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

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

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I. INTRODUCTION

Jurists and commentators have repeated for centuries the refrain that *jurisdictional rules should be clear*.¹ Behind this mantra is the idea that clearly designed jurisdictional rules should enable trial courts to more easily apply the law and therefore allow litigants to more accurately predict how trial courts will rule.² The mantra's ultimate goal is efficiency—that trial courts not labor too long on jurisdiction and most importantly, 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 jurisdiction rules, for example, clarity is somewhat overvalued in theory and unachieved 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.³ There exist compelling reasons to have federal courts adjudicate essential federal questions, even if those 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,⁴ 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 *Gra-*

1. See, e.g., *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 321 (2005) (Thomas, J. concurring); ZECHARIAH 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).

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

*ble & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*⁵ 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.⁶ The Court decided that jurisdiction did not, in fact, require an underlying federal right of action, but that a right of action was relevant to determinations of “substantiality” and federalism.⁷ *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 on federal-question jurisdiction doctrine and whether clarity in theory translates into 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 that 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 *Merrell Dow Pharmaceuticals Inc. v. Thompson*⁸ and state a unified jurisdictional rule.

Using *Grable* as an example, the Article then turns in Part II to an empirical study on the implementation of *Grable’s* new “clarified” rule. The study captures a snapshot of how federal district and appellate courts have reacted to *Grable’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 and 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*. Part IV builds on these theoretical discussions and empirical observations to describe obstacles currently diverting clarification and to suggest some modest steps that litigants,

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

6. *Id.* at 311–12, 314.

7. *Id.* at 318.

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

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,⁹ countless articles,¹⁰ and nearly innumerable opinions.¹¹ 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 presents an overview of the origins, justifications, dilemmas, and applications of the mantra that "jurisdictional rules should be clear," as well as the clarification process at work in one particular corner of jurisdiction: federal-question jurisdiction doctrine.

A. Canonization of Clarity

There is a longstanding mantra among jurists and commentators that "jurisdictional rules should be clear."¹² 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.¹³ The

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9. *E.g.*, ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* (4th ed. 2003); JOHN F. DILON, *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. Nicastrò*, 131 S. Ct. 2780, 2790 (2011); *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).
 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

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.¹⁴ These goals thus boil down to predictability for litigants via consistency in judicial application.¹⁵

Yet there also exists a longstanding debate over clarity versus complexity. This debate also takes the form of rules versus standards.¹⁶ 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 circumstances 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.¹⁷ The line is brightly drawn at \$75,000.01; a penny less precludes jurisdiction.¹⁸ Even though many interpretive questions have arisen in applying this bright-line rule,¹⁹ the line is drawn; it is quantitative, and it is largely

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) ("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.") (quoting David P. Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. CHI. L. REV. 1 (1968)); *cf.* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (noting that courts "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*, 91 VA. L. REV. 1, 5 (2011).
15. *See Hertz*, 130 S. Ct. at 1193 ("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).
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.*, 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.*, Class Action Fairness Act (CAFA) of 2005, 28 U.S.C. §§ 1711–1715 (2006).

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.²⁰ 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.²¹

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

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.²⁴ 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.²⁵

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., 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."); 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 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."); see also, e.g., *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010); *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.");

25. See Field, *supra* note 17, at 683 (explaining this phenomenon as a primary justification for clear and simple rules); see, 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.");

On legitimacy, the proponents of clear rules argue that 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.²⁶ Others have amply catalogued and critiqued this secondary goal elsewhere.²⁷

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

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 of-

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 1794. 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). 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.

28. Divining Congressional intent, or 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.* at 55; see also *id.* at 5.

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.").

ferred by Article III courts.³⁴ For 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, rhetoric,³⁵ and judicial opinions.³⁶ And, in choosing complexity, judges may feel compelled to justify deviation from the mantra.³⁷ As a testament to how axiomatic the mantra has become, Justice Thomas's concurrence in *Grable* states without citation, “Jurisdictional rules should be clear.”³⁸ And he was not the first to do so.³⁹

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 charac-

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34. See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 38, 312 (2005) (citing AM. LAW INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 164–66 (1968)).
35. 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.”).
36. *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 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.”).
37. 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 that “[T]here is no single, precise, all-embracing definition” of “arising under” jurisdiction).
38. *Grable*, 545 U.S. at 321 (Thomas, J., concurring).
39. 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); *Hoagland v. Sandberg, Phoenix & Von Gontard, P.C.*, 385 F.3d 737, 739–40 (7th Cir. 2004) (stating without citation that, “The more mechanical the application of a jurisdictional rule, the better. The chief and often the only virtue of a jurisdictional rule is clarity.”) (citations omitted); *Unique Concepts, Inc. v. Manuel*, 930 F.2d 573, 575 (7th Cir. 1991) (stating without citation that, “Jurisdictional rules should be simple and clear.”).

teristics of rules as announced, rather than the application of those rules and transparency in the adjudication process.⁴⁰ So, despite litigants using precedent to predict jurisdiction, the focus has been on the 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.⁴¹ But little attention has been paid to the possibility of producing the opposite effect—that implementation could breed clarification of fuzzy rules.⁴² 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.⁴³ 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,⁴⁴ applying law with greater immediacy and frequency than other courts, and doing so often without the threat of appellate review.⁴⁵

Dodson and others have pointed out that implementation can muddle and complicate even ostensibly clear and simple rules.⁴⁶ Implementation, though, seems to have at least the potential for the opposite effect, too. A rule that has some (or a lot of) flexibility in its design could be made more clear or stable through the interpretive process.⁴⁷

40. See, e.g., Field, *supra* note 17, at 694.

41. 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).

42. But see Dodson, *supra* note 14 (hypothesizing that interpretive flexibility could produce better or more stable rules over time).

43. See, e.g., Atlas Global Group, L.P. v. Grupo Dataflux, 312 F.3d 168, 177 (5th Cir. 2002) (Garza, J., dissenting), *rev'd*, 541 U.S. 567 (2004) ("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.") (citation omitted).

44. See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 29 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.")

45. 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).

46. 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.")

47. 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

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.”⁴⁸ 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.⁴⁹ 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.⁵⁰

Regardless, precedent and explanation become essential to the litigant-centric view of clarity, emphasizing predictability, because precedent opinions are the data litigants, through their lawyers, use to make those predictions. The creation of precedent enhances the predictive power for parties and their lawyers.⁵¹ 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.⁵² The empirical question

costs imposed by a flexible standard” for embedded federal question jurisdiction); *id.* (“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 remove the case, arguing that the presence of a federal issue satisfies the second branch. There is no judge or professor acting as a gatekeeper—rather, the defendant creates delay by simply noticing removal.”).

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

49. *Id.* at 53.

50. *Id.* at 27–28.

51. *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 has noted, “the amount of wrangling over forum suggests that parties believe in its importance.” Dodson, *supra* note 14, at 51.

52. 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

arises whether jurisdictional decisions are more often reasoned. At least in decisions to remand for lack of subject-matter jurisdiction, the order is unappealable.⁵³ 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, the author will start by asking them in a small segment of jurisdictional doctrine: state-law claims raising federal issues, also known as “embedded” federal questions.⁵⁴

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 resolving a circuit split in its 2005 *Grable* opinion,⁵⁵ offering a before-and-after setting to study the rule’s implementation. *Grable* presented the Court with 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.

rarity). Dodson deals with Fred 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.

53. 28 U.S.C. § 1447(d) (2006).

54. 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 41, 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.

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

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 parties' characteristics and the time for filing.⁵⁶ 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."⁵⁷ 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 jurisdiction 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,⁵⁸ but maintained that rule for only three years before rejecting it and recognizing jurisdiction over substantial federal issues embedded in state claims.⁵⁹ 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.⁶⁰

Though portions of the doctrine have been clarified through application over time, the kaleidoscope of commonsense approach for many years prevented the formation of a "single, precise, all-embracing" test for embedded federal-question jurisdiction.⁶¹ 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.⁶² *Grable* thus repre-

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

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

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

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

60. *Id.*

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

62. See *Grable*, 545 U.S. at 311–12.

sents 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.⁶³ In choosing the fuzzy rule, *Grable* can be seen both as a rejection of formalist principles and as a clarification in federal-question jurisdiction.

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."⁶⁴ Before attempting to pick out the relative clarity and clarifications from this tangle, 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 inexpert 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.⁶⁵ 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."⁶⁶

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.⁶⁷ 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.⁶⁸ This statutory "arising under" jurisdiction parallels Article III's constitutional arising under jurisdiction, but has found more limited application by courts.⁶⁹

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

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

65. Dodson, *supra* note 14, at 7 (citing Barry F. Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 550–54 (1989)).

66. *Grable*, 545 U.S. at 312 (2005) (citing AM. LAW INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 164–66 (1968)).

67. U.S. CONST. art. III, § 2.

68. 28 U.S.C. § 1331 (2006).

69. *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

Although the constitutional and statutory bases for federal-question jurisdiction have remained unaltered since they were written,⁷⁰ 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-law case raises a jurisdictional federal question has morphed and oscillated over time.⁷¹

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.⁷² 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.⁷³ But Justice Holmes en-

nearly identical language, the Court "never has held that statutory 'arising under' jurisdiction is identical to Art. III 'arising under' jurisdiction."

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

71. See *Almond v. Capital Props. Inc.*, 212 F.3d 20, 23 (1st Cir. 2000) ("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.") (citations omitted). Compare *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997) (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") (citation omitted), *Smith v. Kan. 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 U.S.*, 22 U.S. 741, 749 (1824) (holding that Congress may confer federal question jurisdiction over cases with an "ingredient" of federal law), with *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."), and *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). See generally *Ryan*, *supra* note 47, 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").

72. *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 2, at 11–13. This hypothetical remained a hypothetical, and Judge Friendly dismissed the idea as "principled but unwise." *Id.* at 13.

73. *E.g.*, *Am. Well Works*, 241 U.S. at 260 ("A suit arises under the law that creates the cause of action."); *Smith*, 255 U.S. at 214 (Holmes, J., dissenting). Judge Friendly contemplated an even more "extreme[]" minimal model of federal-ques-

ded up dissenting 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:

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.⁷⁴

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."⁷⁵ The compromise position articulated in *Grable* wove various doctrinal strands together into a four-element test.⁷⁶ When determining jurisdiction over embedded federal questions, the *Grable* test is, "does 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."⁷⁷

The Supreme Court's 1986 opinion in *Merrell Dow* set the stage for *Grable*.⁷⁸ In *Merrell Dow*, the majority emphasized that the importance of a federal right of action accompanying an alleged federal question "cannot be overstated."⁷⁹ During the nineteen years after *Merrell Dow*, the courts of appeals split over whether it actually could

tion 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 2, at 13. Judge Friendly similarly dismissed this minimum model as "principled but unwise." *Id.*

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

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

76. *Id.* at 321.

77. *Id.* at 314(numbers added)

78. *See, e.g.*, *Wisconsin v. Abbott Labs.*, 390 F. Supp. 2d 815, 820 (W.D. Wis. 2005) ("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*].") (citation omitted). 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).

79. *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 fact 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 2, § 5.2, at 288.

be overstated—namely, whether *Merrell Dow* “always requires a federal cause of action as a condition for exercising federal-question jurisdiction.”⁸⁰ *Grable* granted certiorari to address the split.⁸¹

Grable presented a neat and tidy package for resolving the split because the alleged federal question was “the only issue”⁸² in the case, which involved a narrow point of tax law relating to form of notice.⁸³ To satisfy delinquent federal taxes, the IRS seized property owned by *Grable & Sons Metal Products, Inc.*⁸⁴ The seizure necessitated notice under a federal tax law provision.⁸⁵ *Grable* received actual notice by certified mail and the sale went forward.⁸⁶ *Darue Engineering & Manufacturing* bought the property at the sale and received a quitclaim deed from the government.⁸⁷ 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*.⁸⁸ Specifically, *Grable* claimed that the federal tax law notice provision required personal service and that service he received by certified mail was improper.⁸⁹

80. *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) (“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.”) (citations omitted). 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 2, § 5.2, at 288.

81. *Grable*, 545 U.S. at 311–12.

82. 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. It’s 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”).

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

84. *Id.* at 310.

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

86. *Id.*

87. *Id.*

88. *Id.* at 311.

89. *Id.*

Darue removed the case to federal court, arguing the title's validity turned on the interpretation of the federal tax law's notice provision.⁹⁰ Grable moved to remand. The district court denied remand,⁹¹ 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.⁹²

The district court ultimately granted summary judgment for Darue, holding the federal notice provision required personal service, but substantial compliance sufficed.⁹³ Grable appealed and the Sixth Circuit affirmed the jurisdictional and merits rulings.⁹⁴ In adjudicating Grable's jurisdictional arguments, the Sixth Circuit cited the well-pleaded complaint rule⁹⁵ 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."⁹⁶

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."⁹⁷ 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

90. *Id.*

91. From the District Court docket, it appears that 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. W.D. Mich. Civil Docket, 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) (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, 697 (W.D. Mich. 2002).

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

93. "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 & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., Inc.*, 207 F. Supp. 2d 694, 697 (W.D. Mich. 2002).

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

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

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

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

issue on removal, which would not distort any division of labor between the state and federal courts, provided or assumed by Congress.”⁹⁸

The Supreme Court affirmed the Sixth Circuit and performed its own synthesis of the “long history” of its “guidance” on federal-question jurisdiction,⁹⁹ 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.”¹⁰⁰ Although acknowledging that it had yet to state a “single, precise, all-embracing” test for federal-question jurisdiction over federal issues embedded in state-law claims between nondiverse parties,¹⁰¹ the *Grable* Court synthesized precedent along four major doctrinal strands: (1) “does 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.”¹⁰² *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].”¹⁰³ The well-pleaded complaint rule additionally requires that the issue appear in the plaintiff’s complaint and not simply as a necessary defense.¹⁰⁴ Thus necessity appears first in the *Grable* synthesis as a

98. *Id.*

99. 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”).

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

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

102. *Id.* at 314.

103. *Id.* at 312–13 (alteration in original) (quoting *Smith v. Kan. 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 the U.S.*, 22 U.S. (9 Wheat.) 738, 822 (1824).

104. *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.¹⁰⁵

The second doctrinal strand, “to consider is whether such issue is actually disputed,”¹⁰⁶ recognizes that a question of federal law must be more than present and necessary to the state claim’s resolution.¹⁰⁷ The disputed element occupies the second position in *Grable’s* test, owing to the “constant refrain” that jurisdiction “demands . . . a contested federal issue.”¹⁰⁸

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.”¹⁰⁹ 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.¹¹⁰ The Court cited three cases as evidence of a “constant refrain” of substantiality:¹¹¹ *City of Chicago v. International College of Surgeons*,¹¹² *Merrell Dow*,¹¹³ and *Franchise Tax Board v. Construc-*

105. 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 41 (supporting the use of bright-line rules in resolving some federal jurisdiction questions). *See generally* CHEMERINSKY, *supra* note 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).

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

107. An early case, *Shulthis v. McDougal*, required that the state-law claim not simply involve a question about federal law, but “really and substantially involve[] a dispute” over federal law. *Shulthis v. McDougal*, 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 316 n.3.

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

109. *Id.* at 313.

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

111. *Id.*

112. 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

tion Laborers Vacation Trust.¹¹⁴ While each case did impose 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.¹¹⁵ Adjudicating embedded federal-question jurisdiction over state tort claims allegedly raising issues about the Federal Food Drug and Cosmetic Act's 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.¹¹⁶ Use of the word tantamount, commonly defined as "equivalent in value, significance, or effect,"¹¹⁷ rendered the absence of a federal remedy equivalent to insufficient substantiality under a literal reading of *Merrell Dow*.¹¹⁸

The circuit courts split in their interpretation of *Merrell Dow*'s meaning, 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.¹¹⁹ *Grable* rejected the literal reading and upheld the Fourth Circuit's interpretation.¹²⁰

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.¹²¹ With the exception of the malleable definition for substantial, the test seems simple enough.

equivalent. As *Grable* noted, and *Merrell Dow* "suggested," federal constitutional 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.

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

114. 463 U.S. 1 (1983).

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

116. *Id.*

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

118. 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.*

119. *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).

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

121. *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 2005.¹²² *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.¹²³ *Merrell Dow* had “emphasized . . . sensitive judgments about congressional intent, judicial power, and the federal system” in any jurisdictional adjudication.¹²⁴ The Court echoed *Franchise Tax Board*’s “forceful[] reiterat[ion]” of the “need for prudence and restraint in the jurisdictional inquiry.”¹²⁵ 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.”¹²⁶ *Merrell Dow* warned that, “exercising 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.”¹²⁷

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 courts about the “congressionally approved balance of federal and state judicial responsibilities.”¹²⁸

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

123. *Id.* at 313–14.

124. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986); see, e.g., Osborn v. Bank of the U.S., 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 2, at 3–4. According to Friendly, the ALL’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; see *Merrell Dow*, 478 U.S. at 810.

125. *Merrell Dow*, 478 U.S. at 810 (citing *Franchise Tax Bd.*, 463 U.S. at 20).

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

127. *Grable* 545 U.S. at 319 (2005).

128. *Id.* at 309.

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.”¹²⁹ 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.¹³⁰ 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.¹³¹ As Andrew Bradt argued, this balancing factor functions effectively as an abstention doctrine.¹³²

Grable’s encapsulation of precedent therefore presented the new test as, “does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”¹³³

Applying the newly-minted test, *Grable* held the federal court properly exercised jurisdiction.¹³⁴ The federal government’s “strong interest” in tax-collection matters rendered the notice provision “an important issue of federal law that sensibly belongs in a federal court” to “vindicate” federal administrative action using “judges used to federal tax matters,” thereby passing the substantiality (and practicality) test.¹³⁵ 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.”¹³⁶

Grable upheld jurisdiction and found substantiality despite the fact that everyone agreed the federal tax statute at issue contained no private right of action.¹³⁷ The Court then had to decide what to do about *Merrell Dow*’s reliance on a similar hole as tantamount to insubstantiality.

129. *Id.* at 314.

130. *Id.* But see 17th St. Assocs. 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.”).

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

132. See Bradt, *supra* note 77, at 1160–76.

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

134. *Id.* at 314–15.

135. *Id.*

136. *Id.*

137. *Id.* at 315, 319.

The *Grable* Court answered by leaving *Merrell Dow* technically standing, but cabining its reasoning with a reading lesson. *Grable* ignored the tantamount language in *Merrell Dow*, explaining 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.”¹³⁸ The *Grable* 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.¹³⁹ The Court clarified that *Merrell Dow*, “should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the ‘sensitive judgments about congressional intent’ that § 1331 requires.”¹⁴⁰ *Grable* 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.¹⁴¹

Put more colorfully by Justice Souter, “The 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.”¹⁴²

Whatever its inherent vices and virtues, *Grable* thus wove the existing lines 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 ossified the importance of federalist balancing, which relies so heavily on discretion as to warrant classification as a new abstention doctrine.¹⁴³ At

138. *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).

139. *Id.* at 317.

140. *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*.”).

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

142. *Id.*

143. *See* *Bradt*, *supra* note 78; *see, e.g., Abbott Labs.*, 390 F. Supp. 2d at 824 (concluding that the complaint necessarily presented a substantial, disputed question of federal law, but remanding based on the balancing factor “[b]ecause this case

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. 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.¹⁴⁴ 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 good¹⁴⁵—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 test must account for the contributions and modifications of implementing opinions. One year after *Grable*, the Supreme Court took the opportunity to comment on its decision in *Empire Healthchoice Assurance, Inc. v. McVeigh*.¹⁴⁶ In applying *Grable*, *Empire* coated the test with interpretive gloss. *Empire* presented the question whether an insurance carrier's claim for benefits reimbursement from an in-

does not implicate an overriding federal interest and because removal would disturb the balance of judicial responsibilities between state and federal courts”).

144. The importance magnifies when considering that an erroneous decision against jurisdiction is unappealable, see 28 U.S.C. § 1447(d), 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 51, at 593–95 (illustrating that plaintiff win rates are lower in removed cases). But see Ryan, *supra* note 47, at 670 (arguing that “the benefits outweigh the costs imposed by a flexible standard” for embedded federal question jurisdiction).
145. See Rory Ryan, *No Welcome Mat, No Problem?: Federal Question Jurisdiction After Grable*, 80 ST. JOHN'S L. REV. 621, 622 (Spring 2006) (concluding that *Grable* “admirably answers more questions than it creates”).
146. 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.

sured's settlement proceeds fell under § 1331,¹⁴⁷ addressing a circuit split.¹⁴⁸ 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, was fatally injured, and his widow sued the alleged tortfeasor who caused the injury in state court and received a settlement.¹⁴⁹ 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.¹⁵⁰ After settlement, the insurer sued McVeigh's estate in federal court seeking reimbursement from the settlement funds for the full amount of benefits paid.¹⁵¹ *Empire* asserted federal jurisdiction based on a federal contractual right and alternatively that the insurance plan itself constituted federal law.¹⁵² 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.¹⁵³

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.¹⁵⁴ After dealing with the first two bases, *Empire* turned to *Grable* as a last-resort jurisdictional argument raised by the United States, participating as amicus curiae.¹⁵⁵ 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

147. *Id.* at 683.

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

149. *Id.* at 688

150. *Id.* at 684.

151. *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.

152. *Id.* at 688.

153. *Id.* at 688–89.

154. *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, and Alito joined. *Id.* at 690. The parties and amici asserted the other two bases. *Id.*

155. *Id.* at 699.

case.”¹⁵⁶ 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.”¹⁵⁷ 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,”¹⁵⁸ *Empire* involved a fact-fight about how much reimbursement was proper.¹⁵⁹ 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.¹⁶⁰ 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 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.”¹⁶¹ And, “[c]onversely, federal jurisdiction is disfavored for cases that are

156. *Id.* at 700 (alteration in original) (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 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”).

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

158. *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)).

159. *Id.* at 701. 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.*

160. 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”).

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

'fact-bound and situation-specific' or which involve substantial questions of state as well as federal law."¹⁶²

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."¹⁶³ *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.¹⁶⁴ *Grable* similarly explained that, while § 1331 is "usually invoked by plaintiffs pleading a federal cause of action," embedded federal questions in state-law claims represent "another longstanding, if less frequently encountered, variety of 'arising under' jurisdiction."¹⁶⁵ Again, although not part of the test, *Empire's* evocative imagery of "squeezing" embedded federal-question cases into a "slim category" colors how *Grable* is viewed, and which way close cases should go.¹⁶⁶ *Empire* represents not a modification of *Grable's* rule, but rather a clarification of *Grable's* scope in application. *Empire's* nuance on *Grable's* rule nudges toward narrow application.

162. *Id.* at 1130 (quoting *Empire*, 547 U.S. at 701).

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

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

165. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005).

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

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 of 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.¹⁶⁷ Although doctrinally "the right to remove has never been dependent on the state of the federal court's docket,"¹⁶⁸ the practical reality—or the perceived reality—that Congress intended the federal courts to have a lighter workload frequently has led courts to decline to exercise jurisdiction.¹⁶⁹ 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

167. *E.g.*, *Grable*, 545 U.S. at 312 ("The doctrine captures the commonsense [sic] 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).

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

169. 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).

denying remand.¹⁷⁰ 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.”¹⁷¹

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.”¹⁷² 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.”¹⁷³ 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.¹⁷⁴ Some commentators have called for a change in the prohibition.¹⁷⁵ In 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

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170. 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) (2006). If the defendant misses this window, or cannot secure the consent of other defendants within time, the court cannot exercise federal-question jurisdiction.
 171. *Thermtron*, 423 U.S. at 346–47 (quoting The Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 553); *see* Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L. J. 83, 113–19 (1994).
 172. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)).
 173. 28 U.S.C. § 1447(d) (2006). 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).
 174. *E.g.*, *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).
 175. *See, e.g.*, Bradt, *supra* note 78; James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493 (2011); Wasserman, *supra* note 171 (arguing for a return to appellate review of certain remand orders); *see also infra* section IV.C.

number of cases proceeding in the federal courts.¹⁷⁶ The Supreme Court endorsed strict construction of the remand statute, relying on the Congressional purpose in the 1887 Amendments.¹⁷⁷ The Fourth Circuit and other circuit courts have cited “significant federalism concerns” justifying the strict construction and the presumption against jurisdiction.¹⁷⁸ This presumption further tips the scale toward remand in doubtful and debatable cases.¹⁷⁹ Practically speaking, the

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176. 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. Daimler Chrysler 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.
177. 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.”).
178. *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., Inc.*, 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.”).
179. 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 jurisdiction 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); *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.

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 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

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.”). See generally Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 637 (2004). But see *McKinney v. Bd. of Trs. of Md. Cmty. Coll.*, 955 F.2d 924, 927–28 (4th Cir. 1992) (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.* at 927 (“Rather than favoring plaintiffs or defendants, . . . the removal procedure is intended to be ‘fair to both plaintiffs and defendants alike.’”).

rates changed after *Grable* stated its unified, flexible test; (2) whether there are any observable differences in available precedent—decisions available on Westlaw or only on 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 through the courts' electronic dockets.¹⁸⁰

While expanding the base of available decisions, this descriptive study narrowly focuses on those three questions. It does not, for example, test which rules are linguistically more clear or what opinions are more clear.¹⁸¹ Nor does it compare diversity or appellate jurisdiction, which ostensibly are more straightforward, to federal-question jurisdiction. And it does not make comparisons of clarity among the various 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.¹⁸² Nor does it meet challenges to test different designs for jurisdictional rules.¹⁸³ This study begins with a much more modest

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180. Inclusion of district court docket research finds increasing support among empiricists and others studying decision-making. See, e.g., Hoffman, et al., *supra* note 52. 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. 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, 784 (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 52. See, e.g., Pauline T. Kim et al., *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J. L. & POL'Y 83 (2009); Levin, *supra* note 45, 988–89.
181. 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).
182. 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.
183. 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

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 give a nudge to this important debate.

The database developed for this study included decisions from 2002–2008 identified as adjudicating removal jurisdiction over embedded federal questions. The database was limited to cases from the Fourth and Seventh Circuit available on Westlaw and PACER, cases from all district courts in those circuits available on Westlaw, and cases from the Northern District of Illinois and the Eastern District of Virginia available only on PACER. 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 does not include all of § 1331 arising-under jurisdiction or all originally filed federal-question cases.¹⁸⁴ Nor does it include removals on all jurisdictional bases.¹⁸⁵ 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. Because the author included PACER cases in her data collection, it was 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

N. Mulligan, *Clear Rules—Not Necessarily Simple or Accessible Ones*, 97 VA. L. REV. 13, 21–22 (2011).

184. 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 47, 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).

185. 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.

asserting federal question jurisdiction to find the few asserting *embedded* federal question jurisdiction, rather than a federal claim.¹⁸⁶

To capture the relevant decisions, the author 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 PACER.

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.¹⁸⁷ This is because, as Stephen Burbank has admonished, "[T]he law in the books is not a reliable guide to the law in action."¹⁸⁸ 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.¹⁸⁹ 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.¹⁹⁰ This choice has in-

186. 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 User Manual for ECF Courts, PACER 53 (last updated June 2010) [hereinafter PACER manual], <http://www.pacer.gov/documents/pacermanual.pdf>.

187. 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 52, 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., Kim et al., *supra* note 180, at 86 (outlining how researchers should take "advantage of the electronic docketing system now operating in all federal district courts"); Levin, *supra* note 45, at 997 (describing the quest by "judges, lawyers and scholars [to] include in their research as many 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").

188. Burbank, *supra* note 187, at 604.

189. *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 180, at 97.

190. 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 180, at 97 n.43 (citing *United States Supreme Court Judicial Database, 1953-1997*

herent bias because it is not a random selection for publication; it is the author's choice and based on myriad subjective and idiosyncratic factors.¹⁹¹ Studies have identified systematic differences between published and unpublished opinions.¹⁹²

Second, focus on *opinions* necessarily excludes decisions memorialized in mere "orders"—a potentially large proportion of district court decisions.¹⁹³ 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.¹⁹⁴ Commentators have suggested that opinions are more likely to accompany appealable determinations, such as granting motions to dismiss or for summary judgment.¹⁹⁵ Decisions whether to remand alleged embedded federal questions carry this potential bias due to § 1447's prohibition on appeals for jurisdictional remands.¹⁹⁶

The decision to include PACER dockets seemed equally obvious for the purposes of my study. I wanted to take an accurate picture of how courts implemented *Grable's* 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.

Terms, ICPSR (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)).

191. The Judicial Conference in 1964 stated the criterion for publication decisions of federal judges, "The 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, REPORTS 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 180, at 206. 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 180, 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)).
192. 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 & 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 180, at 211–13; see Kim et al., *supra* note 180, 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").
193. Kim et al., *supra* note 180, at 98–99.
194. Hoffman et al., *supra* note 52, at 682.
195. 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 180, at 99 (repeating this speculation).
196. See 28 U.S.C. § 1447(d) (2006).

In addition to the opinions published at judges' requests, the federal courts must post all written opinions on their websites regardless of publication status.¹⁹⁷ Opinions, per the Judicial Conference, constitutes only those decisions "that set[] forth a reasoned explanation for a court's decision."¹⁹⁸ 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."¹⁹⁹ That leaves a number of decisions out of the database and therefore only available via PACER. 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.²⁰⁰ 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 PACER decisions to test the hypothesis of Westlaw's under-inclusion, and to get the full picture of how the federal courts are implementing *Grable*.

While Westlaw contains mostly reasoned opinions, PACER includes even those district court decisions without fully reasoned opinions. Espousing "doctology: the intensive study of trial court dockets," 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.²⁰¹ 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.²⁰² Further, the *Docketology* study found that studying PACER 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.²⁰³

197. Hoffman et al., *supra* note 52, 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/cgi-bin/getrpt?GAO-05-12>).

198. *Id.* at 693.

199. Levin, *supra* note 45, at 986 (quoting WEST PUBLISHING CO., PUBLICATION GUIDE FOR JUDGES OF THE UNITED STATES DISTRICT COURTS 2 (1994)).

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

201. Hoffman et al., *supra* note 52, at 684–85.

202. Kim et al., *supra* note 180, at 103.

203. *Id.* at 106.

As between Westlaw and Lexis for database cases, many of the available accounts point to relative parity between the two databases' case law collections.²⁰⁴ But the *Docketology* study of four busy district courts found that Westlaw captured more opinions than Lexis.²⁰⁵ Based on this slight superiority and my own anecdotal testing, I included only the more inclusive of two databases in the study: Westlaw.²⁰⁶

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.²⁰⁷ This search produced an over-inclusive list of cases.²⁰⁸ From the results, only those cases actually deciding jurisdiction over embedded federal questions were included in the dataset.²⁰⁹

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204. See generally KENDALL F. SVENGALIS, LEGAL INFORMATION BUYER'S GUIDE & REFERENCE MANUAL 147-52 (2005) (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), available at http://access-to-law.com/elaw/readings/sven3_full.rtf; see also Julie Jones, *Lexis Joins Westlaw in Providing Access to Court Dockets*, U. CONN. L. SCH. (Dec. 18, 2009, 5:18 PM), available at <http://www.law.uconn.edu/content/lexis-joins-westlaw-providing-access-court-dockets> (implying that Westlaw provided docket access before Lexis).
205. Hoffman et al., *supra* note 52, 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. When Lexis emerged, it got started by hiring typists to copy Westlaw's cases into its own new database. See *id.*
206. A majority of law librarians share my preference. See J. Paul Lomio & Erika V. Wayne, *Law Librarians and LexisNexis vs. Westlaw: Survey Results*, STAN. L. SCH. LEGAL RES. PAPER SERIES, Paper No. 23, 21, Figure 20 (July 2008), <http://www.law.stanford.edu/publications/projects/lrps/pdf/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).
207. See Appendix 2. The search terms in Westlaw were: REMOVE! "ARISE UNDER" & REMAND! & "1441" "REMOVAL JURISDICTION" & ("FEDERAL QUESTION" "FEDERAL QUESTIONS"). The author performed the searches and distributed the resulting lists to her coders.
208. 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, *supra* note 180, at 1140 (describing "deliberately broad" search terms used to capture all decisions in a particular substantive area of law, employment discrimination).
209. 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

In PACER, the search included those civil cases designated as filed under § 1441 as “cause of action”²¹⁰ and “federal question” as “jurisdiction”.²¹¹ 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.²¹²

2. *Sample of Jurisdictions*

Because this study sought a snapshot of the implementation process, rather than a comprehensive catalog of opinions, the author started with a sample of federal-question decisions based on jurisdiction. To capture both sides of the circuit split resolved in *Grable*, the author chose courts on each side of the split. The study focuses on the Fourth and Seventh Circuits because the Fourth and Seventh had the longest-running jurisprudence on each side of the *Merrell Dow* split.²¹³ Those two circuits also happen to have busy courts, offering a large pool of decisions to investigate.

Within PACER, the author began with a more limited sample from the district courts due to the intense labor necessary to search dockets. Specifically, the author started the PACER coding with the busiest district court in each circuit according to the U.S. Courts

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.

210. See PACER manual, *supra* note 186, 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”).
211. 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.
212. 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, *supra* note 180, 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”).
213. 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)).

Administrative Office statistics.²¹⁴ By investigating the dockets in each circuit's busiest district, the author hoped to get a snapshot of how the PACER decisions align with those available on Westlaw.

Because this study looks at *Grable's* clarification of *Merrell Dow*, the author 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 all courts in the Fourth and Seventh Circuits, as well as cases from the two district courts (Northern District of Illinois and Eastern District of Virginia) available only on PACER, adjudicating jurisdiction over embedded federal questions between January 1, 2002 and December 31, 2008. The decisions included in the database were coded for, among other things, their source (Westlaw or PACER), their disposition on the embedded federal-question jurisdictional issue, and their level of depth (whether a simple order or a reasoned explanation).²¹⁵

After culling the irrelevant Westlaw decisions from the search results and sifting through thousands of dockets to identify the additional remand decisions, 416 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

The author examined the picture of embedded federal-question precedents litigants would see through conventional research methods—using a commercial database—and compared that view with the whole picture of decision-making available through docket research.

214. See Appendix 1: Selection Criteria for Sample District Courts.

215. 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. The author has neither the technology nor the inclination to study that currently.

One trend the study unearthed in the two sampled districts is that a relatively small number of embedded federal-question jurisdiction decisions made it into the Westlaw database: about 42% of the decisions in the whole sample were available on Westlaw and the remaining 58% were available only on PACER.²¹⁶ The decisions exclusively on PACER the author refers 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.²¹⁷ Referring to docket decisions as submerged precedent also avoids confusion over the changing definition of “published” versus “unpublished” decisions.²¹⁸

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.²¹⁹ Where previous studies have sampled publication and/or docket decisions in particular areas of substantive law,²²⁰ or the habits of particular jurisdictions,²²¹ this study

216. For the Northern District of Illinois, for example, the search captured thirty-four decisions in Westlaw from January 1, 2004, through January 1, 2008, and eighty-one decisions in PACER for the same period.

217. *See, e.g.*, Siegelman & Donohue, *supra* note 180 (describing published opinions as the iceberg’s tip and unpublished opinions as the iceberg’s remainder); *see also* Hoffman et al., *supra* note 52, at 687 (acknowledging the same idea).

218. *Compare* Siegelman & Donohue, *supra* note 180, at 1138 (defining “published” as available on Lexis), *and* Levin, *supra* note 45, at 985 (same), *with* Siegelman & Donohue, *supra* note 180, at 1138 (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).

219. *See generally* Hoffman, et al., *supra* note 52, at 687–90 (surveying studies).

220. *See, e.g.*, Ringquist & Emmert, *supra* note 180 (comparing policymaking aspects of published and unpublished decisions in environmental civil litigation, 1974–91); Siegelman & Donohue, *supra* note 180 (employment discrimination cases generating Lexis opinions versus those filed, 1972–86); Songer, *supra* note 181 (comparing reversal rates of published and unpublished district court decisions in a sample of criminal, antitrust, and labor cases from 1976–84).

221. *See, e.g.*, Olson, *supra* note 180 (comparing District of Minnesota cases available on microfiche versus databases, 1982–84); Reynolds & Richman, *supra* note 218 (comparing published and unpublished circuit court decisions).

focuses on a particular procedural juncture and begins to cut across jurisdictions.²²²

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.²²³ Out of the 4,310 cases filed in the sample, an average of 71% generated an opinion of some kind picked up by Lexis.²²⁴ Siegelman and Donohue concluded that this 29% of cases not appearing in Lexis could make Lexis decisions an unrepresentative sample.²²⁵ While my sample of embedded federal-question removals was much smaller, the higher rate of decisions not appearing in Westlaw (58%) suggests a similar, or perhaps greater, potential for sample bias in commercial database cases. Further, the expansion 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.²²⁶ In Siegelman and Donohue's study, the Northern District of Illinois had a comparatively high publication rate for civil cases,²²⁷ suggesting that the rate of submergence in other districts may likely be even greater than the rates observed here. The 58% 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 case. 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 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 implemen-

222. *Cf.* Reynolds & Richman, *supra* note 218 (comparing published and unpublished circuit court decisions).

223. Siegelman & Donohue, *supra* note 180, at 1139.

224. *Id.*

225. *Id.* at 1144.

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

227. *Id.*

tation 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 clarification. 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.²²⁸ 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.²²⁹ And the Westlaw editorial team makes further selections from the available cases.²³⁰ In addition, the commercial databases collect decisions periodically from PACER, including in the database those decisions of "substance" and discarding "procedural orders."²³¹

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, 23.75% of the submerged decisions had reasoned explanations, as opposed to bare orders.²³²

228. See Levin, *supra* note 45, at 985.

229. See, e.g., *id.*, at 986–88.

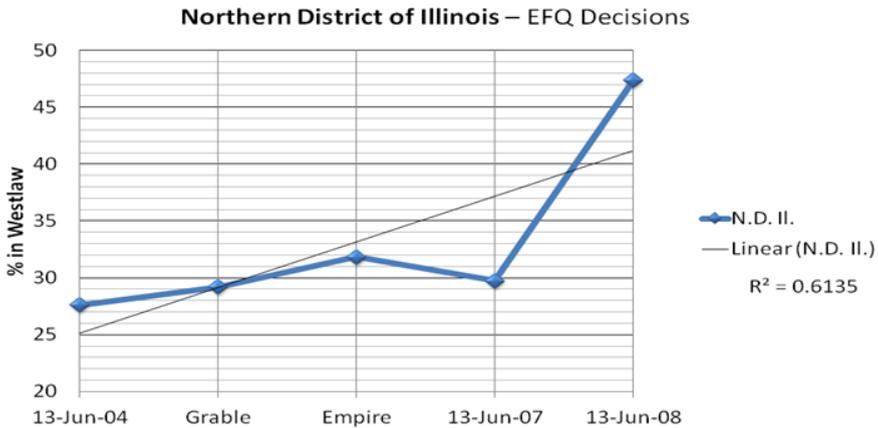
230. See generally Olson, *supra* note 180, at 784–87 (describing the database collection and editorial process as of 1992).

231. See Correspondence from Kirc J. Breissing, Dir. of Prod. Planning, LexisNexis, to Elizabeth Y. McCuskey, Faculty Fellow, Thomas Jefferson Sch. of Law (Aug. 31, 2011) (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").

232. 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. Data on file with author.

The proportion of submerged cases to database cases varied slightly over time. As illustrated below in Figure 1, the proportion of decisions available in Westlaw increased slightly in the Northern District of Illinois the year before *Grable* and the year after. The proportion then decreased during the year following *Empire*, as more decisions were submerged. But, in the second year after *Empire*, the proportion in Westlaw dramatically increased, by around 18%. The more dramatic increase in Westlaw availability corresponds roughly with the April 24, 2007 issuance of the Seventh Circuit's opinion in *Bennett v. Southwest Airlines*²³³—the first Seventh Circuit opinion applying *Grable*. This raises the possibility that the district court became more comfortable offering opinions for public consumption after receiving guidance from its appellate court.

Figure 1



This overall rise in the number of cases captured in Westlaw bears some similarity to Siegelman and Donohue's observations that the percentage of employment discrimination cases filed with a decision included in Lexis rose over time.²³⁴ Although the reason for the strong upward trend in their data remained unclear, the authors speculated that it could reflect increased collection efforts by the databases.²³⁵ They posed, however, that the trend more likely reflected new complexity in the law, making judges more likely to write opinions.²³⁶ With the embedded federal-question data, the source of

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

234. Siegelman & Donohue, *supra* note 180, at 1140–41 fig.1

235. *Id.* at 1140.

236. *Id.* at 1141 n.23 (citing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 358–60 (1985)).

the upward trend is similarly unclear, but could also reflect the courts' comfort level with the new precedent,²³⁷ their emerging awareness of new precedent,²³⁸ or their desire to explain the application of new rules.

More important to the litigant-centric clarity model, however, is the overall small percentage of decisions available in Westlaw: 42%. Excluding docket research therefore excludes almost three out of every five decisions. This selection could be harmless. Or selection could be non-random, producing a biased picture of remand. The relevant question is whether submerged precedent changes the picture of remand rates. Perhaps, instead of an iceberg, the duck metaphor is more apt, with a calmly gliding body visible above the surface belies frenetic paddling below it.

C. District Court Remand Rates

Grable solidified its jurisdictional test and upheld jurisdiction because the Court held that it would “portend only a microscopic effect on the federal-state division of labor” to do so.²³⁹ 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? The author looked to the rate of remand before and after *Grable* to help answer these questions.

The Administrative Office of the Courts calculates the rate of removal across all district courts. 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.²⁴⁰ The Administrative Office 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.

237. Cf. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 832 (2010) (arguing that, because *Twombly*'s new test was unprecedented, it destabilized the pleading system and that, “In seeking restabilizing guidance, one naturally looks to procedural experience for some help,” which was not available).

238. Cf. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009) (identifying phenomenon of reliance on overridden precedents in employment discrimination cases).

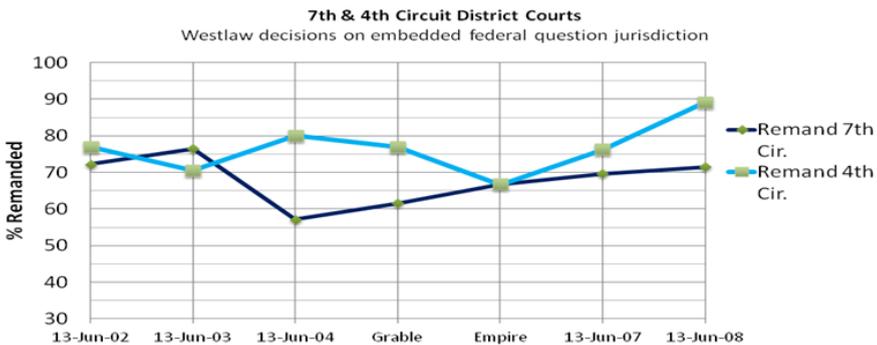
239. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 315 (2005).

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

1. *Westlaw Remand Rate*

Looking only above the surface at the district court decisions in Westlaw, the rate of remand calculated as of June 13 of each year shows the movement before and after *Grable* (June 13, 2005)²⁴¹ and *Empire* (June 15, 2006).²⁴² Figure 2 illustrates that in the year after *Grable*, the district courts in the Seventh Circuit, whose restrictive interpretation *Grable* rejected, actually *increased* the percentage of remands. Intuitively, this is surprising because *Grable* ostensibly broadened the pool of acceptable federal questions by eliminating the cause-of-action requirement. The district courts in the Fourth Circuit, whose interpretation *Grable* upheld, saw a *decline* in remands. Again, this is intuitively surprising because *Grable* upheld the Fourth Circuit's more permissive and complex substantiality rule. In the year immediately following *Empire* both Circuits' district courts remanded a greater portion of claims—the Seventh Circuit's courts continuing an upward trend, and the Fourth Circuit's courts reversing a downward course.²⁴³

Figure 2



Considering the possibility that the remand rate reflected a change in the removal rate, rather than a reaction to *Grable* and *Empire*, I compared the slope of the national removal rate line against the remand rate lines for each year. This is somewhat a comparison of apples to oranges because the removal rate accounts for all substantive

241. *Grable*, 545 U.S. at 308 (decided June 13, 2005).

242. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006) (decided June 15, 2006).

243. In the Westlaw sample collected here, the Fourth Circuit district courts remand cases at a greater rate than the Seventh Circuit district courts, generally, with the exception of a brief inversion in 2002. This is largely true for the pre-*Grable* years, as well, during which the Seventh Circuit maintained a more stringent, bright-line rule requiring a private right of action for federal-question jurisdiction and the Fourth Circuit did not. All data on file with author.

bases across all district courts, but the remand rates account only for embedded federal-question removals in the Fourth and Seventh Circuit's district courts. The national removal rate can, however, at least suggest whether the embedded federal-question remands correspond to national trends.

The national removal rate, as detailed in Appendix 4, Table 3, has remained fairly static in recent years. I expected to see a spike in removals after *Bell Atlantic Corp. v. Twombly*,²⁴⁴ issued on May 21, 2007, and *Ashcroft v. Iqbal*,²⁴⁵ issued on May 19, 2009, as defendants rightly perceived an increased advantage in dismissing claims from federal court.²⁴⁶ 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 3.

The author 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 Westlaw remand rates seen in this study, therefore, do not appear to correspond with the Administrator's data on removals or civil filings, generally.

2. PACER Remand Rates

But, perhaps more interestingly, the rate of remand based on decisions available in Westlaw paints a different picture than the submerged precedent in PACER tells about what really happened in the district courts. The author first isolated the Westlaw results for the busiest district courts, then compared those results with the courts' submerged precedent from PACER.

Looking only at the available Westlaw decisions as reflected in Figure 3, the Northern District of Illinois increased remands after *Grable* and decreased them after *Empire*. Then, for the same court, isolating the submerged precedent in Figure 3, the *opposite* is true again: 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

244. 550 U.S. 544 (2007).

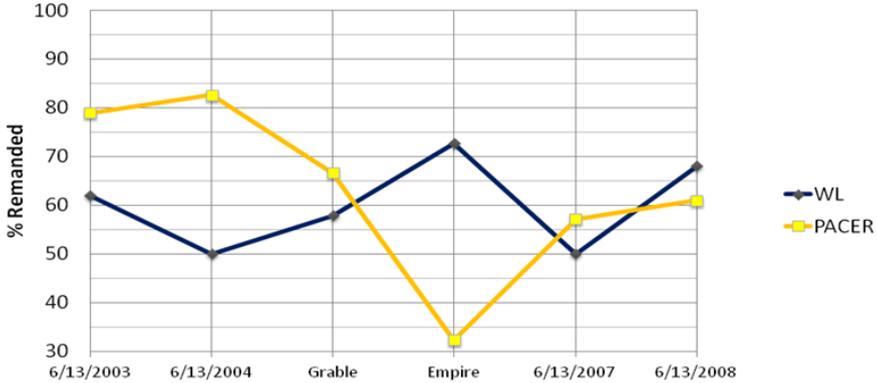
245. 556 U.S. 662 (2009).

246. See Hatamyar, *supra* note 44 (concluding that *Twombly* has increased dismissal rates in federal courts, especially dismissals with leave to amend). Compare Patricia W. Hatamyar, *An Updated Quantitative Study of Iqbal's Impact on 12(B)(6) Motions*, 46 U. RICH. L. REV. 603 (2012) (concluding that *Iqbal* also increased dismissals, especially in civil rights cases), with Joe S. Cecil et al., *Motions to Dismiss for Failure to State a Claim After Iqbal*, FED. JUDICIAL CTR., 21 (Mar. 2011), [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).

proportion of decisions to exercise jurisdiction ended up submerged in PACER.

Figure 3

Northern District of Illinois – Westlaw v. PACER



The author found these results counterintuitive because she 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.²⁴⁷

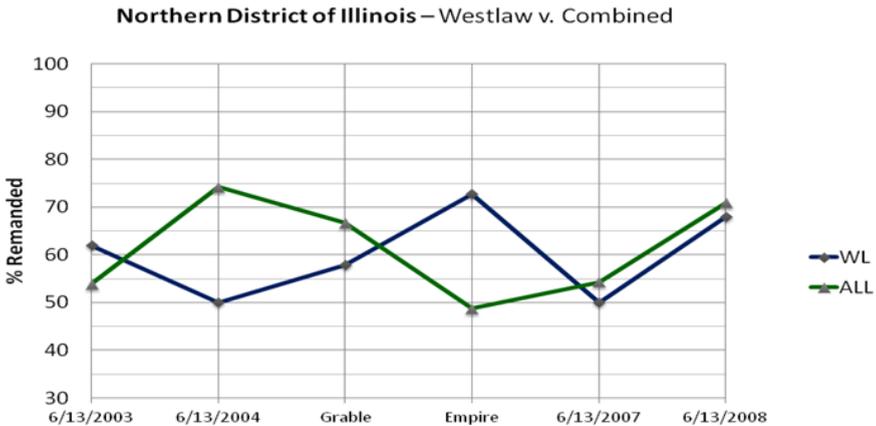
3. True Remand Rates

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 4. There further appears to be an uptick in re-

247. 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. Data on file with author. Interestingly, data from the Eastern District of Virginia shows *some* trends similar to those observed in the N.D. IL sample. The Eastern District of Virginia data are currently under analysis and will be made available shortly.

mands after *Empire's* reminder to keep *Grable* “slim.”²⁴⁸ Comparing 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 that the inclusion of submerged precedent affects the accuracy of the remand picture at any given moment in time, especially during times of uncertainty.

Figure 4



Averaged over the whole time period sampled, however, the Westlaw remand rate and the true remand rate converged. The Northern District of Illinois’s Westlaw rate of remand, averaged over 2004–2007 was 57.58% remanded, while the true rate of remand for the same period was 58.56%. The average rate of submergence remains comparable based on outcome (between decisions to remand versus those exercising jurisdiction): 29.23% of the remand decisions from 2004–2007 in the Northern District are available in Westlaw. From the same period, 30.43% of the decisions *not* to remand are available in Westlaw. This suggests that trends in remand rates in the years immediately after intervening Supreme Court precedent are more susceptible to bias from submerged precedent than long-term calculations are.

Although docket data “are more reliable than data drawn from reported decisions,” they still “are hardly immune to biases.”²⁴⁹ This data analysis currently suffers from small sample size and does not test or isolate why the submerged and surface precedent tell these

248. *Empire* was issued June 15, 2006. See *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006).

249. Burbank, *supra* note 188, at 617.

contrasting stories. But it does suggest that it makes a difference where you look for trends in precedent. My study thus adds yet 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 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."²⁵⁰

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.

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 the Fourth and 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.

250. Levin, *supra* note 45, at 989.

Review of the circuit courts' PACER dockets showed no submerged precedent at the appellate level.²⁵¹

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 the author's searches gathered was its paucity. Less than 6% of the embedded federal-question decisions are 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 41.44% of all the district court decisions reviewable (based on the 58.56% true rate of remand averaged out over the study period, calculated above). So the appellate decisions in my sample represent only a small portion of all *reviewable* decisions.

These few words from the appellate courts may ring loudly in the district courts' ears, however. Plotting the remand data from the district courts with the timing of the appellate decisions, in Figure 5, 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 v. Southwest Airlines Co.*²⁵²

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.²⁵³ Curiously, the increase in the remand rate begun after *Empire* increases somewhat more rapidly, seen in Figure 5, then declines after a remand opinion from the Seventh Circuit. The snapshot taken in this sample suggests, then, 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, the author turned to one measure of whether *Grable* enabled courts and litigants to make more accurate predictions on jurisdiction: reversal rate.

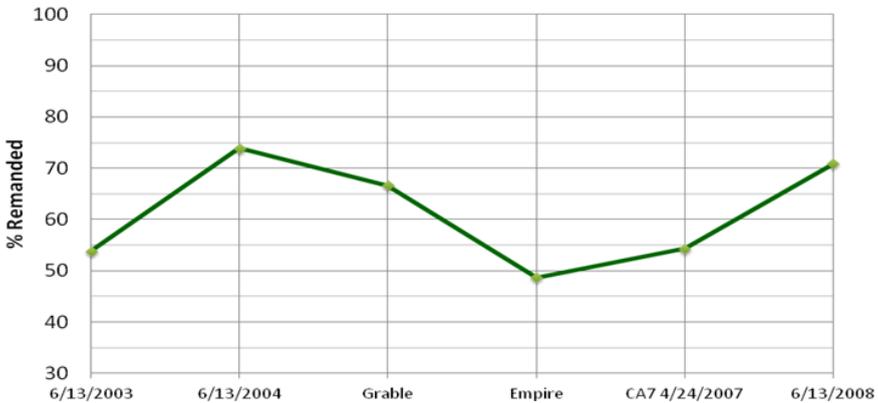
251. Westlaw and Lexis make all appellate opinions available electronically, with the exception of those from the Fifth and Eleventh Circuits. See Levin, *supra* note 45, at 984–85; Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005); 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). Appendix 2 describes observed differences in the publication rate for the two Circuits sampled, see *infra* App. 2.

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

253. *Id.* 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 910–11.

Figure 5**Northern District of Illinois**

All embedded federal question decisions



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.²⁵⁴ 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.²⁵⁵ Comparing this reversal rate to the 12.4% reversal rate in 2004 in private non-habeas civil cases,²⁵⁶ he concluded that embedded federal-question doctrine “is more lacking in coherence than other areas” of civil law.²⁵⁷ 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 made 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.²⁵⁸ First, Preis compared jurisdictional reversals, under de novo review, to reversal rates for question under all stan-

254. Preis, *supra* note 41, at 165.

255. *Id.*

256. See Table B-5, U.S. Courts of Appeals—Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending March 31, 2004, <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2004/tables/B05Mar04.pdf>.

257. Preis, *supra* note 41, at 166.

258. *Id.* at 165–66, 176–77

dards.²⁵⁹ Preis acknowledged that 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.²⁶⁰ Although noting that the de novo reversal rate likely is higher than the 12.4% combined rate, Preis nonetheless concluded that “substantial” federal-question reversal rate is likely much higher than other cases subject to de novo review.²⁶¹

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.²⁶² Further, the Administrative Office’s statistics for appeals terminated on the merits show that the publication rate for the terminating opinion was 19% in 2004²⁶³ (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 2010.²⁶⁴ His sample is under-inclusive of those unpublished opinions. The higher publication rates among the few

259. *Id.* at 165–66.

260. *Id.* at 165.

261. *Id.* at 165–66.

262. 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* App. 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.”). The author’s 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.*, 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)).

263. Table S-3, U.S. Courts of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission During the 12-Month Period Ending September 30, 2004, <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).

264. Table S-3, U.S. Courts of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2010, <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).

embedded federal-question cases my study unearthed raises the possibility that the under-inclusion could be between 12% and 23%, as opposed to the 81% suggested by the Administrative Office's data.²⁶⁵ 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 1986–2006) from all circuits.²⁶⁶ In my study, the very small number of decisions from the Fourth and Seventh Circuits from 2003–2008 makes it impossible to calculate reversal trends with any confidence. In the Fourth Circuit, only eleven opinions issued over those six years, with some years having zero decisions by the appellate court. The Seventh Circuit issued only eight opinions over six years. With so few decisions, it is difficult to make any useful comparisons between years (most years had no opinions) 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 decisions²⁶⁷ for the 2003–2009 period, a total of only forty-three opinions. After *Grable*, the district courts' decisions were reversed 52.5% of the time.²⁶⁸ Over time, as illustrated in Figure 6, the rate of reversal declined after *Grable* and continued to decline after *Empire*. Through the entire period, however, reversals increased slightly.

Some of the appellate decisions reviewing embedded federal-question jurisdictional issues obliquely reviewed district orders *remanding* claims. While substantive review is prohibited, appellate courts do have occasion to look at a remand order while determining whether the district court made the right decision on an issue of attorney's fees.²⁶⁹ 28 U.S.C. § 1447(c) provides plaintiffs' attorney's fees incurred in fighting removal as a remedy for removals deemed by the district court to have been frivolous. Removals are deemed frivolous and warranting fees only "where the removing party lacked an objectively reasonable basis for seeking removal."²⁷⁰ On appeal from the grant or denial of a request for attorney's fees accompanying a remand, courts review the jurisdictional issue under an abuse of discre-

265. See *supra* note 263.

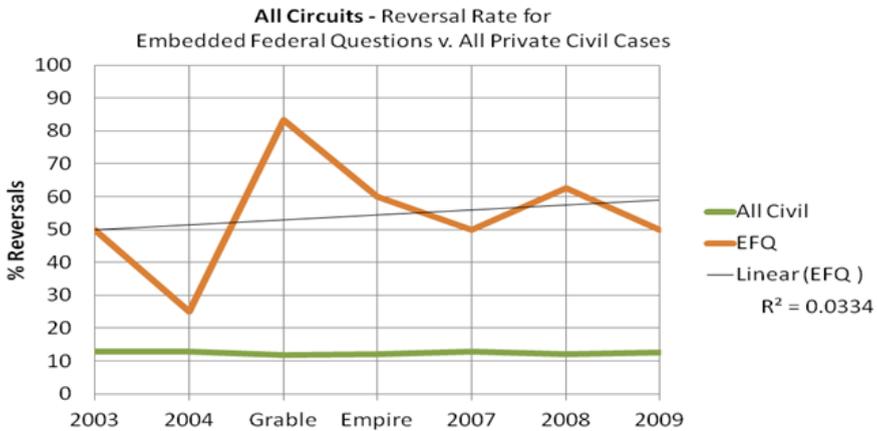
266. Preis, *supra* note 41, at 166.

267. 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.

268. And 72% of the opinions were published. Data on file with author.

269. *E.g.*, Hart v. Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan, 360 F.3d 674 (7th Cir. 2004).

270. Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005).

Figure 6

tion standard.²⁷¹ Due to this different standard, I did not include the fee-award opinions in the reversal calculations.

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, with higher portions submerged immediately after Supreme Court modification of a rule, and more available opinions following Circuit court guidance. 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

271. *Id.*

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 58% of the federal-question jurisdiction decisions remain submerged, only available on PACER.²⁷² This means that 58% of the decisions are practically invisible to litigants calculating jurisdiction. Commercial database research in at least one of the two private commercial databases has become not only *de rigeur*, but also required to establish professional competence and avoid Rule 11 sanctions.²⁷³ So litigants must, and courts should, search for predictive precedent in a database. What they will find there includes all those opinions selected for inclusion in a national reporter,²⁷⁴ 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 217. 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 “include[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 52, at 692 & n.30.

similar legal issues.²⁷⁵ 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.²⁷⁶ 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 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.²⁷⁷

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. The databases are intentionally designed to streamline collection of cases based on a range of detailed topics.²⁷⁸ Within those 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.

275. See BLACKS LAW DICTIONARY (9th ed. 2009) (defining precedent as “[a] decided case that furnishes a basis for determining later cases involving similar facts or issues”).

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. 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).

PACER, by contrast, is comprehensive, but not text-searchable, multi-jurisdictional, or indexed as finitely, so lugubrious for legal-issue searches, as opposed to case-identifying information. As Hillel Levin described it, to effectively search PACER, “one would have to know what to look for in order to find it.”²⁷⁹ 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 genre²⁸⁰ and the statute supplying jurisdiction.²⁸¹ 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.

Until the federal courts decide to make PACER text-searchable (perhaps for a budget-enhancing fee),²⁸² I am not advocating that litigants routinely search PACER in addition to their chosen private database. For one thing, I doubt that litigants would care to add PACER 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 PACER fees incurred.²⁸³ This also might not make sense because many of the decisions in PACER do not offer reasoned explanations.

Alternatively, Westlaw could simply include all decisions made available on PACER.²⁸⁴ This full availability in a text-searchable format would “fully resolve the transparency problem” identified by Hillel Levin.²⁸⁵ Further, it would not require more work for district judges, “it only requires them to make public that which they already

279. Levin, *supra* note 45, at 985.

280. PACER manual, *supra* note 186, at 83 app. A. .

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

282. Levin, *supra* note 45, at 1001 (“In an ideal world, opinions on PACER would be text-searchable and access would be free.”)

283. 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.

284. Levin, *supra* note 45, at 1000 (noting that until PACER becomes text-searchable, “meanwhile, LEXIS and Westlaw should recognize the value of all opinions and should choose to include them all in their online databases”).

285. *See* Levin, *supra* note 45, at 996. Levin also deftly handles potential criticisms of loading all decisions onto Westlaw. *Id.* at 997–98.

write.”²⁸⁶ In many instances, it seems that simply checking a box on the ECF system could bring these existing opinions to the surface because the commercial databases appear to collect cases by gathering those tagged as “Written Opinions” in PACER.²⁸⁷

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.²⁸⁸

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.²⁸⁹ 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 questions²⁹⁰ 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.²⁹¹ Courts have taken them up on the offer. It seems a fair bargain, then to ask for a

286. *Id.* at 1000.

287. See Correspondence from Kirc J. Breissing, Dir. of Prod. Planning, LexisNexis, and Laura Gaddis, LexisNexis Research Specialist, to Elizabeth Y. McCuskey, Faculty Fellow, Thomas Jefferson Sch. of Law (Aug. 31, 2011) (on file with author).

288. Burbank, *supra* note 188; Hoffman et al., *supra* note 52; Kim et al., *supra* note 180; Levin, *supra* note 45.

289. See Hoffman et al., *supra* note 52, at 693.

290. 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, *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 (1995) (discussing choice of law).

291. See Wasserman, *supra* note 171, at 93, 130–32.

few more hours explaining the decision in exchange for the weeks, months, even years of work saved by remanding.²⁹² Plus the time invested in explanation would be an investment in precedent—a public resource.

While the conventional wisdom about Westlaw containing 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 authority. Buoying this precedent above the surface could be considerably less work and may simply involve pressing a button.

PACER 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.”²⁹³ 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.”²⁹⁴ 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.²⁹⁵

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.”²⁹⁶ 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 likely 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.

292. 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.

293. PACER Manual, *supra* note 186, at 61.

294. *Id.*

295. *Id.*

296. Reynolds, *supra* note 291.

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 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 reveals both the extent to which those reviewing courts reach for relief from § 1447(d)'s prohibition.²⁹⁷

The ideal clarifying mechanism would both offer 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.²⁹⁸

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' re-

297. 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.*, 129 S. Ct. 1862, 1869–70 (2009) (Breyer, J., concurring).

298. 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. Daimler Chrysler 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).

quest and the circuit courts' discretion.²⁹⁹ Second, and most recently, James Pfander proposed direct review of remand orders by the Supreme Court through invocation of the Court's supervisory powers.³⁰⁰

Based on my study observations, Wasserman's discretionary circuit review proposal may present the greatest opportunity for clarification by marshalling the directive powers of the circuit courts to clarify close cases.³⁰¹ Pfander's suggestion of Supreme Court original writ review, offers the path of least resistance by relying on existing doctrine and circumventing rule changes.³⁰² But Supreme Court original writ review, necessarily focused on correcting clearly erroneous results, may undo patent injustice, but overlook those close cases so ripe for clarification.

1. Discretionary Circuit Review

Wasserman proposed 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.³⁰³ 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."³⁰⁴ 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."³⁰⁵

Section 1447(d) would likewise be amended to state that a jurisdictional remand is not reviewable except under § 1292(c).³⁰⁶ 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.³⁰⁷ 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

299. Wasserman, *supra* note 171, at 83.

300. Pfander, *supra* note 175.

301. Wasserman, *supra* note 171.

302. Pfander, *supra* note 175.

303. Wasserman, *supra* note 171.

304. *Id.* at 146.

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

306. *Id.* at 148.

307. *Id.*

the appeal to the circuit court's "sound judicial discretion."³⁰⁸ If accepted by the circuit court, the remand appeal would take priority over other "ordinary" civil cases and would forego oral argument.³⁰⁹

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."³¹⁰ The § 1292(b) option does not erode 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, culturally, the courts of appeals have exercised their absolute discretion to accept a very small portion of the interlocutory issues presented for review.³¹¹

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 jurisdiction³¹²—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,"³¹³ § 1292(c) tailors 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.³¹⁴

308. *Id.* at 149.

309. *Id.* at 150.

310. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006).

311. *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).

312. And some empirical testing found that cases containing non-ministerial orders were more likely to be federal-question cases. *Hoffman et al.*, *supra* note 52, at 711.

313. And "that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ." 28 U.S.C. § 1292(b) (2000); *see Taylor v. PPG Indus., Inc.*, 256 F.3d 1315, 1317 (Fed. Cir. 2001) (Mayer, J., dissenting).

314. A third proposition by Andrew Bradt similarly pours new wine into old bottles to achieve appellate review of remand orders. *See Bradt*, *supra* note 77, 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 de-

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.³¹⁵ The Pfander plan combines resort to the Supreme Court’s supervisory powers to correct serious errors via original writ with a textual interpretation of 28 U.S.C. § 1447(d) as entirely prohibiting other forms of appellate review.³¹⁶ 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.”³¹⁷ That is, resort 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.³¹⁸

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).”³¹⁹

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.³²⁰ This mechanism would allow review even of remands for lack of subject-matter jurisdiction, which are currently beyond the circuit courts’ power.³²¹ The Supreme Court would thus offer clarification by directly addressing a claimed district court

velopment 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.

315. Pfander, *supra* note 175, at 493.

316. *See id.* at 500–01.

317. *See id.* at 499.

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

319. *Id.* at 509 n.83.

320. *Id.* at 514.

321. 28 U.S.C. § 1447(d) (2000).

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.³²² 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.

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.³²³ 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."³²⁴ 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.³²⁵

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.³²⁶ 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."³²⁷

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

322. *Id.* at 516.

323. *See id.* at 515–16, 532 n.188; *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 352–53 (1976).

324. *See* SUP. CT. R. 20.1; Pfander, *supra* note 175, at 516, 518–20.

325. Pfander, *supra* note 175, at 516 n.116.

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

327. *Id.* at 541.

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 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 driven the reversal rate down, not 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 precedents. 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.

VI. TABLES & APPENDICES

APPENDIX 1:

SELECTION CRITERIA FOR SAMPLE DISTRICT COURTS

The study presented here examines a very modest sample of district court decisions within the Fourth and Seventh Circuits. The author selected the busiest district court within each Circuit for sampling based on the United States Courts Administrative Office statistics. The author chose the district court with the highest number of private civil cases filed, as averaged over the fiscal years 2002–2008.³²⁸

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.³²⁹

Table 1: Busiest Districts in the 7th Circuit

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

In the Fourth Circuit it was a closer race for busiest court between the Eastern District of Virginia and the District of South Carolina, as detailed in Table 2.³³⁰ The calculation excluded fiscal year 2004, in which the District of South Carolina had an outlying 22,532 filings, more than 19,000 of which were statutory actions filed by two plaintiffs related to personal property damage that involved high-risk mortgage loans to consumers.³³¹ The calculation also excluded fiscal year 2002, in which the Eastern District of Virginia had an outlying 9,415 filings due to a surge in asbestos cases filed there. The more than

328. See, e.g., Table C-3, U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District during the 12-Month Period Ending March 31, 2002, <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).

329. See, e.g., *id.*

330. See, e.g., *id.*

331. See *2004 Judicial Business*, ADMIN. OFFICE OF U.S. COURTS 15–16 (2004), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/front/JudicialBusiness.pdf>. These filings accounted for as much as an 83 percent increase in filings in the district and were so numerous that they affected the national civil filing rate, as well. *2005 Judicial Business*, ADMIN. OFFICE OF U.S. COURTS 11 (2005), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2005/front/judicialbusiness.pdf>.

5,000 asbestos cases filed in the E.D.Va. in FY 2002 accounted for 22% of the cases filed in all district courts that year.³³² Excluding these unrepresentative years, the Eastern District of Virginia edged out the District of South Carolina.³³³

Table 2: Busiest Districts in the 4th Circuit

<i>District</i>	<i>Private civil cases 2003</i>	<i>2005</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>	<i>TOTAL</i>	<i>Yearly Average</i>
E.D.Va.	4,109	3,587	3,329	2,927	2,528	16,480	3,296.00
D.S.C.	3,217	3,263	2,917	3,014	4,004	16,415	3,283.00

APPENDIX 2:

REMAND RATE CODING INFORMATION AND VARIABLE

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, the author searched Westlaw for the following search terms: REMOV! “ARISE UNDER” & REMAND! & “1441” “REMOVAL JURISDICTION” & (“FEDERAL QUESTION” “FEDERAL QUESTIONS”). The author performed the searches and distributed the resulting lists to her 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 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.³³⁴

332. See FY 2002 Admin. Off. Jud. Bus. Ann. Rep., at 17 (2002).

333. If those outlier years are included, the D.S.C. has the highest average at 6,118 and the E.D.Va. has the second-highest average at 4,254. If only those single-subject cases are excluded in 2002 and 2005, then the E.D.Va. has the highest average at 3,540 and the D.S.C. has the second highest average at 3,404.

334. The small numbers of results for appellate cases in the sampled jurisdictions made meaningful analysis of rates and their fluctuations over time nearly impos-

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, the author 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)

We coded first for the amount of explanation in the decision. We coded as “order” those decisions simply announcing the outcome without stating the reasons for it and/or referring only to the reasons stated in briefs or at argument. Decisions that also stated the legal rule, cited authority, and gave an explanation of the rule’s application to the instant case were coded as “opinion.”³³⁵

sible. To get a better snapshot of clarity through reversal rates, the author 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.

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 52, 693. Similarly, Hillel Levin defined “opinion” with reference to the decision’s import and thus includes every decision under the term “opinion.” Levin, *supra* note 45 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. The author’s study results support her definition,

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.

The author 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 the author compared the results to gauge inter-coder agreement, using Cohen’s *kappa*.³³⁶

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.³³⁷ Responding to litigant frustration and academic criticism,³³⁸ the Advisory Committee on the

as described below, because she 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, *Citing Unpublished Federal Appellate Opinions Issued Before 2007*, FED. JUD. CENTER, (Mar. 9, 2007), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Unpub_Opinionspublic/pdf.nsf/lookup/citrules.pdf/\\$file/citrules.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Unpub_Opinionspublic/pdf.nsf/lookup/citrules.pdf/$file/citrules.pdf).
338. See Reynolds & Richman, *supra* note 218; 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); Comm. on Rules of Practice & Procedure, *Meeting of June 17-18, 2004, Washinton, D.C.: Minutes*, U.S. COURTS, 9 (June 2004), available at <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

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.³³⁹

For decisions before January 1, 2007, the Fourth Circuit local rule restricts citation,³⁴⁰ and the Seventh Circuit local rule flatly prohibits it.³⁴¹ As detailed in Tables 3 and 4, 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).³⁴² While the Fourth Circuit has the more lenient rule between the two, it also has a much lower publication rate of 7.08%, which is 9.89% lower than the national circuit average.³⁴³

Table 3: Federal Appellate Court Publication Rates³⁴⁴

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

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 4TH CIR. R. 32.1 (allowing citation only if “there is no published opinion that would serve as well” for a material issue in the case); see also Reagan, *supra* note 10 to App. 3.

341. 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 Foa, *supra* note 192 (expressing skepticism of publication plans); Reagan, *supra* note 10 to App. 3 (noting that the Seventh Circuit prohibits citations to unpublished opinions and the Fourth Circuit discourages citations to unpublished opinions).

342. See *infra* Tables 3 & 4.

343. See *infra* Tables 3 & 4. The Fourth Circuit’s unusually low publication rate is documented in Reynolds & Richman, *supra* note 218.

344. Stats for this table were compiled from the Administrative Office of the Courts. *E.g.*, Table S-3, U.S. Courts of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2005, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2005/tables/s3.pdf> (providing the statistics for the fiscal year of 2005).

Table 4: Fourth & Seventh Circuit Publication Rates³⁴⁵

CA4 YEAR	Publish Rate %	% Difference
2005	8.2	-10.2
2006	6.3	- 9.6
2007	7	- 9.5
2008	7.7	-10.5
2009	6.3	-10.5
2010	7	- 9
TOTAL	7.08	- 9.88

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 five years in the era of restrictive local rules, the author 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,³⁴⁶ 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%.

In the Fourth Circuit, three of the eleven embedded federal-question decisions in the study period were excluded from the Federal Sup-

345. Stats for this table were compiled from the Administrative Office of the Courts. *E.g.*, Table S-3, U.S. Courts of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2005, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2005/tables/s3.pdf> (providing the statistics for the fiscal year of 2005).

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

plement,³⁴⁷ and two of those three were issued prior to the 2007 rule change, rendering them unciteable. The 72.7% publication rate observed in this small sample of embedded federal-question decisions dwarfs the Fourth Circuit's overall average publication rate of 7.08%.³⁴⁸

APPENDIX 4:

REMOVAL RATE IN ALL DISTRICT COURTS

Table 5: Civil Filings and Removals in all District Courts (2000–2008)³⁴⁹

	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	80.8	-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. *See supra* note 209.

347. *See In re Mills*, 287 F. App'x 273 (2008); *Freeman v. Duke Power Co.*, 114 F. App'x 526 (2004); *Forrest v. Transit Mgmt. of Charlotte*, 93 F. App'x 577 (2004).

348. *See supra* note 344.

349. Compiled from data provided by the Administrative Office of the U.S. Courts. *See, e.g.*, Table S-7, U.S. District Courts—Civil Cases Filed, by Origin, During the 12-Month Periods Ending September 30, 2004 Through 2008, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/tables/S07Sep08.pdf> (providing total civil filings for years 2004–08); Table S-7, U.S. District Courts—Civil Cases Filed, by Origin, During the 12-Month Periods Ending September 30, 2000 Through 2004, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/tables/s7.pdf> <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2005/tables/s3.pdf> (providing total civil filings for years 2000–04).