 114 (2d Cir. 2004) (describing the split). *Compare, e.g.*, *Seinfeld v. Austen*, 39 F.3d 761, 764 n.2 (7th Cir. 1994) (“*Merrell Dow* interpreted the word ‘substantial’ in this phrase to mean a congressional choice to include a private right of action in favor of plaintiffs.”), *with Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996), *and Barbara v. N.Y. Stock Exch., Inc.*, 99 F.3d 49, 54 (2d Cir. 1996) (citations omitted) (“Although . . . cases in this circuit have not read *Merrell Dow* categorically to preclude federal question jurisdiction in the absence of a private remedy for violation of the relevant federal law, [ ] the existence *vel non* of such a private right of action is the starting point for our inquiry into the substantiality of the federal questions involved in a lawsuit.”). Chemerinsky also highlighted the ambiguity *Merrell Dow* engendered, making “a more precise statement [of the test] impossible” without “additional clarification” from the Supreme Court. CHEMERINSKY, *supra* note 9, § 5.2, at 288.

82. *Grable*, 545 U.S. at 311–12.

83. As an aside, the Court observed that, in *Grable*, the federal issue “appear[ed] to be the only legal or factual issue contested in the case.” *Id.* at 315. Notably, this “only issue” observation does not appear in the part of the opinion outlining the law. Its only proper use seems to be as a point of emphasis on *really* necessary federal issues, not as a prerequisite to satisfying the jurisdictional test. The singularity of the issue has, unfortunately, attracted more attention than it warrants, with erroneous results. *See generally* Jennifer E. Fairbairn, Comment, *Keeping Grable Slim: Federal Question Jurisdiction and the Centrality Test*, 58 EMORY L.J. 977, 1006 (2009) (identifying a common district court error in applying *Grable* as “overemphasis on the federal issue as the only disputed issue”).

84. *Grable*, 545 U.S. at 310.

85. *Id.*

86. *Id.* (citing 26 U.S.C § 6335 (2000)).

87. *Id.*

88. *Id.* at 310–11.

89. *Id.* at 311.

90. *Id.*

and Grable moved to remand.<sup>91</sup> The district court denied remand,<sup>92</sup> explaining that Grable's claim posed a "significant question of federal law" and the absence of a federal right of action to enforce the claim did not prevent exercise of jurisdiction.<sup>93</sup>

The district court ultimately granted summary judgment for Darue, holding the federal notice provision required personal service, but substantial compliance sufficed.<sup>94</sup> Grable appealed and the Sixth Circuit affirmed the jurisdictional and merits rulings.<sup>95</sup> In adjudicating Grable's jurisdictional arguments, the Sixth Circuit cited the well-pleaded complaint rule<sup>96</sup> and a three-part test "synthesized" by circuit courts from the "long history of Supreme Court guidance": "[A] federal question may arise out of a state law case or controversy if the plaintiff asserts a federal right that 1) involves a substantial question of federal law; 2) is framed in terms of state law; and 3) requires interpretation of federal law to resolve the case."<sup>97</sup>

After granting certiorari, Justice Souter framed the question as "whether want of a federal cause of action to try claims of title to land obtained at a federal tax sale precludes removal to federal court of a state action with nondiverse parties raising a disputed issue of federal title law."<sup>98</sup> Justice Souter's answer for the unanimous Court ultimately was "no" and the Court held "the national interest in providing a federal forum for federal tax litigation is sufficiently substantial to support the exercise of federal-question jurisdiction over the disputed issue on removal, which would not distort any division of labor be-

---

91. *Id.*

92. From the district court docket, it appears the court held a hearing on Darue's motion to remand on April 2, 2011, and issued its two-page order denying the motion that same day. United States District Court for the Western District of Michigan, Civil Docket for Case #: 1:01-CV-37-DWM, at entries for April 2, 2001, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., Inc., 207 F. Supp. 2d 694 (W.D. Mich. 2002) (No. 1:01-CV-37-DWM). The district court published its summary judgment opinion. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., Inc., 207 F. Supp. 2d 694 (W.D. Mich. 2002).

93. *Grable*, 545 U.S. at 311 (quoting district court hearing transcript).

94. "Inasmuch as plaintiff undisputedly received actual notice of the seizure of its Eaton Rapids property by certified mail; was afforded ample opportunity to be present at the tax sale and bid on the property; and has not even argued that it suffered *any* prejudice as a result of the IRS's failure to personally deliver notice, the Court is satisfied that § 6335(a) was substantially complied with." *Grable*, 207 F. Supp. 2d at 697.

95. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 377 F.3d 592 (6th Cir. 2004).

96. *Id.* at 594 (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)) ("[A] federal question 'must be determined from what necessarily appears in the plaintiff's statement of his own claim.'").

97. *Id.* at 595 (citing *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 759 (6th Cir. 2000)).

98. *Grable*, 545 U.S. at 310.

tween the state and federal courts, provided or assumed by Congress.”<sup>99</sup>

The Supreme Court affirmed the Sixth Circuit and performed its own synthesis of the “long history” of its “guidance” on federal-question jurisdiction,<sup>100</sup> including “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>101</sup> Although acknowledging that it had yet to state a “single, precise, all-embracing” test for jurisdiction over embedded federal questions between nondiverse parties,<sup>102</sup> the *Grable* Court synthesized precedent along four major doctrinal strands: (1) “[D]oes a state-law claim necessarily raise a stated federal issue,” that is (2) “actually disputed” and (3) “substantial,” and which (4) “a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”<sup>103</sup> *Grable* appears to have arranged its elements from least controversial to most.

The first strand, “necessary,” traces back to *Smith*’s statement allowing jurisdiction where the right to relief under a state-law claim “depends upon the construction or application of [federal law].”<sup>104</sup> The well-pleaded complaint rule additionally requires that the issue appear in the plaintiff’s complaint and not simply as a necessary defense.<sup>105</sup> Thus, necessity appears first in the *Grable* synthesis as a

---

99. *Id.*

100. *Compare id.* at 312–14 (containing the Supreme Court’s synthesis of precedent), *with Grable*, 377 F.3d at 595 (containing the Sixth Circuit’s “synthesis” of the “long history of Supreme Court guidance”).

101. *Grable*, 545 U.S. at 312 (citing AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164–66 (1968)).

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

103. *Id.* at 314.

104. *Id.* at 312–13 (alteration in original) (quoting *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921)). By the time the Court decided *Smith* in 1921, this “necessity” factor had already become a “classic” in federal-question doctrine. Nearly a century before *Smith*, Chief Justice Marshall in *Cohens v. Virginia* prescribed constitutional federal-question jurisdiction whenever the “correct decision depends on” a question of federal law. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821). Three years later, the Marshall Court explained that this dependence itself provided “a sufficient foundation for jurisdiction” over federal questions. *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 822 (1824).

105. *Gully v. First Nat’l Bank*, 299 U.S. 109, 112–13 (1936) (“To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action. . . . [A]nd the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.”).

classic feature of federal-question jurisdiction, with the weight of consistent precedent behind it.<sup>106</sup>

The second doctrinal strand, “actually disputed,”<sup>107</sup> recognizes a question of federal law must be more than present and necessary to the state claim’s resolution.<sup>108</sup> The disputed element occupies the second position in *Grable’s* test, owing to the “constant refrain” that jurisdiction “demands . . . a contested federal issue.”<sup>109</sup>

The third doctrinal strand, “substantiality,” requires that, in addition to being actually disputed and disputable, the alleged question itself must be substantial, implicating a “serious federal interest in claiming the advantages thought to be inherent in a federal forum.”<sup>110</sup> Substantiality doctrine is historic, but features little consensus over the years about its meaning.

*Grable* cited Justice Cardozo’s 1936 statement in *Gully v. First National Bank* that the test must involve “a selective process which picks the substantial causes out of the web and lays the other ones aside,” while encompassing a “common-sense accommodation of judgment to [the] kaleidoscopic situations” presenting embedded federal issues.<sup>111</sup> The Court cited three cases as evidence of a “constant refrain” of substantiality:<sup>112</sup> *City of Chicago v. International College of Surgeons*,<sup>113</sup> *Merrell Dow*,<sup>114</sup> and *Franchise Tax Board v. Construc-*

106. This hoary commitment to the well-pleaded complaint rule, however, is not wholly without controversy today, as scholars and jurists continue to promote the Holmes Rule’s virtues. *E.g.*, *Grable*, 545 U.S. at 320 (Thomas, J., concurring) (supposing that, “[i]n an appropriate case,” he would be willing to consider adopting the Holmes view of jurisdiction); *see also, e.g.*, Preis, *supra* note 42 (supporting the use of bright-line rules in resolving some federal jurisdiction questions). *See generally* CHEMERINSKY, *supra* note 9, § 5.2, at 277–78, 282 (noting that the “well-pleaded complaint rule has been repeatedly reaffirmed by the United States Supreme Court” and is “firmly established” despite valid criticisms of the rule).

107. *See Grable*, 545 U.S. at 313.

108. An early case, *Shulthis v. McDougal*, required the state-law claim not simply involve a question about federal law, but “really and substantially involve[ ] a dispute” over federal law. 225 U.S. 561, 569 (1912). *Shulthis* denied federal-question jurisdiction over a state quiet title claim because there was not “any controversy respecting the[ ] validity, construction, or effect” of the federal statutes involved. *Id.* at 570; *see Grable*, 545 U.S. at 315 n.3.

109. *Grable*, 545 U.S. at 313.

110. *Id.*

111. *Id.* (alteration in original) (quoting *Gully v. First Nat’l Bank*, 299 U.S. 109, 117–18 (1936)).

112. *Id.*

113. 522 U.S. 156 (1997). Justice O’Connor, writing for the 7–2 majority in *College of Surgeons*, cited *Franchise Tax Board’s* test, as well as *Gully’s* well-pleaded complaint rule. *Id.* at 164. *College of Surgeons*, however, did not further develop the “substantiality” rule, largely because the federal questions at issue involved constitutional claims. *Id.* In this definition-by-example for “substantiality,” the Court had no occasion to consider the reach of *Merrell Dow’s* right-of-action equivalent. As *Grable* noted, and *Merrell Dow* “suggested,” federal constitutional

*tion Laborers Vacation Trust*.<sup>115</sup> While each case imposed a substantiality requirement, each articulated it differently.

In 1986, *Merrell Dow* added a confounding factor to the definition of substantial: a federal remedy in the statute underlying the alleged federal issue.<sup>116</sup> Adjudicating embedded federal-question jurisdiction over state tort claims allegedly raising issues about the Federal Food Drug and Cosmetic Act's (the FDCA) labeling provisions, Justice Stevens's opinion for the 5-4 Court held that the lack of a private right of action under the FDCA was "tantamount" to a conclusion that the issue was not substantial enough to be in federal court.<sup>117</sup> Use of the word "tantamount," commonly defined as "equivalent in value, significance, or effect,"<sup>118</sup> rendered the absence of a federal remedy equivalent to insufficient substantiality under a literal reading of *Merrell Dow*.<sup>119</sup>

The circuit courts split in their interpretation of *Merrell Dow*, with several circuits applying the literal reading to require a private right of action accompany the alleged federal question and the Fourth Circuit holding that a private right of action was not required.<sup>120</sup> *Grable* rejected the literal reading and upheld the Fourth Circuit's interpretation.<sup>121</sup>

Thus, according to *Grable's* reading of precedent, state-law claims with embedded federal issues arise under federal law when the issues are necessary to adjudicating the complaint, actually disputed, and implicate a substantial federal interest in resort to a federal forum.<sup>122</sup> With the exception of the malleable definition for "substantial," the test seems simple enough.

---

questions occupy a more "substantial" sphere than federal statutory questions, with constitutional questions "the more likely ones to reach the level of substantiality that can justify federal jurisdiction." *Grable*, 545 U.S. at 320 n.7.

114. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986).

115. 463 U.S. 1 (1983).

116. *Merrell Dow*, 478 U.S. at 814.

117. *Id.*

118. *Tantamount*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/tantamount> (last visited Oct. 18, 2011).

119. In a footnote, the *Merrell Dow* majority took up the notion that "arising under" jurisprudence "can best be understood as an evaluation of the *nature* of the federal interest at stake." 478 U.S. at 814 n.12. The federal interest needed to be "really" federal, or "substantial" and the absence of a federal right of action equaled the absence of "substantiality." *Id.*

120. *Compare, e.g., Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994) (requiring a parallel federal private right of action for federal-question jurisdiction), *with Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996) (upholding federal-question jurisdiction without an accompanying federal private action).

121. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 311-12 & n.2 (2005).

122. *Id.* at 313.

The final doctrinal strand, however, involves balancing federalism and comity—complicated “considerations [that] ha[d] kept [the Court] from stating a ‘single, precise, all-embracing’ test” before 2005.<sup>123</sup> *Grable* saw in *Franchise Tax Board* and *Merrell Dow*’s discussions of federalism the imposition of “a possible veto” on exercise of jurisdiction in embedded-question cases otherwise satisfying the “arising under” test.<sup>124</sup> *Merrell Dow* “emphasized . . . sensitive judgments about congressional intent, judicial power, and the federal system” in any jurisdictional adjudication.<sup>125</sup> The Court echoed *Franchise Tax Board*’s “forceful[] reiterat[ion]” of the “need for prudence and restraint in the jurisdictional inquiry.”<sup>126</sup> Expressing concern over the “increased volume of federal litigation” and noting the importance of adhering to “legislative intent,” *Merrell Dow* thought it improbable that Congress, having made no provision for a federal cause of action, would have meant to welcome any state-law tort case implicating federal law “solely because the violation of the federal statute is said to [create] a ‘rebuttable presumption’ [of negligence] . . . under state law.”<sup>127</sup> *Merrell Dow* warned, “[E]xercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would . . . have heralded a potentially enormous shift of traditionally state cases into federal courts.”<sup>128</sup>

Although *Grable* correctly held that federal-question jurisdiction could not properly require a federal right of action, *Grable* maintained the jurisdictional significance of caseload management. *Grable* stated the floodgates hysteria in federalist terms, emphasizing deference to the legislative branch and requiring a “sensitive judgment” by district

---

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

124. *Id.* at 313–14.

125. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986); see, e.g., *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824) (Johnson, J., dissenting); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 317 (1996); see also Toby J. Stern, *Federal Judges and Fearing the “Floodgates of Litigation”*, 6 U. PA. J. CONST. L. 377 (2003) (criticizing the use of the floodgates argument by federal courts to avoid taking on a case). In 1973, for example, Judge Friendly cautioned that “the inferior federal courts now have more work than they can properly do—including some work they are not institutionally fitted to do.” FRIENDLY, *supra* note 9, at 3–4. According to Friendly, the ALI’s 1969 Division study did not even “reflect the proper amount of alarm” over caseloads because it began in 1961, “before the tidal wave of litigation that has engulfed the federal courts.” *Id.* at 4.

126. *Merrell Dow*, 478 U.S. at 810 (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 20 (1983)).

127. *Id.* at 811–12 (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377 (1982)).

128. *Grable*, 545 U.S. at 319.

courts about the “congressionally approved balance of federal and state judicial responsibilities.”<sup>129</sup>

*Grable* then instructed that, in addition to the test of the federal question, “there must always be an assessment of any disruptive portent in exercising federal jurisdiction.”<sup>130</sup> This federalism “veto,” adopted in *Grable*, instructs courts to remand if exercising jurisdiction over a necessary, disputed, substantial federal question would alter the “division of labor” Congress intended to maintain between state and federal courts.<sup>131</sup> In short, if exercising the jurisdiction conferred by Article III and the Judiciary Act of 1875 would “attract[] a horde” of newly-removed cases to the federal courts, then courts should abstain from jurisdiction.<sup>132</sup> As Andrew Bradt argued, this balancing factor functions effectively as an abstention doctrine.<sup>133</sup>

*Grable’s* encapsulation of precedent therefore presented the new test as, “[D]oes 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>134</sup>

Applying the newly-minted test, *Grable* held the federal court properly exercised jurisdiction.<sup>135</sup> The federal government’s “strong interest” in tax-collection matters rendered the notice provision “an important issue of federal law”—so important that it “sensibly belongs in a federal court” where “judges used to federal tax matters,” could “vindicate” federal administrative action.<sup>136</sup> Thus, the notice question passed the substantiality (and practicality) test.<sup>137</sup> Further, jurisdiction over this essential, disputed, and substantial federal question would “portend only a microscopic effect on the federal-state division of labor” because “it will be the rare state title case that raises a contested matter of federal law.”<sup>138</sup>

*Grable* upheld jurisdiction and found substantiality despite the fact that everyone agreed the federal tax statute at issue contained no

---

129. *Id.* at 308–09.

130. *Id.* at 314.

131. *Id.* *But see* 17th St. Assocs., LLP v. Markel Int’l Ins. Co., 373 F. Supp. 2d 584, 594 (E.D. Va. 2005) (“The decision *not* to exercise jurisdiction raises ‘significant federalism concerns’ at least as important as the decision *to* exercise jurisdiction. . . . The right to remand and the right to remove are of equal import: while certain plaintiffs pleading claims based on state law are entitled to air their grievances before a state tribunal, certain defendants are equally entitled to mount their defense in a federal forum.”).

132. *Grable*, 545 U.S. at 318.

133. *See* Bradt, *supra* note 79, at 1160–76.

134. *Grable*, 545 U.S. at 314.

135. *Id.* at 314–15.

136. *Id.* at 315.

137. *Id.*

138. *Id.*

private right of action.<sup>139</sup> The Court then had to decide what to do about *Merrell Dow's* reliance on a similar hole as tantamount to insubstantiality.

The *Grable* Court answered by leaving *Merrell Dow* technically standing, but cabining its reasoning with a reading lesson. Ignoring the “tantamount” language in *Merrell Dow*, the Court explained that the opinion “cannot be read whole as overturning decades of precedent, as it would have done by effectively adopting the Holmes dissent in *Smith* . . . and converting a federal cause of action from a sufficient condition . . . into a necessary one.”<sup>140</sup> The Court went out of its way to leave *Merrell Dow* intact, despite reaching the opposite conclusion regarding the necessity of a private right of action.<sup>141</sup> *Merrell Dow*, the Court instructed, “should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the ‘sensitive judgments about congressional intent’ that § 1331 requires.”<sup>142</sup> In *Grable*, the Court made the absence of a private right of action somewhat important in sorting out substantiality, and primarily important in divining “clue[s]” to Congress’s intended balance of federal and state responsibilities.<sup>143</sup>

Put more colorfully by Justice Souter, “[t]he Court [in *Merrell Dow*] saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction . . . would have attracted a horde of original filings and removal cases . . . .”<sup>144</sup>

Whatever its inherent vices and virtues, *Grable* thus wove the existing strands of doctrine together as elements in a “single” and “all-encompassing” test, while “clarifying” that *Merrell Dow* did not require a federal right of action for substantiality. Whether *Grable* hit its mark for crafting a “precise” test is more debatable. *Grable* presented the Court with the opportunity to choose a bright-line rule, and the Court unanimously rejected it. The unanimous test values flexibility and discretion—“substantiality,” “balance,” and even “necessary” all involve sensitive judgments about the pleading’s meaning and Congressional intent. At worst, *Grable* muddied the waters and

---

139. *Id.* at 315, 319.

140. *Id.* at 317; *cf. id.* at 320 (Thomas, J., concurring) (supposing that “[i]n an appropriate case,” he would be willing to consider adopting the Holmes view of jurisdiction).

141. *Id.* at 317 (majority opinion).

142. *Id.* at 318; *see also* *Wisconsin v. Abbott Labs.*, 390 F. Supp. 2d 815, 821 (W.D. Wis. 2005) (describing how *Grable* “backed away from [*Merrell Dow's*] approach”); *cf. id.* (“The [*Grable*] Court stated further that its holding did not overrule the decision in *Merrell Dow*. Rather, it characterized *Merrell Dow* as consistent with the framework set out in *Grable*.”).

143. *Grable*, 545 U.S. at 318.

144. *Id.*

ossified the importance of federalist balancing, which relies so heavily on discretion as to warrant classification as a new abstention doctrine.<sup>145</sup> At best, *Grable* clarified the substantiality rule as between two possible meanings and chose the more flexible of the two, requiring more inquiry, discretion, and judgment in determining what issues *belong* in the federal courts. This suggests that, while the formalist ideal of bright-line rules for clarity and expediency has retained its gravitas, the allure of flexibility and discretion to make the hard calls endures. While prizing the expedience of hard-and-fast rules, courts want to reserve the power to decide issues flexibly when needed.

The clarity debate at times oversimplifies the dueling questions whether it is more important to make it clear or to get it right.<sup>146</sup> With a question whose answer determines, at the outset of a case, which forum and rules will apply, and whether the federal courts may serve their purpose, it is more important to get it right.<sup>147</sup> And *Grable* proceeded from that calculation in crafting its unified test. In clarifying that the malleable definition of substantiality prevails, *Grable* gave the federal courts an escape hatch to reach the merits of those cases, raising important questions of federal law that would benefit from uniform interpretation, but which do not have a federal cause of action underlying them. *Grable* is good<sup>148</sup>—or at the very least, useful—for studying the implementation of clear versus fuzzy jurisdictional rules.

## 2. *Slimming Doctrinal Application in Empire*

The evolution of the jurisdictional test is, however, not the only force at play in the study of jurisdictional clarity and clarification. Any examination of the world before and after *Grable* announced its

---

145. See Bradt, *supra* note 79, at 1156; see also, e.g., *Abbott Labs.*, 390 F. Supp. 2d at 823–24 (concluding the complaint necessarily presented a substantial, disputed question of federal law, but remanding based on the balancing factor “[b]ecause this case does not implicate an overriding federal interest and because removal would disturb the balance of judicial responsibilities between state and federal courts”).

146. See Rose, *supra* note 16, at 609–10 (pointing out ways in which “crystals and mud dissolve into each other” and aspects of the debate that are “overstate[d]”).

147. The importance magnifies when considering that an erroneous decision against jurisdiction is unappealable, see 28 U.S.C. § 1447(d) (2006), and an erroneous decision for jurisdiction wastes resources if ultimately reversed, or affects the opportunity for recovery if not reversed. See Clermont & Eisenberg, *supra* note 52, at 593–95 (illustrating that plaintiff win rates are lower in removed cases). *But see* Ryan, *supra* note 48, at 670 (disputing that “the benefits outweigh the costs imposed by a flexible standard” for embedded federal-question jurisdiction).

148. See Rory Ryan, *No Welcome Mat, No Problem?: Federal-Question Jurisdiction After Grable*, 80 ST. JOHN’S L. REV. 621, 622 (2006) (concluding that *Grable* “admirably answers more questions than it creates”).

test must account for the contributions and modifications of implementing opinions. One year after the decision, the Supreme Court took the opportunity to comment on *Grable* in *Empire Healthchoice Assurance, Inc. v. McVeigh*.<sup>149</sup> In applying *Grable*, *Empire* coated the test with interpretive gloss. *Empire* addressed a circuit split<sup>150</sup> regarding whether an insurance carrier's claim for benefits reimbursement from an insured's settlement proceeds fell under § 1331.<sup>151</sup> The *Empire* majority's commentary on *Grable*, while answering this question, put *Grable* in its place without altering its doctrine.

In *Empire*, a federal employee, Mr. McVeigh, enrolled in a federal employees' health insurance plan and was fatally injured.<sup>152</sup> Mr. McVeigh's widow brought suit in state court against the alleged tortfeasor who caused the injury and the parties reached a settlement.<sup>153</sup> The private insurer, who contracted with the federal government to offer insurance pursuant to a federal statute, had notice of the widow's tort suit but chose to be a spectator, rather than a participant.<sup>154</sup> After settlement, the insurer sued McVeigh's estate in federal court seeking reimbursement from the settlement funds for the full amount of benefits paid.<sup>155</sup> *Empire* asserted federal jurisdiction based on a federal contractual right and alternatively claimed that the insurance plan itself constituted federal law.<sup>156</sup> The district court granted Mrs. McVeigh's motion to dismiss based on lack of subject-matter jurisdiction and a divided panel of the Second Circuit affirmed the dismissal.<sup>157</sup>

Justice Ginsburg's majority opinion affirmed the dismissal, holding jurisdiction did not exist on any of the three bases considered: (1) federal common law, (2) federal contractual rights, and (3) *Grable* federal-question jurisdiction.<sup>158</sup> After dealing with the first two bases, *Empire* turned to *Grable* as a last-resort jurisdictional argument

---

149. 547 U.S. 677 (2006). *Empire* examined arising under jurisdiction over a suit initially filed by the plaintiff in federal court, rather than removed there by the defendant. *Id.* at 683.

150. *Id.* at 689. The Fourth, Seventh, and Eighth Circuits upheld federal jurisdiction over insurers' reimbursement claims, and the Third Circuit rejected jurisdiction. *Id.*

151. *Id.* at 683.

152. *Id.* at 687.

153. *Id.*

154. *Id.* at 683–84.

155. *Id.* at 683. The enrollee's widow, Mrs. McVeigh, had agreed to put \$100,000 of her \$3,175,000 settlement in escrow to reimburse *Empire* the \$157,309 it spent on coverage, less the attorneys' fees and litigation costs of bringing the tort suit. *Id.* at 687–88. But *Empire* filed suit in federal court seeking the entire amount paid, without an offset for the litigation fees and costs. *Id.* at 688.

156. *Id.* at 688.

157. *Id.* at 688–89.

158. *Id.* at 690, 701. The first basis, federal common law, was not raised by the parties, but instead by Justice Breyer's dissent, in which Justices Kennedy, Souter,

raised by the United States, participating as *amicus curiae*.<sup>159</sup> Although *Empire* did not alter *Grable*'s test in any way, Justice Ginsburg's descriptions of—and commentary about—*Grable* seemed to put a finger on the scale toward limited exercise of jurisdiction.

First, *Empire* repeated *Grable*'s observation that the federal tax issue in *Grable* appeared to be “the only . . . issue contested in the case.”<sup>160</sup> The proper reading of this “only issue” characteristic in *Grable*, however, seems to be that it underscores—but does not create—the necessity of the federal question to the case. And, incidentally, it made *Grable* a desirable candidate for certiorari.

Second, *Empire* contrasted the “fact-bound and situation-specific” issue of how much to reimburse *Empire*'s plan with *Grable*'s federal tax question, which was “both dispositive of the case and . . . controlling in numerous other cases.”<sup>161</sup> While *Grable*'s federal tax question presented “a nearly ‘pure issue of law’” that “could be settled once and for all and thereafter would govern numerous tax sale cases,”<sup>162</sup> *Empire* involved a fact-fight about how much reimbursement was proper.<sup>163</sup> This “dispositive and controlling”—or “pure issue of law”—commentary can only properly be read as one consideration in *Grable*'s substantiality element, not as an additional requirement for jurisdiction.

*Empire* raises this “dispositive and controlling” aspect near its discussion of substantiality and cites only to a *Grable* passage indirectly linking substantiality with the hope of uniformity.<sup>164</sup> Thus, *Empire* looked to the dividends reaped from any federal court effort to answer the alleged federal question, favoring those cases that would best and

---

and Alito joined. *Id.* at 706 (Breyer, J., dissenting). The parties and amici asserted the other two bases. *Id.* at 690, 693 (majority opinion).

159. *Id.* at 699.

160. *Id.* at 700 (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 315 (2005)). As noted earlier, this observation has led to erroneous and unwarranted focus in some district court opinions. See generally Fairbairn, *supra* note 83, at 1006 (identifying a common district court error in applying *Grable* as “[o]veremphasis on the [federal i]ssue as the [o]nly [d]isputed [i]ssue”).

161. *Empire*, 547 U.S. at 700–01 (citing *Grable*, 545 U.S. at 313).

162. *Id.* at 700 (quoting RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 65 (5th ed. Supp. 2005)).

163. *Id.* at 700–01. The Court also dismissed the alleged federal question of whether and to what extent the reimbursement should account for attorney's fees as “best positioned” for resolution in a state court and therefore afoul of *Grable*'s “balancing” element. *Id.* at 701.

164. Compare *id.* at 700, with *Grable*, 545 U.S. at 313 (“It has in fact become a constant refrain in [federal-question] cases 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.”), and *id.* at 312 (explaining that “substantial questions of federal law” embedded in state-law claims “justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues”).

most quickly promote uniformity in federal law. As the D.C. Circuit recently noted, under *Empire* “[f]ederal jurisdiction is favored” in cases presenting “‘a nearly pure issue of law . . . that could be settled once and for all and thereafter would govern numerous . . . cases.’”<sup>165</sup> And, “[c]onversely, federal jurisdiction is disfavored for cases that are ‘fact-bound and situation-specific’ or which involve substantial questions of state as well as federal law.”<sup>166</sup>

But *Empire*’s last words about *Grable* offer the most unsubtle nudge of all. Despite the United States’ “overwhelming interest” in the health and welfare of federal employees, Justice Ginsburg concluded that *Empire* could not be “squeezed into the slim category *Grable* exemplifies.”<sup>167</sup> The Court in *Merrell Dow* had already opined that the “vast majority” of federal-question jurisdiction cases are Holmes Rule cases in which federal law creates the cause of action.<sup>168</sup> *Grable* similarly explained that, while § 1331 is usually “invoked by plaintiffs pleading a cause of action created by federal law,” embedded federal questions in state-law claims represent “another longstanding, if less frequently encountered, variety of federal ‘arising under’ jurisdiction.”<sup>169</sup> Again, although not part of the test, *Empire*’s evocative imagery of “squeezing” embedded federal-question cases into a “slim category” colors how courts view *Grable* and which way close cases should go.<sup>170</sup> *Empire* represents not a modification of *Grable*’s rule,

165. *Bender v. Jordan*, 623 F.3d 1128, 1130 (D.C. Cir. 2010) (quoting *Empire*, 547 U.S. at 700) (internal quotation marks omitted).

166. *Id.* (quoting *Empire*, 547 U.S. at 701).

167. *Empire*, 547 U.S. at 701.

168. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (citation omitted).

169. *Grable*, 545 U.S. at 312.

170. As of July 1, 2011, more than sixty decisions in Westlaw have quoted *Empire*’s “slim category” phrasing. That list includes six appellate opinions, from the Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits, all of which held jurisdiction lacking. See *Kalick v. Nw. Airlines Corp.*, 372 F. App’x 317, 320 (3d Cir. 2010) (denying federal-question jurisdiction and noting that *Empire* “emphasized that *Grable & Sons* exemplified a ‘slim category’”); *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 914 (8th Cir. 2009) (remanding and contrasting the “private contract—a bread-and-butter state court issue” with *Grable*’s “slim category”); *Morgan Cnty. War Mem’l Hosp. ex rel. Bd. of Dirs. of War Mem’l Hosp. v. Baker*, 314 F. App’x 529, 536 (4th Cir. 2008) (denying jurisdiction because “[a]ppellees cannot be squeezed into *Grable*’s slim category”); *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1296 (11th Cir. 2008) (remanding when “keeping in mind that the Supreme Court has explained that ‘*Grable* exemplifies’ a ‘slim category’ of cases”); *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 574 (6th Cir. 2007) (remanding because “this case ‘cannot be squeezed into the slim category’”); *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 910 (7th Cir. 2007) (remanding after comparing case to *Empire* and quoting “slim category” passage); cf. *Potter v. Hughes*, 546 F.3d 1051, 1065 (9th Cir. 2008) (Ikuta, J., dissenting) (arguing that, instead of affirming

but rather a clarification of *Grable's* scope in application. *Empire's* nuance on *Grable's* rule nudges toward narrow application.

### 3. *Cinching Jurisdiction with Pragmatism, Presumptions, and Procedure*

In addition to the forces of implementing opinions' interpretations, a study of decisions using *Grable's* rule requires acknowledgement of the pragmatic pressures on judicial administration. For embedded federal-question jurisdiction, docket-management concerns and the pre-existing responses to those concerns exert pressure against exercising jurisdiction.

*Grable's* federalism veto and *Empire's* slimming prescription took aim at averting a flood of federal-question cases, providing a doctrinal avenue for courts to control their caseloads with remand. Invocations of "common sense," which have permeated the development of the test, have further tightened the spigot on federal-question jurisdiction.<sup>171</sup> Although doctrinally "the right to remove has never been dependent on the state of the federal court's docket,"<sup>172</sup> the practical reality—or the perceived reality—that Congress intended the federal courts to have a lighter workload frequently has led courts to decline jurisdic-

---

district court's dismissal of the complaint, the appellate court should have remanded for lack of jurisdiction, citing *Empire's* "slim" passage).

171. *E.g.*, *Grable*, 545 U.S. at 312 ("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 . . ."); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 20 (1983) ("We have always interpreted . . . 'the current of jurisdictional legislation since the Act of March 3, 1875,' with an eye to practicality and necessity." (quoting *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950))); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 378–80 (1959) (applying "commonsensical [sic] and lawyer-like modes of construction, and the evidence of history and logic" to federal-question jurisdiction); *Gully v. First Nat'l Bank*, 299 U.S. 109, 117–18 (1936) (explaining that embedded federal-question jurisdiction requires a "commonsense accommodation of judgment to [the] kaleidoscopic situations" in which federal issues arise). *Compare Grable*, 545 U.S. at 315 (upholding jurisdiction because tax law "is an important issue . . . that sensibly belongs in a federal court"), *with Empire*, 547 U.S. at 700–01 (denying jurisdiction because "the bottom-line practical issue" was too fact-specific). *But see Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907) ("[T]he Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."); *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (discussing fraudulent joinder); 14 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3641 (3d ed. 1998) (same).

172. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976).

tion.<sup>173</sup> This docket-management pragmatism has manifested itself in many forms.

Structural incentives to remand cases removed from state courts help calm the fear of torrential federal litigation. Most notably, § 1447(d) forecloses appellate review of remand orders, but not orders denying remand.<sup>174</sup> While the 1875 Act allowed review of remand orders by writ of error or appeal in the Supreme Court, the 1887 amendments to the Act repealed the appellate review provision and substituted “a provision that ‘improperly removed’ cases should be remanded and that ‘no appeal or writ of error from the decision of the circuit court *so remanding* such cause shall be allowed.’”<sup>175</sup>

In precluding appellate review, Congress sought to relieve the courts of appeals’ burgeoning docket and prevent “interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court.”<sup>176</sup> Section 1447(d) therefore provides: “An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.”<sup>177</sup> The statutory foreclosure of appeals has sparked the widely-muttered suspicion among litigants that district courts use subject-matter jurisdiction remand to manage their caseloads, regardless of the merits.<sup>178</sup> Some commentators have called for a change in the prohibition.<sup>179</sup> In

173. See generally Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 764–65 (1986) (discussing docket pressure in the creation of the three-tiered federal court system).

174. 28 U.S.C. § 1447(d) (2006); see also *Woods v. Nissan N. Am.*, No. Civ. CCB-04-2898, 2005 WL 1000089, at \*2 (D. Md. Apr. 29, 2005) (“[A] district court should be cautious in denying defendants access to a federal forum because remand orders are generally unreviewable.”). Similarly, the procedure for removal set forth in § 1446(a) sets a thirty-day window in which the defendant must remove. 28 U.S.C. § 1446(a), (b). If the defendant misses this window, or cannot secure the consent of other defendants within time, the court cannot exercise federal-question jurisdiction.

175. *Thermtron*, 423 U.S. at 346–47 (quoting Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553); see Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L. J. 83, 113–19 (1994).

176. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)).

177. 28 U.S.C. § 1447(d). Notably, courts have held that § 1447(d) also prohibits granting review of remand orders under § 1292(b). *E.g.*, *In re WTC Disaster Site*, 414 F.3d 352, 367 (2d Cir. 2005); *Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 129–30 (3d Cir. 1998); *Krangel v. Gen. Dynamics Corp.*, 968 F.2d 914, 914 (9th Cir. 1992).

178. See *Thermtron*, 423 U.S. at 339 (reversing district court’s remand based on docket control); see also Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1189 (2006) (illustrating ways in which appellate courts have attempted to “repress docket clearing behavior” including jurisdictional dismissals and remands).

179. See, e.g., *Bradt*, *supra* note 79, at 1192–94; James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U.

terms of clarity's goals, this particular pairing of clear rules (appeal of remand foreclosed) and fuzzy rules (discretion in the basis for remanding) carries the potential to erode both predictability and legitimacy.

In addition to Congress's foreclosure of appeal, the judicially-created presumption against jurisdiction in removed cases helps curb the number of cases proceeding in the federal courts.<sup>180</sup> The Supreme Court endorsed strict construction of the remand statute, relying on the Congressional purpose in the 1887 Amendments.<sup>181</sup> The Fourth Circuit and other circuit courts have cited "significant federalism concerns" justifying the strict construction and the presumption against jurisdiction.<sup>182</sup> This presumption further tips the scale toward remand in doubtful and debatable cases.<sup>183</sup> Practically speaking, the

---

PA. L. REV. 493, 519 (2011); Wasserman, *supra* note 175, at 130–40 (arguing for a return to appellate review of certain remand orders); *see also infra* section IV.C (analyzing two approaches for appellate review of remand orders).

180. The fee-shifting provision in 28 U.S.C. § 1447(c) further adds to the pressure against removal jurisdiction. This subsection permits district courts to order defendants to pay plaintiffs' costs in defending "baseless" removals. Notably, 28 U.S.C. § 1447(c) "is *not* a sanctions rule; it is a fee-shifting statute, entitling the district court to make whole the victorious party." *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000). Thus, removals carry the possibility of fee-shifting, even if they otherwise satisfy Rule 11 of the *Federal Rules of Civil Procedure* and are in good faith.
181. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941) ("[T]he language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.").
182. *E.g.*, *Palkow v. CSX Transp., Inc.*, 431 F.3d 543, 555 (6th Cir. 2005) ("The Supreme Court's command that federal courts must exercise jurisdictional restraint is perhaps even more compelling in the context of removal than in the context of original jurisdiction. The decision whether to remove a suit to federal court directly implicates the constitutional allocation of authority between the federal and state courts."); *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365–66 (5th Cir. 1995) ("[B]ecause the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns" and requires strict construction.); *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) ("Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction."); *see also Adams v. Aero Servs. Int'l, Inc.*, 657 F. Supp. 519, 521 (E.D. Va. 1987) ("Removal of civil cases to federal court is an infringement on state sovereignty."); *Shamrock Oil*, 313 U.S. at 109 ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.").
183. *See, e.g., In re Hot-Hed Inc.*, 477 F.3d 320, 324 (5th Cir. 2007) ("[A]ny doubt about the propriety of removal must be resolved in favor of remand . . ."); *Lorenz v. Tex. Workforce Comm'n*, 211 F. App'x 242, 245 (5th Cir. 2006) ("[A]mbiguities are construed against removal because the removal statute is strictly construed in favor of remand."); *In re Baby C v. Price*, 138 F. App'x 81, 83 (10th Cir. 2005) (noting the presumption against removal jurisdiction and that "doubtful cases must be resolved in favor of remand"); *Mulcahey*, 29 F.3d at 151 ("If federal juris-

strict construction toward remand in these close cases, coupled with § 1447(d)'s foreclosure of appeal for remands, must divert many debatable cases away from the possible clarifying influence of appellate review. This when-in-doubt-throw-it-out presumption practically controverts the professed desire for clarity in jurisdictional rules by preventing appellate clarification of many doubtful or unclear applications of the rule.

The federal-question jurisdiction landscape thus includes some clear rules, some fuzzy ones, a recent clarification, and procedural obstacles that may stunt further clarification. It is fertile ground to study the effect of these jurisdictional rules through the eyes of its beholders: district courts and the litigants drawn there.

### III. VIEWING CLARIFICATION AND IMPLEMENTATION THROUGH *GRABLE*

Jurisdictional clarity's goals focus on how the rule is received and perceived. For embedded federal-question jurisdiction, *Grable* offers a clarifying event and a choice of a nuanced rule through which to examine *how* clarity works—how a rule may be received and perceived by litigants and the courts they seek to predict.

This Part looks at *Grable's* impact on district and appellate decision-making by studying the precedents created before and after the

---

diction is doubtful, a remand is necessary.”); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993) (doubts about removal are resolved in favor of remand); *In re Bus. Men's Assurance Co. of Am.*, 992 F.2d 181, 183 (8th Cir. 1993) (citations omitted) (“The district court was required to resolve all doubts about federal jurisdiction in favor of remand.”); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (“Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.”); *Cheshire v. Coca-Cola Bottling Affiliated, Inc.*, 758 F. Supp. 1098, 1102 (D.S.C. 1990); *cf. Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 425–26 (4th Cir. 1999) (holding that, in fraudulent joinder analysis on removal, “there need be only a slight possibility of a right to relief. Once the court identifies this glimmer of hope for the plaintiff, the jurisdictional inquiry ends.”); *Hartman v. Caraco Pharm. Labs., Ltd.*, Civ. No. 2:10-1319, 2011 WL 1636961, at \*2 (S.D. W. Va. Apr. 29, 2011) (“[F]raudulent joinder claims are subject to a rather black-and-white analysis in this circuit. Any shades of gray are resolved in favor of remand. At bottom, a plaintiff need only demonstrate a ‘glimmer of hope’ in order to have his claims remanded.”). *But see McKinney v. Bd. of Trs. of Md. Cmty. Coll.*, 955 F.2d 924, 927 (4th Cir. 1992) (quoting and affirming district court opinion, *McKinney v. Bd. of Trs. of Md. Cmty. Coll.*, 713 F. Supp. 185, 189 (W.D.N.C. 1989) (internal quotation marks omitted) (warning against “assuming that there is something inherently bad about removal and ‘defeating’ the plaintiff’s choice of forum”; explaining that, “[t]o the contrary, by providing for removal in the first place, Congress seems to believe that the defendant’s right to remove a case that could be heard in federal court is at least as important as the plaintiff’s right to the forum of his choice”)); *id.* (“Rather than favoring plaintiffs or defendants, . . . the removal procedure is intended to be ‘fair to both plaintiffs and defendants alike.’”). *See generally* Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 637 (2004).

decision. The empirical study presented here captured a sample of the precedent available on Westlaw, as well as the “submerged” precedents found only on the courts’ electronic dockets. The results give a snapshot of the federal-question jurisdiction precedent being generated by the courts and the picture of the clarification process as litigants may see it.

### A. Sample of Decisions

To examine the picture of embedded federal-question precedent available for litigants making jurisdictional predictions, the study sought to gather information on (1) whether district court remand rates changed after *Grable* stated its unified, flexible test; (2) whether remand rates look different based on how or where one looks—on Westlaw or on court dockets; and (3) whether litigants and courts have more accurately predicted and advocated for removal jurisdiction under the new rule. To pursue answers, I examined district and appellate court decisions adjudicating federal-question jurisdiction for federal questions embedded in state-law claims before and after *Grable*. For district court decisions on embedded federal questions, this study draws from decisions available on Westlaw, as well as those available only on the courts’ electronic dockets.<sup>184</sup>

While expanding the base of available decisions, this descriptive study narrowly focuses on those three questions. It does not, for example, test which rules or opinions are linguistically more clear.<sup>185</sup> Nor does it compare federal question to diversity or appellate jurisdiction, which ostensibly are more straightforward. And it does not make

---

184. Inclusion of district court docket research finds increasing support among empiricists and others studying decision-making. See, e.g., Hoffman et al., *supra* note 53; Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213 (2009). Among the five most cited studies including docket research are (1) Evan J. Ringquist & Craig E. Emmert, *Judicial Policymaking in Published and Unpublished Decisions: The Case of Environmental Civil Litigation*, 52 POL’Y RES. Q. 7 (1999); (2) Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC’Y REV. 1133 (1990); (3) Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782 (1992); (4) Donald R. Songer, *Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review*, 50 J. POL. 206 (1988); and (5) the methodical and methodological study in Hoffman et al., *supra* note 53. See, e.g., Pauline T. Kim et al., *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL’Y 83, 97 (2009); Levin, *supra* note 46, at 988–89.

185. Cf. Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75 (1998); Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 L. & SOC’Y REV. 1027 (2011).

comparisons of clarity among the various other bases for removal (e.g., federal officer, foreign state, etc.).

This study begins to address, but does not directly answer, specific calls for empirical studies to measure the systemic costs of clarity and ambiguity.<sup>186</sup> It does not, however, meet challenges to test different designs for jurisdictional rules.<sup>187</sup> This study begins with a much more modest step, focusing instead on a portion of the implementation process for already-designed and ostensibly improved rules. Indeed, the study is merely descriptive of *what* is happening in a certain corner of *Grable's* implementation and what it looks like from different perspectives, without the power to satisfyingly test *why* it is happening or *what if* a different jurisdictional regime heard a similar mix of arguments. Nonetheless, understanding some of the *what* hopefully will nudge this important debate.

The database developed for this study included decisions from 2002 to 2008 identified as adjudicating removal jurisdiction over embedded federal questions. The database contains only those cases from the Seventh Circuit available on Westlaw and cases from the Northern District of Illinois available on Westlaw and the Public Access to Court Electronic Records (PACER) dockets. This limited set results from the following principles.

### 1. *Sample and Sources of Decisions*

First, this study looks solely at decisions in the “tangled corner” of embedded federal-questions and encompasses only § 1441 federal-question removals. It excludes federal-question cases originally filed in federal court and thus does not include all of § 1331 arising-under jurisdiction.<sup>188</sup> It does not include removals on all jurisdictional ba-

---

186. Scott Dodson, for example, argues that “difficulties in design, implementation, and instrumentalism all erode the ideal of clear and simple jurisdictional rules.” Dodson, *supra* note 14, at 49–50. In doing so, he acknowledges the need for empirical studies to test whether clarity decreases judicial and litigant costs and smoothes intergovernmental relations. *Id.* at 50 n.236.

187. In his response to Dodson’s call for embracing complexity, Lumen Mulligan concedes the worthiness of Dodson’s addition to the debate, saying “clarity comes at a cost,” but laments that difficulties in empirically testing the costs of different jurisdictional regimes may freeze the debate at a purely theoretical level. Lumen N. Mulligan, *Clear Rules—Not Necessarily Simple or Accessible Ones*, 97 VA. L. REV. IN BRIEF 13, 21–22 (2011).

188. A future study could add to the dataset and compare federal-question original filings with removals. Nonetheless, confining the study to removals likely excluded few cases. See Ryan, *supra* note 48, at 678 & n.133 (excluding originally-filed cases from study of delay in embedded federal question cases and noting a ratio of 59:6 removed cases to originally filed cases in a sample of commercially-available opinions).

ses.<sup>189</sup> By focusing on the *Grable*-type removals, the study aims to capture those decisions in which *Grable* and *Merrell Dow* could and should be applied by district courts. Further, the focus on removed cases was intended to include those cases in which jurisdiction would most likely be contested, flowing from plaintiff's choice of state claims and state court, and defendant's preference for federal court, expressed in removing the case. And the restriction to removals served a practical purpose. Including docket cases in this data collection made it necessary to confine the search to removed cases (identified in PACER as filed under 28 U.S.C § 1441 and based on "federal-question" jurisdiction), rather than sift through *all* cases filed originally in federal court asserting federal-question jurisdiction to find the few asserting *embedded* federal-question jurisdiction instead of a federal claim.<sup>190</sup>

To capture the relevant decisions, I searched both Westlaw and federal courts' electronic dockets via PACER. The database included published and unpublished decisions from Westlaw, as well as those decisions available only on dockets.

The decision to include both published and unpublished decisions was an easy one, made on the empirical foundations laid in previous studies. As several commentators have argued, the full picture of district court decision-making should include not only *all* decisions available on the commercial databases, but also those decisions recorded solely on the courts' dockets.<sup>191</sup> This is because, as Stephen Burbank

---

189. It excludes, for example, 28 U.S.C. § 1441 removals based on diversity jurisdiction, as well as § 1441(d) foreign state, § 1441(e) mass action, § 1442 federal officer defendant removals, § 1443 civil rights, and § 1444 foreclosure of federal property removals.

190. PACER currently does not contain a mechanism for parties to select embedded federal-question jurisdiction as the filing basis. The only four options for identifying "[t]he basis of jurisdiction under which this complaint has been filed" at the district court level are "(1) U.S. Government Plaintiff (2) U.S. Government Defendant (3) Federal Question (U.S. Government Not a Party) [or] (4) Diversity." PACER, ADMIN. OFFICE OF THE U.S. COURTS, PACER USER MANUAL FOR ECF COURTS 53 (2012) [hereinafter PACER manual], available at <http://www.pacer.gov/documents/pacermanual.pdf>.

191. See, e.g., Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 604 (2004); Hoffman et al., *supra* note 53, at 727 ("In our view, docketology's main contribution is to starkly expose how little trial court work is explained through written opinions. An astonishingly low 3% of all orders are available on the databases; more than 80% of difficult orders are similarly 'hidden' without explanation."); see also, e.g., Keele et al., *supra* note 184, at 234–36 (noting that the "vast majority" of opinions "remain unpublished" and advising that "future scholars should not continue to ignore the rich source of information available in unpublished opinions"); Kim et al., *supra* note 184, at 86 (outlining how researchers should take "advantage of the electronic docketing system now operating in all federal district courts"); Levin, *supra* note 46, at 997 (describing the quest by "judges, lawyers and scholars [to] include in their research as many

has admonished, “the law in the books is not a reliable guide to the law in action.”<sup>192</sup> Biases in the selection of decisions for inclusion in the federal reporters, in the availability of unpublished opinions, and even in the amount of explanation for a given outcome, all distort the picture of the legal landscape taken through the lens of published opinions.<sup>193</sup> Focusing on published opinions is thus doubly under-inclusive of district court decision-making. First, focus on *published* opinions includes only those few opinions the authoring judges themselves deem worthy of inclusion in a reporter.<sup>194</sup> This choice has inherent bias because it is not a random selection for publication; it is the author’s choice and based on myriad subjective and idiosyncratic factors.<sup>195</sup> Studies have identified systematic differences between published and unpublished opinions.<sup>196</sup>

Second, focus on *opinions* necessarily excludes decisions memorialized in mere “orders”—a potentially large proportion of district court

unpublished opinions as they can possibly get their hands on” to help “determine exactly what judges are doing in actual cases and hold them accountable”).

192. Burbank, *supra* note 191, at 604.

193. *Id.* Problems include risk of producing biased results because many opinions are unpublished, many district court decisions do not produce opinions, and not all cases filed receive adjudication (many are concluded by settlement or agreement). Kim et al., *supra* note 184, at 97.

194. Across all doctrines, published opinions make up a small portion of all opinions, under representative of decision-making in general. Kim et al., *supra* note 184, at 97 n.43 (citing *United States Supreme Court Judicial Database, 1953–1997 Terms*, ICPSR (last visited Oct. 9, 2007), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/09422> (finding based on Federal Judicial Center data that, of the 41% of cases briefed and submitted, only one-quarter produce published opinions)).

195. The Judicial Conference in 1964 stated the criterion for publication decisions of federal judges, “[T]he judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value.” ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964), available at <http://www.uscourts.gov/judconf/64-Mar.pdf>; see Songer, *supra* note 184, at 206–07. Cases with “general precedential value” excludes the many cases that require only the “clear extention [sic] of a prior rule of law” which are “assumed to have little or no precedential value, contribute little to the development of public policy, and to involve no significant exercise of discretion by federal judges.” Songer, *supra* note 184, at 207 (citing Pamela Foa, Comment, *A Snake in the Path of the Law: The Seventh Circuit’s Non-Publication Rule*, 39 U. PITT. L. REV. 309, 309–40 (1977)).

196. Rowland and Carp’s study found greater ideological influence and liberal bent in published district court opinions than unpublished ones. See C.K. Rowland & Robert A. Carp, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 24–25 (1996). Donald Songer’s study found that more than half of the difficult appellate decisions (reversals and non-unanimous decisions) originated with unpublished district court opinions. Songer, *supra* note 184, at 211–13; see Kim et al., *supra* note 184, at 98 (reviewing these studies and concluding that “published district court opinions can neither be taken as representative of all district court opinions nor assumed to capture all of the important policy-making decisions”).

decisions.<sup>197</sup> The *Docketology* study, most notably, found opinions written in only three percent of all judicial actions and less than twenty percent of all non-ministerial orders.<sup>198</sup> Commentators have suggested that opinions are more likely to accompany appealable determinations, such as granting motions to dismiss or for summary judgment.<sup>199</sup> Decisions whether to remand alleged embedded federal questions carry this potential bias due to § 1447's prohibition on appeals for jurisdictional remands.<sup>200</sup>

The decision to include dockets seemed equally obvious for the purposes of my study. I wanted to take an accurate picture of how courts implemented *Grable's* new rule, so looking only at those cases that resulted in decisions published in Westlaw would necessarily exclude decisions the database editors did not know about, or did not select for inclusion.

In addition to the opinions published at judges' requests, the federal courts must post all written opinions on their websites regardless of publication status.<sup>201</sup> Opinions, per the Judicial Conference, constitute only those decisions "that set[ ] forth a reasoned explanation for a court's decision."<sup>202</sup> Westlaw identifies and selects these unpublished opinions for inclusion in its federal case law database by the criteria that they are "opinions of interest to the local bench and bar in a particular district."<sup>203</sup> That leaves a number of decisions out of the database and therefore only available on dockets. Remand decisions seemed especially susceptible to under-inclusion in Westlaw because the decision to remand is unappealable, and therefore would not result in any published appellate opinion.<sup>204</sup> And, I speculated, remand decisions might be less likely to generate enough explanation at the district court level to attract Westlaw's attention. Thus, I included Westlaw and docket decisions to test the hypothesis of Westlaw's under-inclusion, and to get the full picture of how the federal courts are implementing *Grable*.

---

197. Kim et al., *supra* note 184, at 98–99.

198. Hoffman et al., *supra* note 53, at 682.

199. *See id.* at 719, 721 n.161 (“[D]ispositions within cases that resulted in an appeal were more likely to result in opinions.”); Kim et al., *supra* note 184, at 99 (repeating this speculation).

200. *See* 28 U.S.C. § 1447(d) (2006).

201. Hoffman et al., *supra* note 53, at 692–93 (citing LINDA D. KOONTZ, U.S. GOV'T ACCOUNTABILITY OFFICE, ELECTRONIC GOVERNMENT: FEDERAL AGENCIES HAVE MADE PROGRESS IMPLEMENTING THE E-GOVERNMENT ACT OF 2002 (2004), available at <http://www.gao.gov/assets/250/244965.pdf>).

202. *Id.* at 693.

203. Levin, *supra* note 46, at 986 (quoting WEST PUBLISHING CO., PUBLICATION GUIDE FOR JUDGES OF THE UNITED STATES DISTRICT COURTS 2 (1994)).

204. With a few notable exceptions, this is described in the subsection on reversal rates. *See infra* subsection III.D.2.

While Westlaw contains mostly reasoned opinions, dockets on PACER include *all* written district court decisions—even those with little or no discussion. Espousing “docketology: the intensive study of trial court dockets,” authors Hoffman, Izeman, and Lidicker found that a large portion of district courts’ work does not come with an explanation, and this mass of “under-explained work . . . makes up the constitutive backbone of litigants’ substantive rights” adjudicated by courts.<sup>205</sup> As Kim, Schlanger, Boyd, and Martin have suggested, “PACER offers a significant data source for more accurately capturing and understanding the activity of the district courts” because it captures all events in a case’s life and makes most written documents available electronically for a small fee.<sup>206</sup> Further, the *Docketology* study found that studying dockets in addition to Westlaw “permits a comparison of decisions which are truly comparable—i.e., those made in the same procedural context—rather than simply comparing whatever decisions are available” through Westlaw and Lexis.<sup>207</sup>

As between Westlaw and Lexis, many of the available accounts point to relative parity between the two databases’ case law collections.<sup>208</sup> But the *Docketology* study of four busy district courts found that Westlaw captured more opinions than Lexis.<sup>209</sup> Based on this slight superiority and my own anecdotal testing, I included only the more inclusive of the two databases in the study: Westlaw.<sup>210</sup>

---

205. Hoffman et al., *supra* note 53, at 684–85.

206. Kim et al., *supra* note 184, at 103; *accord* Keele et al., *supra* note 184, at 222–23, 235–36.

207. Kim et al., *supra* note 184, at 106.

208. *See generally* KENDALL F. SVENGALIS, LEGAL INFORMATION BUYER’S GUIDE AND REFERENCE MANUAL 147–52 (2005), *available at* [http://access-to-law.com/elaw/readings/sven3\\_full.rtf](http://access-to-law.com/elaw/readings/sven3_full.rtf) (explaining that, although, Westlaw initially enjoyed a major advantage in case indexing, the competitive process of “leapfrogging” has produced relative parity between the two databases); *see also* Julie Jones, *Lexis Joins Westlaw in Providing Access to Court Dockets*, U. CONN. SCH. L. (Dec. 18, 2009, 5:18 PM), <http://www.law.uconn.edu/content/lexis-joins-westlaw-providing-access-court-dockets> (implying that Westlaw provided docket access before Lexis).

209. Hoffman et al., *supra* note 53, at 710 n.138 (noting that, in New York and Pennsylvania, the databases were essentially identical, but that for California and Maryland district courts, Lexis’s collection was significantly smaller). This is due in part to the way the database duopoly began: Westlaw published reporters initially and when Lexis emerged, it got started by hiring typists to copy Westlaw’s cases into its own new database. *See id.*

210. A majority of law librarians share my preference. *See* J. Paul Lomio & Erika V. Wayne, *Law Librarians and LexisNexis vs. Westlaw: Survey Results* 21 fig.20 (Stan. L. Sch., Legal Research Paper Ser. No. 23, 2008), <http://www.law.stanford.edu/sites/default/files/biblio/1002/145874/doc/slspublic/lomiowayne-rp23.pdf> (finding that a substantial majority of law librarians working in various institutional settings prefer Westlaw to Lexis, but surveying participants’ preferences without testing those assumptions against the databases’ actual content).

Within the Westlaw database, my search included all cases mentioning removal, remand, and federal-question jurisdiction, regardless of whether they had been designated for publication in a reporter series.<sup>211</sup> This search produced an over-inclusive list of cases.<sup>212</sup> From the results, only those cases actually deciding jurisdiction over embedded federal questions were included in the dataset.<sup>213</sup>

In PACER, the search included those civil cases filed under § 1441 as “cause of action”<sup>214</sup> and “federal question” as “jurisdiction.”<sup>215</sup> Because the PACER searches necessarily were based on the as-filed characteristics of the cases instead of specified terms in an opinion like Westlaw, the PACER reports included a relatively small proportion of actual decisions on federal-question jurisdiction.<sup>216</sup> Bloomberg

- 
211. See *infra* Appendix 2. The search terms in Westlaw were: REMOVE! “ARISE UNDER” & REMAND! & “1441” “REMOVAL JURISDICTION” & (“FEDERAL QUESTION” “FEDERAL QUESTIONS”). I performed the searches and distributed the resulting lists to my coders.
212. Two hundred fifty of the total 533 hits did not actually adjudicate jurisdiction over an embedded federal question. Thus, the Westlaw dataset is comprised of approximately 53% of the total hits. Cf. Siegelman & Donohue III, *supra* note 184, at 1140 (describing “deliberately broad” search terms used to capture all decisions in a particular substantive area of law, employment discrimination).
213. The database excluded, for example, decisions made exclusively on the issue of complete preemption that did not adjudicate whether a federal question was embedded in the state-law claims. I excluded these cases because complete preemption doctrine transforms the state-law claims into federal *claims*, rather than picking essential federal *issues* from state-law claims and leaving the plaintiff’s chosen claims intact. See *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (noting that complete preemption exists where the preemptive force of a federal statute is so extraordinary that it converts an ordinary state-law claim into a statutory federal claim). But, if a decision considered removal based (both or alternatively) on an embedded federal question and on complete preemption, I coded the embedded federal question portion and included it in the database.
214. See PACER manual, *supra* note 190, at 59 (describing “CAUSE” field as identifying “[t]he U.S. Civil Statute (in Title: Section format) under which the plaintiff filed the complaint and a brief description of the statute”).
215. This was accomplished by creating reports in the PACER Civil Cases Reports feature of actions filed under the removal statute, 28 U.S.C § 1441, denoting “federal question” as the jurisdiction.
216. A great portion of the cases filed as § 1441 federal-question jurisdiction either settled, were dismissed, had no dispute over jurisdiction, or otherwise had no decision on federal-question jurisdiction. It is possible that, in a subset of these no-decision cases, the judge was satisfied that the case warranted federal-question jurisdiction but did not take the opportunity to record that conclusion in a *sua sponte* decision. This would represent a decision of sorts upholding jurisdiction, but one of which there is no evidence other than silence. This hypothetical category of silent decisions is not considered in this study because it remains, for the moment, too hypothetical. Cf. Siegelman & Donohue III, *supra* note 184, at 1139 (noting in the employment discrimination context that “[c]ases that required judicial action are likely to be subject to the same kinds of sample selection . . . as published cases”).

Law now offers text-searchable access to PACER's database, which I used to check the inclusiveness of my docket results.<sup>217</sup>

## 2. *Jurisdictional Sample*

Because this study sought a snapshot of the implementation process, rather than a comprehensive catalog of opinions, I started with a sample of federal-question decisions based on jurisdiction. To capture the change in rule from bright-line to flexible, I chose to study courts on the losing side of the circuit split resolved in *Grable*. The study focuses on the Seventh Circuit because that circuit had the longest-running jurisprudence on the *Merrell Dow* side of the split.<sup>218</sup> The Seventh Circuit also happens to have busy courts, offering a large pool of decisions to investigate.

Within the district court dockets, I began with a more limited sample from the district courts due to the intense labor necessary to search dockets. Specifically, I started the docket coding with the busiest district court in the circuit according to the U.S. Courts Administrative Office statistics.<sup>219</sup> By investigating the dockets in the circuit's busiest district, I hoped to get a snapshot of how the docket decisions align with those available on Westlaw.<sup>220</sup>

Because this study looks at *Grable's* clarification of *Merrell Dow*, I sampled the subset of decisions in these jurisdictions for the three and a half years before and after the *Grable* opinion issued. The coding begins January 1, 2002 and ends December 31, 2008, with *Grable* intervening almost exactly midway on June 13, 2005.

The database thus included published and unpublished Westlaw cases from the Seventh Circuit, as well as cases from the busiest district court (the Northern District of Illinois) available on Westlaw or only on dockets, adjudicating jurisdiction over embedded federal questions between January 1, 2002 and December 31, 2008. The decisions

---

217. See Mary Sheridan Newman et al., *Here a Docket, There a Docket: Part II*, 29 LEGAL INFORMATION ALERT, no. 5, 2010, reprint available at <https://www.bloomberglaw.com/files/2011/06/LIA-reprint.pdf>. Bloomberg Law's docket search capabilities are discussed in Part IV, *infra*.

218. See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 n.2 (2005) (comparing *Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994) (finding that federal-question jurisdiction over a state-law claim requires a parallel federal private right of action) with *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996) (finding that a federal private action is not required)).

219. See *infra* Appendix 1.

220. The study also drew cases from the winning side of the *Merrell Dow* circuit split—the Fourth Circuit and its busiest district court, the Eastern District of Virginia. Those results, however, proved too sparse to meaningfully analyze trends in precedent, owing both to the small sample results within Westlaw decisions, and to the unavailability of a large portion of underlying documents in the PACER database for the sample years. Thus, only the Northern District of Illinois results are included here.

included in the database were coded for, among other things, their source (Westlaw or docket), their disposition on the embedded federal-question jurisdictional issue, and their level of depth (whether a simple order or a reasoned explanation).<sup>221</sup>

After culling the irrelevant Westlaw decisions from the search results and sifting through thousands of dockets to identify the additional remand decisions, 151 decisions remained in the data sample for analysis. This is a modest sample, warranting caution in drawing any conclusions, and is most useful for describing the landscape of decision-making before and after *Grable*. If nothing else, the small sample size suggests that *Grable's* jurisdiction is, in fact, as Justice Ginsburg prescribed in *Empire*, a “slim category.”

The remainder of this Part describes the results from the sample data.

## B. Submerged Precedent

I examined the picture of embedded federal-question precedents litigants would see through conventional research methods—using Westlaw or Lexis—and compared that view with the whole picture of decision-making available through docket research.

One trend the study unearthed in the sampled district is that a relatively small number of embedded federal-question jurisdiction decisions made it into the Westlaw database. In the Northern District of Illinois, for example, the search captured sixty-three decisions (43.2%) in Westlaw from January 1, 2002, through January 1, 2009, and eighty-three additional decisions (about 56.8%) on dockets for the same period. The decisions exclusively on dockets I refer to as “submerged precedent” in a nod to the iceberg metaphor used to describe the portion of cases that get reported to the general public.<sup>222</sup> Referring to docket decisions as submerged precedent also avoids confusion over the changing definition of “published” versus “unpublished” decisions.<sup>223</sup>

---

221. See Appendix 2: Remand Rate Coding Information and Variables for a more detailed description of the codebook information and process. Within the docket research, I did, however, only collect announced rulings on jurisdiction. Because federal judges have an obligation to determine jurisdiction even if not raised by the parties, some cases without an announced ruling ostensibly could represent a silent “decision” that jurisdiction existed. But, I did not try to code these ruling-less jurisdictional decisions because they are too hypothetical. That level of coding would delve into decisions announced only in judges’ minds. I have neither the technology nor the inclination to study that currently.

222. See, e.g., Siegelman & Donohue III, *supra* note 184 (describing published opinions as the iceberg’s tip and unpublished opinions as the iceberg’s remainder); see also Hoffman et al., *supra* note 53, at 687 (acknowledging the same idea).

223. Compare Siegelman & Donohue III, *supra* note 184, at 1138 (defining “published” as available on Lexis), and Levin, *supra* note 46, at 985 (same), with Keele et al.,

This mass of submerged precedent suggests research based solely on cases in the commercial databases carries a risk of distorting the picture of district court decision-making. For embedded federal-question decisions, Westlaw research alone would exclude more than half of the decisions generated. While the observation of under-inclusiveness in Westlaw (and Lexis) is not a new one, my study data corroborates findings in previous studies, which have added incrementally to the scholarship on civil docket research and its implications for empirical claims by assessing differences in availability, publication, and decision writing.<sup>224</sup> Where previous studies have sampled publication, docket decisions, or both in particular areas of substantive law,<sup>225</sup> or the habits of particular jurisdictions,<sup>226</sup> this study focuses on a particular procedural juncture.<sup>227</sup>

Siegelman and Donohue, for example, studied employment discrimination cases in the Northern District of Illinois between 1972 and 1987, comparing the number of decisions available on Lexis to the number of cases filed.<sup>228</sup> Out of the 4,310 cases filed in the sample, an average of 71% generated an opinion of some kind picked up by Lexis.<sup>229</sup> Siegelman and Donohue concluded that this 29% of cases not appearing in Lexis could make Lexis decisions an unrepresentative sample.<sup>230</sup> While my sample of embedded federal-question removals was much smaller, the higher rate of decisions not appearing in Westlaw (56.8%) suggests a similar, or perhaps greater, potential for sample bias in commercial database cases. Further, the expansion

---

*supra* note 184, at 222–23 (describing Westlaw and Lexis as containing “all published cases and a few unpublished cases”), Siegelman & Donohue III, *supra* note 184, at 1138 n.16 (explaining that previous circuit court rules defined “published” as having full text of the opinion “appearing in print in a West reporter”) and William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1169–71, 1194 (1978) (contemplating “published” opinions as those available in print and examining printing costs).

224. See generally Hoffman et al., *supra* note 53, at 687–90 (surveying studies).

225. See, e.g., Ringquist & Emmert, *supra* note 184, at 8–9 (comparing policymaking aspects of published and unpublished decisions in environmental civil litigation from 1974 to 1991); Siegelman & Donohue III, *supra* note 184, at 1137–41 (noting employment discrimination cases generating Lexis opinions versus those filed from 1972 to 1986); Songer, *supra* note 184, at 208–12 (comparing reversal rates of published and unpublished district court decisions in a sample of criminal, antitrust, and labor cases from 1976 to 1984).

226. See, e.g., Olson, *supra* note 184, at 788–92 (comparing District of Minnesota cases available on microfiche versus databases from 1982–84); Reynolds & Richman, *supra* note 223, at 1173–81 (comparing published and unpublished circuit court decisions).

227. Cf. Reynolds & Richman, *supra* note 223, at 1173–81 (comparing published and unpublished circuit court decisions).

228. Siegelman & Donohue III, *supra* note 184, at 1139.

229. *Id.*

230. *Id.* at 1144.

of the employment study across seven other districts showed the rate of submergence varied by region, making database cases a geographically skewed sample as well.<sup>231</sup> In Siegelman and Donohue's study, the Northern District of Illinois had a comparatively high publication rate for civil cases,<sup>232</sup> suggesting that the rate of submergence in other districts may be even greater than the rates observed here. The 56.8% submergence rate observed in this study thus adds another increment to the empirical literature, and adds yet another note of caution on the risks of trying to study the iceberg from its tip.

Beyond the academic implications for empirical studies of jurisdictional decision-making, the submergence of embedded federal-question precedents has special relevance to the primary goal of the jurisdictional clarity mantra—litigant predictability—because litigants use precedent to make predictions and arguments about how and what a court will decide in their cases. By researching precedent only in the commercial databases, litigants could see less than half of the embedded federal-question decisions made by the relevant court. The practical availability of precedent opinions therefore impacts the amount and possibly the representativeness of the data visible to litigants—it affects how clearly they can see the true picture of jurisdictional rules' application.

Because the available precedent necessarily impacts litigants' predictive powers for determining jurisdiction, the amount of explanation and number of readily-available opinions should affect the implementation process. This submerged precedent has two main implications for jurisdictional clarity and clarification. First, it raises the questions of what is submerged, why it is submerged, and how it could emerge. Second, it changes the picture of implementation and application, and therefore opportunities for generating clarifying precedent. That is, looking beneath the surface changes the picture of how district courts are applying the rule.

All decisions begin below the surface because they are issued to parties in a dispute and therefore must be entered on the litigation's electronic docket. District judges, unlike appellate ones, are not required to send Westlaw and Lexis their opinions.<sup>233</sup> So district judges' discretion buoys particular decisions to the surface. District judges can designate decisions for publication in a reporter, they can send them to Westlaw, and they can, to some extent, suggest what decisions should comprise the visible precedent.<sup>234</sup> And the Westlaw

---

231. *Id.* Of the seven districts studied by Siegelman and Donohue, the Northern District of Illinois had the second highest publication rate across all civil cases. *See id.* at 1143 tbl.1.

232. *Id.*

233. *See* Levin, *supra* note 46, at 985.

234. *See, e.g., id.* at 986–88.

editorial team makes further selections from the available cases.<sup>235</sup> In addition, the commercial databases collect decisions periodically from PACER, including in the database those decisions of “substance” and discarding “procedural orders.”<sup>236</sup> Thus, the databases do not contain a random sample of decisions.<sup>237</sup>

Ostensibly, the cases that make it to the surface have more than a conclusion; they offer some reasoned explanation and precedential value. But, adding to the inherent risk of an unrepresentative picture, the submerged embedded federal-question precedent identified here suggests that not only the number of remands is obscured, but also that some valuable, reasoned precedents are out of view. In the Northern District of Illinois sample in this study, 25% of the submerged decisions had reasoned explanations, as opposed to bare orders.<sup>238</sup>

Excluding docket research therefore excludes over half the embedded federal question decisions, many of which offer reasoned explanations. This selection could be harmless. Or selection could be non-random, producing a biased picture of remand. This Article approaches only the initial question—whether submerged precedent changes the picture of remand rates—by calculating the rate of remand.<sup>239</sup> Perhaps, instead of an iceberg, the duck metaphor is more apt: a calmly gliding body visible above the surface belies frenetic paddling below it.

### C. District Court Remand Rates

*Grable* solidified its jurisdictional test and affirmed jurisdiction because the Court held that it would “portend only a microscopic effect

---

235. See generally Olson, *supra* note 184, at 784–87 (describing the database collection and editorial process as of 1992).

236. See E-mail Correspondence from Kirc J. Breissinger, Dir. of Prod. Planning, LexisNexis, to Elizabeth Y. McCuskey, Faculty Fellow, Thomas Jefferson Sch. of Law (Aug. 31, 2011 8:57) (on file with author) (explaining that Lexis collects from PACER all decisions that are “substantive in nature,” which “generally means that [Lexis] avoid[s] procedural orders”).

237. See Keele et al., *supra* note 184, at 214.

238. In the Northern District of Illinois PACER sample collected here, nineteen of the eighty decisions warranted coding as “opinion” instead of “order” based on the coding criteria described in Appendix 2. Data and codebook on file with author. As described in Part III, below, a simple administrative solution may exist to bring the reasoned opinions into Westlaw’s purview. Because Westlaw appears to collect its decisions from those tagged as “Written Opinion” in PACER, requiring explained jurisdictional decisions to carry this PACER coding could bring more of these precedents into view through the commercial databases. This data is on file with the author.

239. A textual analysis of the orders and opinions is needed to assess whether the Westlaw precedent constitutes a truly unrepresentative sample of decisions.

on the federal-state division of labor” to do so.<sup>240</sup> The question then arises whether *Grable*’s test will portend any measurable effect on the federal-state balance and district court decision-making—What have courts done with the flexibility *Grable* enshrined in the test? I looked to the rate of remand before and after *Grable* to help answer this question.

Considering the possibility that remand rates reflected changes in the removal rate, rather than a reaction to *Grable* and *Empire*, I compared the changes in the national removal rate against the remand rate trends for the Northern District of Illinois.<sup>241</sup> The removal rate across all courts for all civil topics has hovered, for the most part, between 11 and 14.3% for the past decade, as detailed in Appendix 4, Table 4.<sup>242</sup>

I expected to see a spike in removals after *Bell Atlantic Corp. v. Twombly*,<sup>243</sup> issued on May 21, 2007, and *Ashcroft v. Iqbal*,<sup>244</sup> issued on May 19, 2009, as defendants rightly perceived an increased advantage in dismissing claims from federal court.<sup>245</sup> The federal courts Administrative Office’s removal data, however, do not bear out that expectation and actually show a decline in removal and an increase in total filings in *Twombly*’s first year, as illustrated in Appendix 4, Table 4.

I also suspected the national removal numbers might spike after *Grable* officially removed the supposed cause of action impediment to jurisdiction. But, the Administrative Office’s data in Appendix 4 show a 2.6% increase in civil filings between 2005 and 2006, with a 2.5% decrease in the number of removals. The remand rates observed in this study, as described below, do not appear to correspond generally with the Administrator’s data on removals or civil filings.

---

240. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 315 (2005).

241. This is somewhat a comparison of apples to oranges because the removal rate accounts for all substantive bases across all district courts, but the remand rates account only for embedded federal-question removals in the Seventh Circuit’s district courts. The national removal rate can, however, at least suggest whether the embedded federal-question remands correspond to national trends.

242. See *infra* Appendix 4 (providing the removal rates in all district courts for the years 2000–08).

243. 550 U.S. 544 (2007).

244. 556 U.S. 662 (2009).

245. See Hatamyar, *supra* note 45, at 607–08 (concluding that *Twombly* has increased dismissal rates in federal courts, especially dismissals with leave to amend). Compare Patricia W. Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 618–21 (2012) (concluding that *Iqbal* also increased dismissals, especially in civil rights cases), with JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *Iqbal* 21 (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf) (concluding that *Iqbal*’s effect on 12(b)(6) dismissals has been modest).

While the Administrative Office of the Courts calculates the rate of removal across all district courts, it does not, however, generate a rate of remand statistic. So this study aimed to gauge the rate of remand for federal-question removals by looking first at the circuits on both sides of the split over *Merrell Dow*. What it discovered, initially, was that the picture of the remand rate varies based on *where* you look.

1. *Westlaw and Docket Remand Rates*

The rate of remand based on decisions available in Westlaw paints a different picture than the submerged precedent on dockets tells. I first isolated the Westlaw results for the Northern District of Illinois, then compared those results with the court's submerged precedent from PACER. I calculated the rate of remand as of June 13 of each year to plot the change in remand rates before and after *Grable* (June 13, 2005)<sup>246</sup> and *Empire* (June 15, 2006).<sup>247</sup>

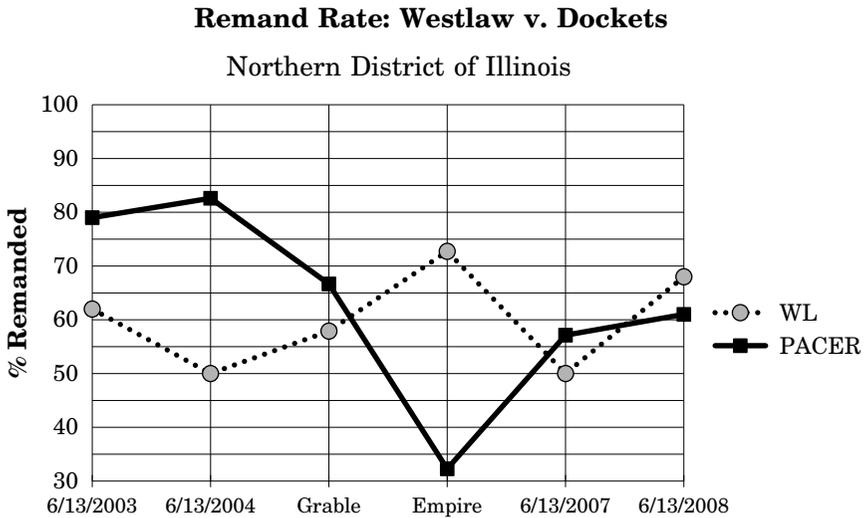
Looking only at the available Westlaw decisions as reflected in Figure 1, the Northern District of Illinois increased remands after *Grable* and decreased them after *Empire*. For the same court, isolating the submerged precedent in Figure 1 reveals the *opposite* trend: remands dropped off sharply following *Grable*, then shot back up just as sharply after *Empire*. Thus, in Illinois's Northern District, a higher proportion of decisions to remand ended up in Westlaw, and a higher proportion of decisions to exercise jurisdiction ended up submerged on dockets.

---

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

247. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006).

Figure 1



I found these results counterintuitive because I would have thought that immediately after a new Supreme Court decision, district courts would have explained their appealable decisions to exercise jurisdiction for potential appellate reviewers, making that outcome more likely to be included in Westlaw. One possibility for the observed trend is that, because *Grable* was in its infancy, with little or no clarifying precedent from the circuit courts, the district courts were more constrained in applying it, publishing the decisions that would not be appealed, and submerging the others for the moment. A slightly higher number of those few submerged, reasoned explanations remanded claims—57.89% of the reasoned opinions remanded and the remainder exercised jurisdiction.<sup>248</sup>

## 2. True Remand Rates

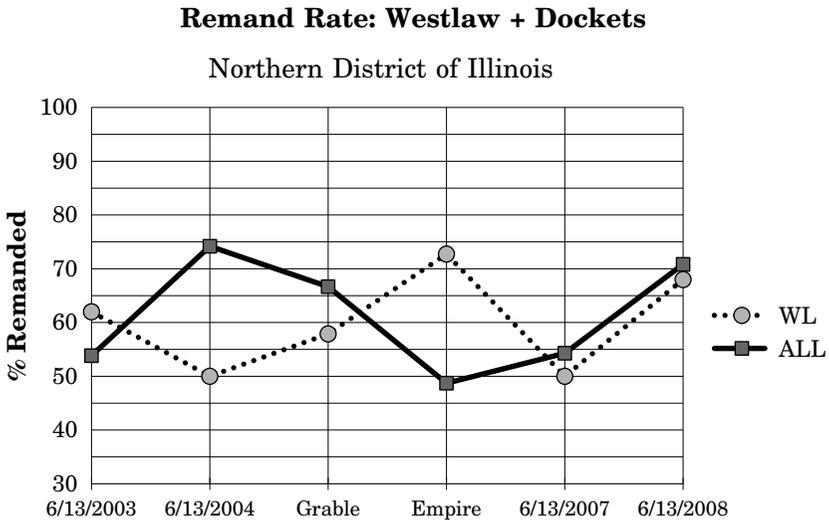
Looking at the rate of remand among all decisions in Westlaw and PACER—or the “true” rate of remand—*Grable*’s clarification appears to correspond with some effect on the percent of cases remanded, as illustrated in Figure 2. There further appears to be an uptick in remands after *Empire*’s reminder to keep *Grable* “slim.”<sup>249</sup> Comparing

248. In the Northern District of Illinois PACER sample, eleven of the nineteen opinions remanded claims. Interestingly, three of those eleven remand opinions resulted from *sua sponte* consideration, as opposed to a party’s motion. All of the remaining eight opinions exercising jurisdiction resulted from remand motions. This data is on file with the author.

249. *Empire* was issued June 15, 2006. See *Empire*, 547 U.S. at 701.

the trends in the true rate of remand with the rate of remand observable in Westlaw alone, the trends are nearly inverse from the time certiorari was granted through the first year after *Empire*, suggesting the inclusion of submerged precedent affects the accuracy of the remand picture at any given moment in time, especially during times of uncertainty.

Figure 2



Averaged over the whole period sampled, Westlaw remand rate and the true remand rate diverged. The Northern District of Illinois’s Westlaw rate of remand, averaged over 2002–2008 was 65% remanded, while the true rate of remand for the same period was 78%. The average rate of submergence also diverges based on outcome (between decisions to remand versus those exercising jurisdiction): 36% of the court’s decisions to remand from 2002 to 2008 in the Northern District are available in Westlaw. From the same period, 68% of the decisions *not* to remand are available in Westlaw.

Figure 3

|                  | Westlaw | PACER |
|------------------|---------|-------|
| <b>Remand</b>    | 41      | 73    |
| <b>No Remand</b> | 22      | 10    |

The question remains for future analysis whether there are observable differences in the characteristics or reasoning of the underlying opinions producing this divergence.

Although docket data “are more reliable than data drawn from reported decisions,” they still “are hardly immune to biases.”<sup>250</sup> This data analysis currently suffers from a small sample size and does not test or isolate why the submerged and surface precedent tell these contrasting stories. But it does suggest that it makes a difference where you look for trends in precedent. The study adds another increment to the growing body of work exposing the meaningful differences that exist between the picture of the world taken through the lens of Westlaw versus the world as it exists on court dockets. For purposes of the clarity mantra’s litigant-predictability goal, the accuracy of prediction depends on where litigants look. “[T]he general unavailability of [submerged] opinions potentially leads to a misconception of the law itself.”<sup>251</sup>

Here, the sample size prevents any conclusive statement about whether *Grable* meaningfully affected the rate of remand in these courts. Adding courts to the data sample in the future could possibly produce a more conclusive analysis. This analysis does, however, illustrate trends in generating precedent, as well as how submerged precedent may obscure the view of trends in jurisdictional decision-making and immediate reactions to new tests.

#### D. Appellate Implementation

While the Supreme Court can design rules for the entire federal system, the circuit courts of appeal further implement or clarify those rules for their district courts. Appellate opinions have two main implications for the litigant-centric clarity examined here. First, plotting the district court remand rate around the timing of appellate opinions illustrates reactions among district courts to appellate clarifications. Second, the reversal rate for district court opinions offers a measure of how accurate litigants and district courts have been in predicting the correct jurisdiction under *Grable*’s nuanced rule. Examining the few available appellate opinions in the sampled years shows a rough correspondence with trends in district courts’ decisions on embedded federal questions, while the reversal rates before and after *Grable* suggest that courts and litigants have reached more accurate predictions under the flexible reading *Grable* chose.

---

250. Burbank, *supra* note 191, at 617.

251. Levin, *supra* note 46, at 989. *But see* Keele et al., *supra* note 184, at 234 (finding no ideological differences in district court’s published versus unpublished opinions).

### 1. *Circuit Clarifications*

To get an accurate snapshot of the appellate courts' role in the implementation process, I first had to determine where to look. I designed the study to capture Seventh Circuit appellate opinions, as well as any intervening Supreme Court precedents adjudicating jurisdiction over removed federal-question cases between 2002 and 2008. The appellate decisions I studied on embedded federal questions, unlike the district court decisions, all appear on Westlaw. Review of the circuit courts' PACER dockets showed no submerged precedent at the appellate level.<sup>252</sup>

While the appellate embedded federal-question decisions are comparatively accessible and mostly citable, there are still few of them. One of the most striking features of the circuit data I gathered was its paucity. Less than 4% of the embedded federal-question decisions were appellate. This tiny ratio of appellate decisions to district opinions on embedded federal-question jurisdiction may also result from § 1447(d)'s foreclosure of appeal. Section 1447(d) renders only 22% of all the district court decisions reviewable.<sup>253</sup> So the appellate decisions in my sample represent only a small portion of all *reviewable* decisions.

These few words from the appellate courts, however, may ring loudly in the district courts' ears. In the Northern District of Illinois, the appellate clarification arrived via the Seventh Circuit's opinion in *Bennett v. Southwest Airlines Co.*<sup>254</sup> Judge Easterbrook's panel opinion in *Bennett* cited both *Grable* and *Empire* in remanding state-law claims alleged to raise questions about federal aviation standards.<sup>255</sup>

Plotting the remand data from the district courts with the timing of the appellate decisions, in Figure 4, reveals that district court remand rates change before and after Supreme Court opinions in *Grable* and *Empire*, but also before and after the Seventh Circuit's opinion in *Bennett*.

---

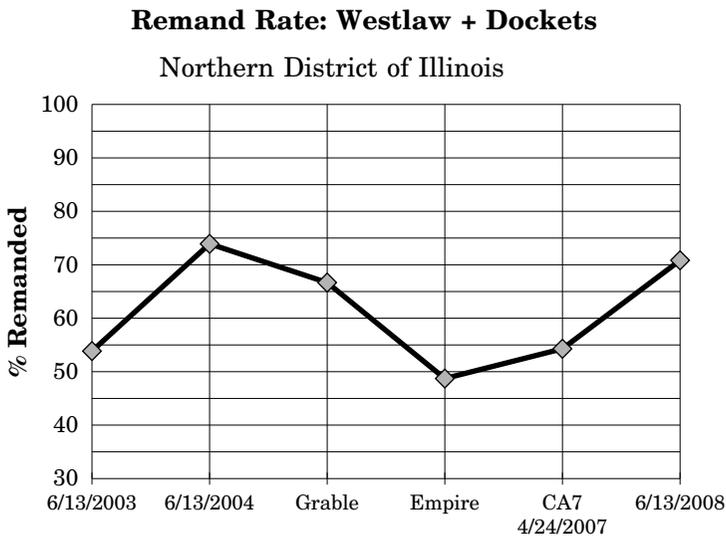
252. Westlaw and Lexis make all appellate opinions available electronically, with the exception of those from the Fifth and Eleventh Circuits. See Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1883–87 (2005); Levin, *supra* note 46, at 984–85; Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1441 (2005). Appendix 3 charts the publication rate for the Seventh Circuit. See *infra* Appendix 3.

253. Based on the 78% true rate of remand averaged out over the study period. See *supra* subsection III.C.2.

254. *Bennett v. Sw. Airlines Co.*, 484 F.3d 907 (7th Cir. 2007).

255. See, e.g., *id.* at 909–10. Although the opinion did not actually apply *Grable's* factors or mention them by name, Judge Easterbrook held remand was required because the plaintiffs were challenging airline employee actions, not the federal law. *Id.* at 910–12.

Figure 4



The increase in the remand rate which began after *Empire* increases somewhat more rapidly after a remand opinion from the Seventh Circuit. The snapshot taken in this sample suggests that clarifying appellate opinions—including those from the Supreme Court—have some directive influence on district courts’ application of embedded federal-question jurisdictional rules.

## 2. Reversal Rates

After figuring out where to look for appellate clarification and examining its impact on remand rates, I turned to one measure of whether *Grable* enabled courts and litigants to make more accurate predictions on jurisdiction: reversal rate.

A previous study by Jonathan Preis used reversal rate to gauge clarity, hypothesizing that muddy rules would result in increased reversal rates as district courts guess at how to interpret and apply the rules.<sup>256</sup> Preis studied published circuit opinions adjudicating the “substantiality” of embedded federal questions, finding a 55% reversal rate in those opinions during *Merrell Dow*’s reign through the first year of the *Grable* era.<sup>257</sup> Comparing this reversal rate to the 12.4% reversal rate in 2004 in private non-habeas civil cases,<sup>258</sup> he con-

256. Preis, *supra* note 42, at 165.

257. *Id.*

258. See STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2004, at 26 tbl.B-5 (2004), available at <http://>

cluded that embedded federal-question doctrine “is more lacking in coherence than other areas” of civil law.<sup>259</sup> Under this model, a declining reversal rate through the *Grable* years may suggest that *Grable* infused the doctrine with greater coherence—that it produced at least greater consistency and perhaps even greater clarity, and vice versa.

Preis identified two inferential steps in drawing his conclusion about reversal rates and coherence: the first step over the impact of standard of review and the second over differences in published and unpublished opinions.<sup>260</sup> First, Preis compared jurisdictional reversals, under de novo review, to reversal rates for federal question under all standards.<sup>261</sup> Preis acknowledged the 12.4% reversal rate for all private non-habeas cases includes both issues subject to de novo review, like jurisdiction, and those subject to more deferential standards.<sup>262</sup> Although noting the de novo reversal rate likely is higher than the 12.4% combined rate, Preis nonetheless concluded that the “substantial” federal-question reversal rate is likely much higher than other cases subject to de novo review.<sup>263</sup>

Second, Preis’s calculation of 55% reversal relies only on formally published opinions, while the Administrative Office’s 12.4% statistics include published and unpublished opinions and orders.<sup>264</sup> Further, the Administrative Office’s statistics for appeals terminated on the merits show the publication rate for the terminating opinion was 19%

---

[www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2004/tables/B05Mar04.pdf](http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2004/tables/B05Mar04.pdf).

259. Preis, *supra* note 42, at 166.

260. *Id.* at 165–66, 176–77.

261. *Id.* at 165–66.

262. *Id.* at 165.

263. *Id.* at 165–66.

264. Preis further limited his sample of published cases to those citing either *Smith* or *Merrell Dow*. *Id.* at 159 n.60, 177 n.132. This limitation likely captured a majority, but not necessarily the entirety, of the universe of appellate opinions adjudicating embedded federal questions. My study found that, for example, in the five years after the Supreme Court announced *Grable*, twenty appellate cases adjudicating embedded federal-question jurisdiction did not even cite *Grable*, see *infra* Appendix 3, and at least one opinion, issued two years after *Grable*, relied solely on the part of *Merrell Dow* abrogated by *Grable*. See *Saadat v. Landsafe Flood Determination Inc.*, 253 F. App’x. 343, 344 (5th Cir. 2007) (“A complaint that alleges a violation of a federal statute as an element of a state cause of action, when there is no private cause of action under the statute, does not state a claim conferring federal question jurisdiction.”). My study also found some cases before *Grable* cited neither *Merrell Dow* nor *Smith*—including the Sixth Circuit’s *Grable* opinion. See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 377 F.3d 592, 594–95 (6th Cir. 2004) (citing *Taylor v. Anderson*, 234 U.S. 74, 75–76 (1914) and summarizing the “long history of Supreme Court guidance” on embedded federal-question jurisdiction by citing *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 759 (6th Cir. 2000), *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 918 (5th Cir. 2001), and *Seinfeld v. Austen*, 39 F.3d 761, 763 (7th Cir. 1994)).

in 2004<sup>265</sup> (the statistical year against which Preis measured) and has been consistently less than that since, dipping to 15.9% in 2006 and to 16% in 2010.<sup>266</sup> Preis's sample is under-inclusive of those unpublished opinions. The higher publication rates among the few embedded federal-question cases my study unearthed raise the possibility that the under-inclusion could be between 12% and 23%, as opposed to the 81% suggested by the Administrative Office's data.<sup>267</sup> Preis's study, though not entirely exhaustive, is still far-reaching and very extensive.

Preis's study also benefits from a slightly larger sample, encompassing sixty-seven opinions over twenty years of published opinions (from 1986 to 2006) from all circuits.<sup>268</sup> In my study, the very small number of decisions from the Seventh Circuit from 2003 to 2008 makes it impossible to calculate reversal trends with any confidence. The Seventh Circuit issued only eight opinions over six years. With so few decisions, it is difficult to make any useful comparisons between years or between rates of reversal and publication.

To examine the rate of reversal for embedded federal questions after *Grable* with a better sample, I reviewed all circuits' embedded federal-question decisions<sup>269</sup> for the 2003 to 2009 period, a total of only forty-three opinions.<sup>270</sup> After *Grable*, the district courts' decisions were reversed 52.5% of the time.<sup>271</sup> Over time, as illustrated in Figure 5, the rate of reversal declined after *Grable* and continued to decline after *Empire*. Through the entire period, however, reversals increased slightly.

---

265. See STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 39 tbl.S-3 (2004), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/tables/s3.pdf> (showing a total of 81% of unpublished opinions or orders filed in cases were terminated on the merits after oral hearing or on submission of briefs in 2004).

266. See STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 46 tbl.S-3 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/tables/S03Sep10.pdf> (showing a total of 84% of unpublished opinions or orders filed in cases were terminated on the merits after oral hearing or on submission of briefs in 2010).

267. See *supra* note 265.

268. Preis, *supra* note 42, at 166.

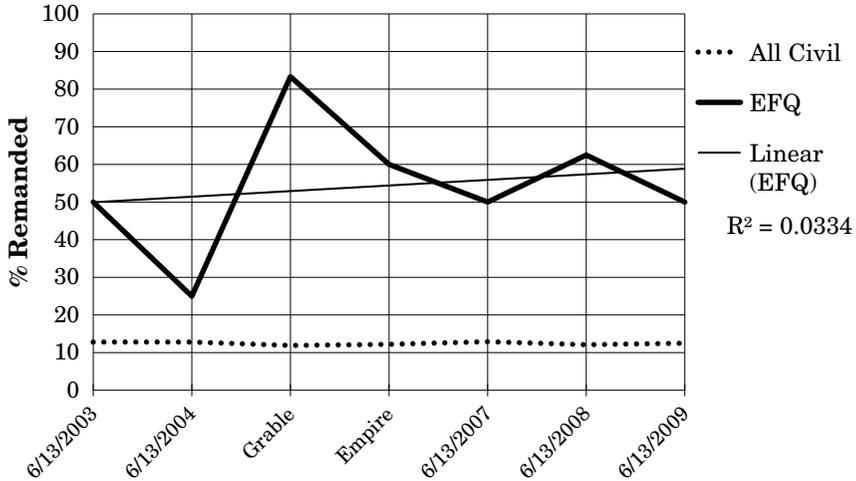
269. Note that this is a larger substantive grouping than Preis's sample. My sample includes all embedded federal-question decisions and Preis's sample included specifically those on the "substantiality" of the federal question.

270. I excluded from this calculation those appellate decisions obliquely considering embedded federal-question jurisdiction while reviewing a district court' grant or denial of a request for attorney's fees accompanying a remand. *E.g.*, *Hart v. Wal-Mart Stores, Inc. Associates' Health & Welfare Plan*, 360 F.3d 674 (7th Cir. 2004). On appeal from the grant or denial of a request for attorney's fees accompanying a remand under 28 U.S.C. § 1447(c), courts review the jurisdictional issue under the abuse of discretion standard, rather than *de novo*. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

271. And 72% of the opinions were published. This data is on file with the author.

Figure 5

**Reversal Rate**  
**All Circuits – Reversal Rate for Embedded Federal Questions**  
 v. All Private Civil Cases



The rate of reversal is but a proxy for the relative clarity and accuracy of predictive data. In my study, that proxy measure suggests a similar overall reversal rate to what Preis observed, but with some clarifying influence from Supreme Court guidance in *Grable* and *Empire*. More tellingly, the paucity of federal-question jurisdiction decisions from appellate courts suggests relatively few opportunities for clarifying the doctrine at the appellate level.

The snapshot of *Grable's* implementation taken here thus reveals two trends. First, a majority of the decisions are submerged on dockets. Second, remand rate changes roughly correspond with appellate clarifications. Thus, a large mass of the predictive precedential data is obscured from litigants and the sharpening influences of appellate decisions are few and far between.

The next Part prescribes some possible renovations to the clarification process to improve the accuracy of the data available to litigants (and scholars) and to improve the clarification of the rules themselves.

#### IV. PROMOTING CLARITY & CLARIFICATION

Looking at federal-question jurisdiction through the eyes of its beholders, namely the district courts applying the rules and the litigants trying to predict what those district courts will do, the picture taken

through conventional research obscures the view of what is truly happening with the implementation of jurisdictional rules.

Based on the snapshot taken in this study, three possible solutions emerge to bring more precedent to surface for clarification, predictive value, or at least further study: (1) litigants (and scholars) could look harder; (2) district courts could write more; and (3) appellate courts could intervene more often. The first solution focuses on what those trying to foretell or study the application of federal-question jurisdiction rules (litigants and scholars) might do to plumb the depths of submerged precedent. The last two focus on what courts and Congress might do to promote clarification and the emergence of more clarifying precedent available through conventional research.

### A. Docket Searches

My study found that 56.8% of the federal-question jurisdiction decisions remain submerged, only available on dockets.<sup>272</sup> This means that 56.8% of the decisions are obscured from view for litigants calculating jurisdiction. Commercial database research in Westlaw or Lexis has become not only *de rigueur*, but also required to establish professional competence and avoid Rule 11 sanctions.<sup>273</sup> So litigants must, and courts should, search for predictive precedent in those databases. What they will find there includes all those opinions selected for inclusion in a national reporter,<sup>274</sup> as well as a large number of decisions not selected for a national reporter, but still only the tip of the iceberg.

To see the majority of decisions on embedded federal questions, litigants—and those curious folks studying jurisdiction—must take a dive beneath the surface through the time-intensive search process of scouring court dockets. Submerged precedent also may make individual case outcomes seem more arbitrary because it obscures the larger trends in district court jurisprudence and application of jurisdictional rules.

Just because these submerged decisions are invisible in Westlaw does not mean that those decisions are not precedent. Our common-law system includes as precedent any decisions by previous courts on

---

272. See *supra* text accompanying note 222. Several free docket databases have emerged, but none have PACER's comprehensiveness and certainly none have the imprimatur of the federal judiciary.

273. FED. R. CIV. P. 11(c)(4) (authorizing sanctions “includ[ing] nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney’s fees and other expenses directly resulting from the violation”).

274. There is no “official” reporter for federal district court opinions. West publishes the Federal Supplement and determines its contents. *E.g.*, Hoffman et al., *supra* note 53, at 692 & n.30.

similar legal issues.<sup>275</sup> Thus, district court decisions have value as precedential authority regardless of whether Westlaw or Lexis includes them in their databases, and all appellate opinions issued after January 1, 2007, are citable.<sup>276</sup> In any given litigation, a decision's publication status can only enhance its precedential value, not its ability to be cited as authority.

There are reasons that litigants and courts currently do not scour dockets to bring other submerged precedent above the surface. Those reasons likely are convention, time, and money. As a matter of convention, courts likely do not expect parties or their lawyers to undergird legal arguments with docket research. Failure to search dockets (other than in the instant case and directly-related matters) in addition to commercial case law databases does not carry the threat of sanctions, discipline, or malpractice liability.<sup>277</sup>

Parties may ignore extensive docket research without threat of punishment, plus conducting that research is time-intensive and expensive. Westlaw and Lexis, although not comprehensive, are mightily accessible. They can successfully charge their hefty fees for accessing their respective databases because they have revolutionized legal research by indexing, cross-indexing, and making the full text of every decision searchable either by natural language or Boolean connections.<sup>278</sup> The databases are intentionally designed to streamline collection of cases based on a range of detailed topics.<sup>279</sup> Within those

---

275. See BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "precedent" as "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues"); see also Keele et al., *supra* note 184, at 218 (noting studies finding that published and unpublished opinions "do not vary in precedential value").

276. Although some appellate courts for a time tried to tie precedential value to publication, the resulting uproar recently culminated in revision to the federal appellate rules. See FED. R. APP. P. 32.1 (2010).

277. Sanctions and malpractice liability also implicate time and money.

278. See generally LEXISNEXIS, <http://www.lexisnexis.com> (last visited Apr. 6, 2012); WESTLAW, <http://www.westlaw.com> (last visited Apr. 6, 2012).

279. Courts have recognized the efficiency produced by the commercial databases. When considering requests for reimbursement of Westlaw and Lexis charges pursuant to fee-shifting statutes, several of the federal circuits have allowed reimbursement because the database services "presumably save money by making legal research more efficient." *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 975 (D.C. Cir. 2004) (applying Equal Access to Justice Act, 28 U.S.C. § 2412); see also, e.g., *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany*, 369 F.3d 91, 98 (2d Cir. 2004) (awarding research fees after "agree[ing] that the use of online research services likely reduces the number of hours required for an attorney's manual search, thereby lowering the lodestar"); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992) (applying equitable fund theory in class action litigation and explaining that "paying" clients "reimburse[ ] lawyers' LEXIS and WESTLAW expenses, just as [they] reimburse[ ] their paralegal expenses"). But see *Jones v. Unisys Corp.*, 54 F.3d 624, 633 (10th Cir. 1995) ("[C]osts for computer legal research are not statutorily authorized" under 28 U.S.C. § 1920.).

databases, it is relatively easy to identify the cases one needs to read to gain command of the precedent on any issue in any jurisdiction.

PACER, by contrast, is comprehensive but not yet text-searchable, multi-jurisdictional, or indexed as finitely—so searching PACER for legal issues, as opposed to case-identifying information, is lugubrious.<sup>280</sup> As Hillel Levin described it, to effectively search PACER “one would have to know what to look for in order to find it.”<sup>281</sup> Anyone else looking for a decision on a general topic must wade through all the designated “written opinions” without the ability to search by particular topic. Or they must wade through cases *filed* under that particular topic to see whether any decision issued. Plus, PACER only offers indexing at a general level—usually the case genre<sup>282</sup> and the statute supplying jurisdiction.<sup>283</sup> Because each court maintains its own PACER database, PACER does not provide trans-jurisdictional (or even between district and circuit court) searches for a given issue. The topical searches must proceed court-by-court. And PACER allows detailed searching within a one-month span only, so the topical searches must also proceed month-by-month. PACER does allow open text searches for particular parties, lawyers, and judges, but these fields do not capture all the dockets on a particular legal issue.

Bloomberg Law has introduced an interface that allows inter-jurisdictional, text-based searches through the PACER database.<sup>284</sup> This interface eliminates many of the time-intensive aspects of searching directly through PACER and enables searches for particular terms that may not be reflected in the as-filed characteristics captured in PACER. If, however, a document is unavailable in PACER, it will also be unavailable through Bloomberg Law’s interface to PACER. Most crucially for my study, the minutes of hearings in which jurisdictional decisions were made orally from the bench generally are not available. I began my data collection before Bloomberg Law’s docket capabilities were fully optimized, so I relied on the original PACER dockets for

---

280. The U.S. Court Administrative Office has been working since 2008 on developing the “Next Generation” of CM/ECF systems with the help of survey input from users. See *Looking for Next Generation of the CM/ECF System*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), May 2009, at 6–7, available at <http://www.uscourts.gov/uscourts/news/ttb/archive/2009-05%20May.pdf>. The Administrative Office also has convened “Additional Stakeholders’ to identify, review, and recommend functional requirements for the next generation.” *About the Project*, ADDITIONAL STAKEHOLDERS FUNCTIONAL REQUIREMENTS GRP., <http://www.nceb.uscourts.gov/documents/nextgen/About%20The%20Project.pdf> (last visited July 8, 2012).

281. Levin, *supra* note 46, at 985.

282. PACER manual, *supra* note 190, at 86 app. A.

283. *Id.* at 53 (providing a description of the “cause” field).

284. See Newman et al., *supra* note 217.

this study and used the Bloomberg Law interface to check those results.<sup>285</sup>

Bloomberg Law's interface does begin to address calls for Westlaw to simply include all decisions made available on PACER.<sup>286</sup> Full availability in a text-searchable and highly-indexed format like Westlaw's would "fully resolve the transparency problem" identified by Hillel Levin.<sup>287</sup> Further, it would not require more work for district judges, as "it only requires them to make public that which they already write."<sup>288</sup> In many instances, it seems that simply checking a box on the ECF system could bring existing opinions into Westlaw's purview because the commercial databases seem to collect cases by gathering those tagged as "Written Opinions" in PACER.<sup>289</sup> Although Bloomberg Law appears poised to enable widespread and targeted docket research, I am not advocating in this article that litigants routinely search dockets in addition to Westlaw or Lexis. I doubt litigants would care to add docket search fees and lawyer time to the already substantial cost of legal research. I suspect this is so even though the cost of litigating an erroneous choice of jurisdiction would likely be more than the fees incurred.<sup>290</sup> This also might not make sense because many of the decisions on dockets do not offer reasoned explanations.

The results of this study do, however, reinforce other commentators' call for inclusion of dockets in studying district courts and especially in making empirical claims.<sup>291</sup> Further, this study suggests that lawyers seeking more accurate predictions of federal-question jurisdictional rulings might use docket research to get a more precise picture of the precedent.

---

285. *Cf.* Levin, *supra* note 46, at 1001 ("In an ideal world, opinions on PACER would be text-searchable and access would be free.")

286. Levin, *supra* note 46, at 1001 (noting that until PACER becomes text-searchable, "LEXIS and Westlaw should recognize the value of all opinions and should choose to include them all in their online databases").

287. *Id.* at 996. Levin also deftly handles potential criticisms of loading all decisions onto Westlaw. *Id.* at 997–98.

288. *Id.* at 1000.

289. See E-mail Correspondence from Kirc J. Breissing, Dir. of Prod. Planning, LexisNexis, to Elizabeth Y. McCuskey, Faculty Fellow, Thomas Jefferson Sch. of Law (Aug. 31, 2011 8:57) (on file with author).

290. My PACER bill for this study, for example, was around \$400. The bill included hundreds of docket searches and downloads. As discussed below, PACER does not charge for every downloaded document, but does charge for a majority of the available material.

291. Burbank, *supra* note 191; Hoffman et al., *supra* note 53; Kim et al., *supra* note 184; Levin, *supra* note 46; Keele et al., *supra* note 184.

## B. Explained Decisions

Instead of diving beneath the surface for precedent, the surface level simply could be dropped. This could be accomplished by making more written decisions worthy of Westlaw, or just by changing the mechanisms for selecting Westlaw cases.

Only opinions with some explanatory value—albeit sometimes very slight—make their way into the commercial databases.<sup>292</sup> Following this protocol, one way to increase the precedent and predictive power for litigants would be to require courts to provide reasoned explanations in jurisdictional decisions. This could be accomplished by amendment to the removal statute, or by creating new local rules or internal operating procedures calling for reasoned explanation in jurisdictional decisions. The reasoned explanation requirement could be invoked only at a party's request, saving district courts the labor of explaining every jurisdictional decision.

Any proposal increasing the already heavy workload for federal district courts, however, faces high hurdles. The rarity of *Grable* federal questions<sup>293</sup> diminishes the burden somewhat, as does the phenomenon identified in this study that many judges are already explaining decisions that simply do not make it to Westlaw. And, jurisdiction jurisprudence and procedure long have empowered courts to lighten their dockets with jurisdictional remands.<sup>294</sup> Courts have taken them up on the offer. It seems a fair bargain, then to ask for a few more hours explaining the decision in exchange for the weeks, months, or even years of work saved by remanding.<sup>295</sup> Plus the time invested in explanation would be an investment in precedent—a public resource.

While the conventional wisdom about Westlaw containing only explained decisions may or may not be true, the converse did not always ring true in my studied sample—not all explained decisions make it into Westlaw. Many of the submerged precedent are full opinions or at least include several paragraphs of explanation and citations to au-

---

292. See Hoffman et al., *supra* note 53, at 693.

293. Dodson, *supra* note 14, at 57 & n.264; see 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3562 (3d ed. 2008) (“[T]he cases raising a serious question whether jurisdiction exists are comparatively rare.”); Freer, *supra* note 16, at 342; Shapiro, *Reflections*, *supra* note 26, at 1841 (arguing that “the overwhelming majority of jurisdictional questions are straightforward and readily resolved”). *But cf.* William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1389 n.84 (1997) (discussing choice of law).

294. See Wasserman, *supra* note 175, at 93, 130–32.

295. Yes, in many cases it will be worth it to a litigant to throw the Hail Mary against long odds for a chance to be in federal court. But greater available precedent may alter the Hail Mary calculus by raising the specter of fee awards for baseless removal.

thority. Buoying this precedent above the surface could be considerably less work and may simply involve pressing a button.

The Electronic Case Filing itself contains an option for judges to designate their decisions as written opinions, as opposed to simple orders. In PACER, the written opinions field “provides a listing of written opinions made by the court for the date range entered.”<sup>296</sup> This field borrows the Federal Judicial Conference’s definition of “written opinion,” encompassing “any document issued by a judge or judges of the court sitting in that capacity that sets forth a reasoned explanation for a court’s decision.”<sup>297</sup> Similar to the process for designating opinions for publication in the Federal Reporter, in PACER the responsibility for determining which documents meet the definition of “written opinion” rests with the authoring judge.<sup>298</sup>

Making available decisions and explanations for so-called “easy” cases could contribute not only to the accuracy of the picture litigants have of remand, but also to the perception of how consistent or fair the application of the jurisdictional rules has been. As William Reynolds explained, “The success of a system depends in part on how it handles the easy, as well as the difficult, cases.”<sup>299</sup> Showing litigants the whole picture of remands could bolster perceptions of fairness in any one case and make individual outcomes seem less anomalous in context.

Although relatively effortless, this check-the-box solution may not find favor with judges, who likely have a host of reasons for funneling some decisions into Westlaw and submerging others, most of which currently are neither accessible nor quantifiable. This check-the-box solution does not address and cannot account for those reasons.<sup>300</sup>

The first solution risks overburdening litigants, the second solution risks overburdening district courts, so this third solution might be just right—to permit some targeted, discretionary appellate review of remand decisions.

### C. Appellate Review

The picture of the implementation process taken in my study supports the clarifying value of targeted discretionary review for remand

---

296. PACER manual, *supra* note 190, at 61.

297. *Id.*

298. *Id.*

299. Reynolds, *supra* note 293.

300. PACER began a pilot program in 2011, partnering the federal courts with the Government Printing Office to offer additional free public access to participating courts’ “opinions” through the GPO’s on-line system. See *New Pilot Project Will Enhance Public Access to Federal Court Opinions*, ADMIN. OFFICE OF THE U.S. COURTS (May 4, 2011), [http://www.uscourts.gov/news/newsView/11-05-04/New\\_Pilot\\_Project\\_Will\\_Enhance\\_Public\\_Access\\_to\\_Federal\\_Court\\_Opinions.aspx](http://www.uscourts.gov/news/newsView/11-05-04/New_Pilot_Project_Will_Enhance_Public_Access_to_Federal_Court_Opinions.aspx).

orders. The paucity of appellate decisions on embedded federal questions diminishes opportunities for clarification. Yet, those few circuit opinions' visible correspondence with changes in district court remand rates suggests a directive influence exerted at the circuit level. Moreover, the contorted ways in which the federal-question jurisdiction issue came before the appellate courts in my sample reveal the extent to which those reviewing courts reach for relief from § 1447(d)'s prohibition.<sup>301</sup>

The ideal clarifying mechanism would offer both direction for trial courts in close cases and increase the precedent visible to litigants predicting the proper jurisdiction—even in easy cases. Targeting the decisions that appear to have the most impact on clarification and district court decisions—appellate opinions—the targeted-review solution ideally would increase opportunities for appellate clarification, without profoundly increasing the district or appellate courts' workloads. And, appellate review of remand orders carries the potential to ferry more submerged precedents into Westlaw, thus improving the accuracy of the remand picture practically available to litigants.<sup>302</sup>

Two authors have proposed procedures for appellate review of remand orders that offer solutions relevant to the slim category of federal-question jurisdictional remands. First, Rhonda Wasserman proposed amending 28 U.S.C. § 1447(d) and § 1292(b) to permit circuit-level appellate review of remand orders at the district courts' request and the circuit courts' discretion.<sup>303</sup> Second, and more recently, James Pfander proposed direct review of remand orders by the Supreme Court through invocation of the Court's supervisory powers.<sup>304</sup>

Based on my study observations, Wasserman's discretionary circuit review proposal may present the greatest opportunity for clarification by marshaling the directive powers of the circuit courts to clarify close cases.<sup>305</sup> Pfander's suggestion of Supreme Court original

---

301. Several appellate opinions on attorney-fee requests after remand have taken the opportunity to review the propriety of the remand and its basis in law, including application of *Grable's* test. *E.g.*, *Chase Manhattan Mortg. Corp. v. Smith*, 507 F.3d 910 (6th Cir. 2007). Indeed, in the sovereign immunity context, Justice Breyer recently called for an expert review of “whether statutory revision is appropriate” to ease § 1447(d)'s consequences. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 644–45 (2009) (Breyer, J., concurring).

302. In my circuit-wide sample, 37% of the appellate decisions came from submerged district court precedents. Increasing the number of clarifications visible to litigants becomes especially important in light of 28 U.S.C. § 1447(c)'s fee-shifting provision for good-faith removals held by district courts to be “unjustified” under contemporaneous precedent. *Cf. Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000) (explaining that the fee-shifting provision can be invoked by good-faith removals and does not require conduct rising to the level of sanctions).

303. Wasserman, *supra* note 175, at 83.

304. Pfander, *supra* note 179.

305. Wasserman, *supra* note 175.

writ review offers the path of least resistance by relying on existing doctrine and circumventing rule changes.<sup>306</sup> But Supreme Court original writ review, necessarily focused on correcting clearly erroneous results, may undo patent injustice, yet overlook those close cases so ripe for clarification.

### 1. *Discretionary Circuit Review*

Wasserman proposes amending 28 U.S.C. § 1447, § 1292, and the *Federal Rules of Appellate Procedure* to create a discretionary review procedure for remand orders certified by the issuing district court.<sup>307</sup> As the first step in this certified interlocutory review procedure, she proposes enacting § 1292(c), allowing district courts to certify remand orders that “involve[] a substantial question as to which there is sufficient ground for difference of opinion to warrant an appeal.”<sup>308</sup> This new section would eliminate § 1292(b)’s additional requirements for certification that the issue presents a “controlling” question of law that “would ‘materially advance the ultimate termination of the litigation.’”<sup>309</sup>

Section 1447(d) would likewise be amended to state that a jurisdictional remand is not reviewable except under § 1292(c).<sup>310</sup> Then, § 1447(c) would be amended to allow a stay of the remand order by either the district court or court of appeals pending application for appeal and any resulting appeal.<sup>311</sup> To reduce delay and disruption from the certified interlocutory review procedure, Wasserman proposes enacting a new rule to the *Federal Rules of Appellate Procedure*, Rule 5.2, making the petition for leave to appeal due within ten days of the remand order and committing the decision whether to entertain the appeal to the circuit court’s “sound judicial discretion.”<sup>312</sup> If accepted by the circuit court, the remand appeal would take priority over other “ordinary” civil cases and would forego oral argument.<sup>313</sup>

Congress intended its preclusion of appellate review to prevent “interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.”<sup>314</sup> The § 1292(c) option does not erode

---

306. Pfander, *supra* note 179.

307. Wasserman, *supra* note 175.

308. *Id.* at 146.

309. *See id.* at 147 (quoting 28 U.S.C. § 1292(b) (1988)) (explaining that remand orders “rarely, if ever” would materially advance the litigation’s termination and therefore “control” the outcome).

310. *Id.* at 148.

311. *Id.*

312. *Id.* at 149.

313. *Id.* at 150.

314. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)).

this goal of efficiency because it permits appeal of remands only where the issuing court believes it is a close question and the appellate court agrees that it should be answered conclusively. And, historically, the courts of appeals have exercised their absolute discretion to accept a very small portion of the interlocutory issues presented for review.<sup>315</sup>

This § 1292(c) option addresses the undesirable imbalance created by the judicially-created presumption against jurisdiction, which shunts the least clear applications—the “doubtful” or debatable cases for federal-question jurisdiction<sup>316</sup>—away from the possibility of appellate clarification by placing them in the unappealable category created by § 1447(d). By borrowing § 1292(b)’s formulation of certifiable issues as “question[s] of law as to which there is substantial ground for difference of opinion,”<sup>317</sup> § 1292(c) would tailor review to those issues ripe for clarification.

Wasserman’s certified interlocutory review option is thus ideal for promoting clarification, but more difficult to enact. Pfander’s plan, by contrast, is easy to implement but may be less conducive to clarification of close questions.<sup>318</sup>

## 2. *Supreme Court Supervisory Review*

Responding to a “quiet crisis” in appellate review of remand orders generally, Pfander proposed an elegant solution centered on Supreme Court review.<sup>319</sup> The Pfander plan combines resort to the Supreme Court’s supervisory powers to correct serious errors via original writ

---

315. See *Nystrom v. TREX Co.*, 339 F.3d 1347, 1351 (Fed. Cir. 2003) (noting that acceptance of § 1292(b) issues lies within the “absolute discretion of this court,” and that “[s]uch appeals are rarely granted”); *In re Convertible Rowing Exerciser Patent Litig.*, 903 F.2d 822 (Fed. Cir. 1990) (likening the circuit refusal of § 1292(b) to Supreme Court denials of certiorari).

316. Some empirical testing found that cases containing non-ministerial orders were more likely to be federal-question cases. Hoffman et al., *supra* note 53, at 711.

317. 28 U.S.C. § 1292(b) (2006). The proposed provision also would borrow § 1292(b)’s requirement that “an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . .” *Id.*; see *Taylor v. PPG Indus., Inc.*, 256 F.3d 1315, 1317 (Fed. Cir. 2001) (Mayer, J., dissenting).

318. A third proposition by Andrew Bradt similarly pours new wine into old bottles to achieve appellate review of remand orders. See Bradt, *supra* note 79, at 1193. Bradt argues that *Grable’s* federalism “veto” element operates like an abstention doctrine in which district courts remand federal questions that qualify as necessary, disputed, and substantial. *Id.* at 1156, 1173. Treating those decisions to remand based on the federalism “veto” abstentions would render that particular category of decisions reviewable by the appellate courts under existing abstention doctrine. *Id.* at 1204. This creative solution aptly describes *Grable’s* federalism element and also prescribes an appropriate response that would aid “general development of the doctrine in order to provide district courts more guidance.” *Id.* at 1204–05. Because this abstention solution would apply only to a small subclass of *Grable* remands, however, it offers diminished clarification potential.

319. Pfander, *supra* note 179, at 493.

with a textual interpretation of 28 U.S.C. § 1447(d) as entirely prohibiting other forms of appellate review.<sup>320</sup> The solution's elegance emanates from its focus "not on new legislation or rulemaking," but instead "on two changes that lie well within the [Supreme] Court's own authority."<sup>321</sup> That is, resorting to the Supreme Court's Article III original jurisdiction untethers the solution from the process of formally revising § 1447(d) *and* the solution returns to a bright-line textual reading of that statute:

Through the combination of these two changes . . . the Court would preserve its ability to correct serious errors at the district court level without entitling parties to seek review in the intermediate appellate courts in similar cases. Such an approach would allow the Court to exercise its own judgment in evaluating the seriousness of the error and the need for appellate oversight without obliging Congress or the rulemakers to attempt to specify in advance an exhaustive catalog of the various kinds of remand . . . errors that might warrant appellate review. Moreover, by foreclosing judge-made exceptions to § 1447(d), the Court could confirm the message of *Mohawk*: the task of crafting exceptions at the intermediate appellate level should be one for the legislative or rulemaking process.<sup>322</sup>

Pfander acknowledges that "appellate reversal serves an important role in assuring the legality of lower court dispositions," and a rule foreclosing "all review might invite ever more adventuresome remand orders (and perhaps eventually lead to a legislative or rulemaking response)."<sup>323</sup>

The original writ plan proposes the Supreme Court "revitalize" its existing All Writs Act power to hear original petitions for mandamus to correct serious district court errors, eliminating the necessity of intermediate appellate review.<sup>324</sup> This mechanism would allow review even of remands for lack of subject-matter jurisdiction, which are currently beyond the circuit courts' power.<sup>325</sup> The Supreme Court would thus offer clarification by directly addressing a claimed district court error in remanding, but only in selected cases. The original writ procedure comes with a screening mechanism in the form of a preliminary petition for leave, which functions much like the highly-discretionary certiorari petition review.<sup>326</sup> This discretionary escape valve permitting only serious errors to pass into review would control the Supreme Court's docket and function somewhat similarly to § 1292(b)'s certification.

---

320. *See id.* at 500–01.

321. *See id.* at 499.

322. *Id.* at 501 (referring to *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605–07 (2009)).

323. *Id.* at 509 n.83.

324. *Id.* at 514.

325. 28 U.S.C. § 1447(d) (2000).

326. Pfander, *supra* note 179, at 516.

The Supreme Court's original writ proceedings, in contrast to § 1292(b) certification, carry with them mandamus's high hurdles to review. Mandamus requires a showing of extraordinary injustice, permitting review only of "serious mistakes" or clear and "significant" errors—traditionally ones that lack justification.<sup>327</sup> As a matter of docket-management, *Supreme Court Rule* 20.1 describes the petition for original writ review as a matter committed to the Court's discretion and "sparingly exercised."<sup>328</sup> Pfander explains that under the mandamus standards for original writ review, few remands would present issues "grave enough to warrant intervention," and the "extraordinary nature of mandamus relief" could send a message to practitioners that the Court will entertain only the "clearest cases" of error.<sup>329</sup>

Even though the two standards differ in scope and severity, their practical application might even out the workload. That is, despite the more generous standard in § 1292(b), each circuit court may actually exercise its § 1292(b) powers as infrequently as the Supreme Court exercises its supervisory powers.<sup>330</sup> And Pfander suggests that "the [Supreme] Court could still contribute to the development of the law at the district court level through the issuance of supervisory writs," allowing the Court "to stay in touch with developments at the district court level."<sup>331</sup>

## V. CONCLUSION

It is time to embrace a fresh perspective on clarity in jurisdictional rules, both in theory and in practice. Focusing on the theoretical design behind the rules, bright lines can undermine the purpose of jurisdiction by denying a federal forum for adjudicating substantial questions of federal law embedded in state-law claims. Despite weighty rhetoric favoring bright-line rules and clarity for clarity's sake, the Supreme Court in *Grable* unanimously seemed to agree by rejecting a bright-line rule in favor of a nuanced one when crafting *Grable's* unified test for embedded federal-question jurisdiction.

Practically speaking, the implementation of *Grable's* nuanced rule has not resulted in rampant reversals or a deluge of cases proceeding in the federal courts. That is, the nuanced rule has not wreaked havoc upon the federal workload by infusing the rules with flexibility. If anything, it has had the opposite effect, as district judges wield that discretion against exercising jurisdiction. Similarly, the nuanced rule

---

327. See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 352–53 (1976); Pfander, *supra* note 179, at 515–16, 532 n.188.

328. See SUP. CT. R. 20.1; Pfander, *supra* note 179, at 516, 518–20.

329. Pfander, *supra* note 179, at 516 n.116.

330. See *id.* at 533 n.193.

331. *Id.* at 541.

has not engendered rampant confusion between district and appellate courts. While reversals for embedded federal-question decisions remain higher than the average for all private civil cases, *Grable's* jurisdictional rule has not driven the reversal rate significantly up.

In addition to obscuring the *purpose* of embedded federal-question jurisdiction, the focus on the design of rules has also occluded the vision of jurisdictional clarity's desired *effect*: litigant predictability. By turning the focus to jurisdictional clarity through litigants' eyes, the implementation and clarification processes acquire greater significance than the theoretical debate over the inherent design of the rules. Viewed through a litigant-centered perspective, significant procedural obstacles prevent conventional research from capturing the sharpest picture of what courts are doing to implement *Grable's* rule. The large mass of precedent submerged on courts' dockets changes the picture of the remand rate and contains valuable, reasoned decisions. Further, the foreclosure of appeal for all jurisdictional remands renders the invaluable opportunities for appellate clarification in close cases few and far between.

If jurisdictional clarity is to truly serve its litigant-centered goal, then we must permit targeted, discretionary review of district court remand orders. Review will not only exert a directive influence on the clarification process, but also may improve litigant perceptions of the fairness and consistency in how those rules are applied to them.

## APPENDIX 1

**Selection Criteria for Sample District Courts**

The study presented here examines a very modest sample of district court decisions within the Seventh Circuit. I selected the busiest district court within the Seventh Circuit for sampling based on the United States Courts Administrative Office statistics. I chose the district court with the highest number of private civil cases filed, as averaged over the fiscal years 2002–2008.<sup>332</sup>

In the Seventh Circuit, the Northern District of Illinois, which includes Chicago, was the busiest by far, as detailed in Table 1’s comparison between the Northern District of Illinois and the next busiest court in the Circuit, the Southern District of Indiana.<sup>333</sup>

**Table 1: Busiest Districts in the 7th Circuit**

| District  | Private civil cases 2002 | 2003  | 2004  | 2005  | 2006  | 2007  | 2008  | TOTAL  | Yearly Average  |
|-----------|--------------------------|-------|-------|-------|-------|-------|-------|--------|-----------------|
| N.D. Ill. | 8,617                    | 9,090 | 9,429 | 7,224 | 6,600 | 6,638 | 6,699 | 54,297 | <b>7,756.71</b> |
| S.D. Ind. | 2,602                    | 2,459 | 2,673 | 2,462 | 2,274 | 2,141 | 2,185 | 16,796 | 2,399.43        |

## APPENDIX 2

**Remand Rate Coding Information and Variables**

All of the information and processes used to search for decisions, to identify relevant cases, and to code their individual characteristics are set forth in a codebook, available upon request.

To capture embedded federal-question decisions in removed cases, I searched Westlaw for the following search terms: REMOV! “ARISE UNDER” & REMAND! & “1441” “REMOVAL JURISDICTION” & (“FEDERAL QUESTION” “FEDERAL QUESTIONS”). I performed the searches and distributed the resulting lists to my coders.

Each of the decisions fitting the substantive and jurisdictional criteria outlined in Part III was coded for identifying information and a few major aspects of substance. Because this Article examines clarification and the implementation process for a nuanced jurisdictional rule, the coding fields and variables for this study capture the rate of

332. See, e.g., STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2002, at 47 tbl.C-3 (2002), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2002/tables/c03mar02.pdf> (providing the number of civil cases filed during the twelve month period ending in March of 2002).

333. See, e.g., *id.*

remand over time (by coding the date and outcome of the decision), the reversal rate over time (by coding appellate outcomes), and the relative availability and utility of the decision to litigants making predictions (by coding where the decision can be found and whether it contains a reasoned explanation). The fields relevant to this analysis are included in the following list, with a description of the values used for each field noted in parentheses.<sup>334</sup>

1. *Source: (Westlaw or PACER)*

All decisions available on Westlaw were coded as Westlaw. The PACER results were purged of those entries also available on Westlaw before being entered into the database. So those decisions available only on PACER were coded in the database as PACER. The source field captures the practical question of where a litigant or court could obtain an electronic copy of the decision. I treated this field separately from the question whether the decision was included in the Federal Reporter, Supplement, or Rules Decisions, which is captured in the "Publication" field, described below.

2. *Case Name and Citation: (caption and citation)*

Cases found in Westlaw included the most formal citation available. If a case was published in the Federal Supplement, I used that citation. If a case was not included in the reporter, I used the "WL" electronic reporter citation. PACER cases used the docket number as a citation.

3. *Court: (the court issuing the decision)*

4. *Date of Decision: (month, day, year)*

5. *Depth: (order or opinion)*

I coded first for the amount of explanation in the decision. I coded as "order" those decisions simply announcing the outcome without stating the reasons for it or referring only to the reasons stated in briefs or at argument. Decisions that also stated the legal rule, cited

---

334. The small numbers of results for appellate cases in the sampled jurisdictions made meaningful analysis of rates and their fluctuations over time nearly impossible. To get a better snapshot of clarity through reversal rates, I conducted additional sampling and coding for appellate cases in all circuits, as explained above in subsection III.D.2 on reversal rates. Coding and analysis for additional types of information, including type of case, basis of decision, judge characteristics, reporter publication, and procedural contexts is on-going as of the date of this Article and will be the subject of future work.

authority, and gave an explanation of the rule's application to the instant case were coded as "opinion."<sup>335</sup>

6. *Outcome: (remanded, not remanded, partially remanded)*

The outcome field focused solely on the outcome of the federal-question jurisdictional issue. So, for example, an opinion deciding initially that federal-question jurisdiction existed, then moving on to determine that the federal claims should be dismissed and the remaining state claims remanded for lack of supplemental jurisdiction would be coded as "not remanded" because it decided not to remand based on lack of federal-question jurisdiction.

I employed four research assistants to complete this coding for the 553 total Westlaw cases identified by our searches, as well as those dockets identified as containing a decision on embedded federal-question jurisdiction. During the seven months in which my research assistants coded cases, we met regularly to discuss our results. As each assistant completed a coding assignment, I audited the results and discussed lessons and coding corrections with the whole group.

Throughout the project, coders blindly coded portions of one another's assignments and I compared the results to gauge inter-coder agreement, using Cohen's *kappa*.<sup>336</sup>

### APPENDIX 3

#### Circuit Court Publication & Citation Restrictions

While all appellate opinions are available in the commercial databases, local rules at the circuit court level limit opinions' precedential value based on publication status. Until January 1, 2007, the circuits' respective local rules dictated whether and to what extent litigants could cite unpublished opinions.<sup>337</sup> Responding to litigant frus-

---

335. In selecting these values, I depart slightly from *Docketology's* "simple definition" that an "opinion" is any judicial disposition on Westlaw or Lexis and "an 'order' is any disposition that is not." See Hoffman et al., *supra* note 53, at 693. Similarly, Hille Levin defined "opinion" with reference to the decision's import and thus includes every decision under the term "opinion." Levin, *supra* note 46, at 982–83. Levin's definition is not especially relevant to my study because it is not reflective of PACER practices or the clarifying value of precedent—while "important" for counting, *e.g.*, *id.* at 983, unreasoned or unexplained decisions offer little clarification of *how* the rule applies. My study results support my definition, as described below, because I found many "reasoned explanations" available only on PACER.

336. For each coding variable described in this Appendix, the *kappa* was 0.75 or higher. The author also checked for agreement in the coding of cases for selection into or exclusion from the database and found higher than 0.7 agreement.

337. See generally ROBERT TIMOTHY REAGAN, FED. JUD. CENTER, CITING UNPUBLISHED FEDERAL APPELLATE OPINIONS ISSUED BEFORE 2007 (2007), [http://www.fjc.gov/public/pdf.nsf/lookup/citrules.pdf/\\$file/citrules.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/citrules.pdf/$file/citrules.pdf).

tration and academic criticism,<sup>338</sup> the Advisory Committee on the Federal Appellate Rules proposed an amendment to Rule 32.1, preventing circuits from prohibiting citation to unpublished decisions. The Supreme Court adopted the new rule in April 2006, and the federal rules now permit litigants to cite all circuit decisions issued after January 1, 2007, but preserve the circuits' local rules for decisions before that date.<sup>339</sup>

For decisions before January 1, 2007, the Seventh Circuit local rule flatly prohibits it.<sup>340</sup> As detailed in Tables 2 and 3, the Seventh Circuit somewhat makes up for its prohibitory rule by publishing its opinions at a rate 25% higher than the federal circuit court average (42.7% publication in the Seventh Circuit, compared with 16.97% nationally).<sup>341</sup>

**Table 2: Federal Appellate Court Publication Rates<sup>342</sup>**

| YEAR    | Publish Rate |
|---------|--------------|
| 2005    | 18.4         |
| 2006    | 15.9         |
| 2007    | 16.5         |
| 2008    | 18.2         |
| 2009    | 16.8         |
| 2010    | 16           |
| AVERAGE | 16.97        |

338. See Reynolds & Richman, *supra* note 223; see also Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215, 1216 (2004) (explaining that sometimes unpublished cases are the only supporting authority for a client's case); Minutes of Comm. on Rules of Practice & Procedure 9 (June 17–18, 2004), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2004-min.pdf> (“One lawyer-member suggested that local non-citation rules pose a serious perception problem for the courts of appeals. He said that it is difficult to explain to a client that a court has decided a similar case in the recent past, but the case cannot be cited to the same court.”).

339. FED. R. APP. P. 32.1 (2007).

340. See 7TH CIR. R. 32.1 (prohibiting citation “except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case”); see also Pamela Foa, Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309, 309–40 (1977) (expressing skepticism of publication plans); REAGAN, *supra* note 337 (noting that the Seventh Circuit prohibits citations to unpublished opinions and the Fourth Circuit discourages citations to unpublished opinions).

341. See *infra* Tables 2 & 3.

342. Stats for this table were compiled from the Administrative Office of the Courts. *E.g.*, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF

**Table 3: Seventh Circuit Publication Rates<sup>343</sup>**

| CA7 YEAR | Publish Rate % | % Difference |
|----------|----------------|--------------|
| 2005     | 43.4           | 25           |
| 2006     | 35.6           | 19.7         |
| 2007     | 45             | 28.5         |
| 2008     | 51.1           | 32.9         |
| 2009     | 40.9           | 24.1         |
| 2010     | 40.2           | 24.2         |
| TOTAL    | 42.70          | 25.73        |

Because this study covers six years in the era of restrictive local rules, I examined the publication status for the sample of embedded federal-question decisions to see whether these restrictions impacted the embedded federal-question precedent available for citation. In the Seventh Circuit, only one of the eight decisions issued in the six years studied was excluded from the Federal Supplement,<sup>344</sup> and the one unpublished embedded federal-question opinion was from 2002, making it unciteable as precedent. Although the eight-opinion sample of embedded federal-question decisions is a very small one, its publication rate of 87.5% is more than double the Seventh Circuit's average overall publication rate of 42.5%.

---

THE UNITED STATES COURTS 42 tbl.S-3 (2005), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2005/tables/s3.pdf> (providing the statistics for the fiscal year of 2005).

343. Stats for this table were compiled from the Administrative Office of the Courts. *E.g., id.* (providing the statistics for the fiscal year of 2005).

344. See *Covington v. Mitsubishi Motor Mfg. of Am., Inc.*, 51 Fed. App'x 992 (7th Cir. 2002).

## APPENDIX 4:

## Removal Rate in All District Courts

**Table 4: Civil Filings and Removals in all District Courts (2000–2008)**<sup>345</sup>

|                           | 2000    | 2001    | 2002         | 2003    | 2004    | 2005    | 2006    | 2007    | 2008    |
|---------------------------|---------|---------|--------------|---------|---------|---------|---------|---------|---------|
| Total Civil Filings       | 259,517 | 250,907 | 274,841      | 252,962 | 281,338 | 253,273 | 259,541 | 257,507 | 267,257 |
| Total Filings Rate Change | -0.3    | -3.3    | 9.5          | -7.9    | 11.2    | -10.0   | 2.6     | -0.8    | 3.8     |
| Removals                  | 30,194  | 30,683  | 55,480       | 36,228  | 34,443  | 30,174  | 29,437  | 30,282  | 30,065  |
| Removal % of Total        | 11.63%  | 12.23%  | 20.19%       | 14.32%  | 12.24%  | 11.91%  | 11.34%  | 11.76%  | 11.25%  |
| Removal Rate Change       | 0.9     | 1.6     | <b>80.8*</b> | -20.3   | -4.9    | -12.4   | -2.5    | 2.9     | -0.7    |

\*The great spike in removals in 2002 is likely due to the onslaught of asbestos cases filed in that year.

345. Compiled from data provided by the Administrative Office of the U.S. Courts. *See, e.g.*, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 43 tbl.S-7 (2008), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/tables/S07Sep08.pdf> (providing total civil filings for years 2004–08); STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 43 tbl.S-7 (2004), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/tables/s7.pdf> (providing total civil filings for years 2000–04).