

SUBMERGED PRECEDENT

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INTRODUCTION

The American civil justice system serves both individual and social interests by adjudicating disputes and establishing a system for resolving conflicts under law. Court decisions—the tangible products of that system—can play both private and public roles, telling feuding litigants who is right while offering reasoning available for posterity in the body of precedent. This article scrutinizes the public nature of precedent, inquiring which decisions remain confined to private parties’ knowledge and which are made available for public consumption. Most broadly, the investigation presented here questions what role a decision’s accessibility should play in our system of precedent and how technological evolution can drive—and be driven by—precedent’s animating principles.

Theory and empiricism inform the pursuit of answers to these questions. This article begins with empirical examination. Drawing from a sample of federal district court decisions, the study presented here focuses on “submerged precedent”—reasoned opinions available only on court dockets, and not on the Westlaw and Lexis commercial databases.

These submerged precedents exhibit the hallmark of “precedent” in that they contain reasoned elaborations of the bases for a court’s decision. Submerged precedents often contain reasoning in greater length, depth, and intricacy than their visible counterparts in Westlaw or Lexis. Yet these precedents buried on dockets are effectively “submerged” from plain view, like the portion of an iceberg below the ocean’s surface. Submerged precedent, for example, encompasses a federal district court’s 1,240-word opinion deeply analyzing whether a contractual forum-selection clause may prospectively waive the right to contest removal jurisdiction.¹ Westlaw, by contrast, includes a 525-word opinion from a different circuit on this topic, but does not include the more deeply-reasoned district court opinion or direct guidance from that district’s circuit.²

Submerged precedent, in a practical sense, is reserved solely for those who know it exists, namely the parties to that case and extraordinarily intrepid re-

¹ *Omnicare, Inc. v. Walgreens*, No. 08-cv-03901 (N.D. Ill. Sept. 25, 2008) (reprinted in Appendix 1).

² *Ocwen Orlando Holdings Corp. v. Harvard Property Trust, LLC*, 526 F.3d 1379 (11th Cir. 2008); *cf. Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014) (7,229-word opinion on enforceability of particular clause for venue dismissal). Westlaw also contains some other district court opinions of similar length, as well as many much shorter and more fact-specific decisions on other topics. *See, e.g., Brown v. Press Repair Eng’g Sales & Serv., Inc.*, No. 8:08-cv-1115-T-23TGW, 2008 WL 5263748 (M.D. Fla. Dec. 17, 2008) (1,133-word order); *see also, e.g., PGT Trucking, Inc. v. Lyman*, 500 F. App’x 202 (3d Cir. 2012) (731 words, including discussion of appellate review); *Cornus Corp. v. GEAC Enter. Sols., Inc.*, 356 F. App’x 993 (9th Cir. 2009) (285 words); *Spectracom, Inc. v. Tyco Int’l, Inc.*, 124 F. App’x 75 (3d Cir. 2004) (1,190-word opinion, writing “only for the parties”).

searchers employing grueling docket-based search techniques to find these opinions. Submerged precedent's visible counterparts in Westlaw and Lexis, by contrast, fulfill both private and public functions in conveying decisions for parties, as well as providing referents for future parties and courts.

While the high-profile debate rages over appellate courts' designation of opinions as "unpublished" and therefore non-precedential,³ the study of submerged precedent presented here identifies a deeper layer of "unpublication" in district courts—one that not only limits public *use* of court opinions, but largely prevents public *knowledge* of those opinions' existence. All reasoned appellate opinions are open to public view through Westlaw and Lexis, and thus are available for citation in future cases and the kind of comparison that has sparked controversy. The current debate at the appellate level no longer questions public *access* to unpublished opinions, but now centers on appellate courts' prerogative to label those opinions prospectively as fit for future precedential *use*. Submerged precedent, by extension, identifies a mass of opinions obscured from public view, and therefore practically restricted from public use or even comparison.

Numerous studies have pointed to the skewed picture of trial courts' workload, management, and disposition of cases that exists from examining Westlaw and Lexis opinions alone, akin to navigating the iceberg from its tip.⁴ But submerged precedent pushes docketology in an uncharted direction by identifying a mass of reasoned *opinions*—putative precedent and not mere evidence of decision-making—that exist only on dockets. Submerged precedent thus raises the specter that docket-based research may be necessary in some areas to ascertain an accurate picture of *the law itself*, not just trial courts' administration of it.

The existence of a submerged body of reasoned law carries the potential to destabilize our system of precedent and undermine the system's animating principles of fairness, efficiency, and legitimacy by obscuring decisional law. To investigate whether these threats to the precedential system from submergence have materialized, this article presents an analysis of a sample of opinions: remand decisions from two district courts over seven years, all adjudicating federal-question removals of state-law claims. The study found that 30 percent of all reasoned opinions are submerged on dockets (and 44 percent of all decisions contain no reasoning at all). Looking purely at outcome measures (whether to grant or deny remand), the existence of submerged precedent distorts the picture of remand rates. In this sample, for example, reasoned opinions concerned with

³ See *Plumley v. Austin*, 547 U.S. ___ (2015) (Thomas, J., dissenting) (criticizing use of the "unpublished" label); Adam Liptak, *Courts Write Decisions that Elude Long View*, N.Y. TIMES (Feb. 2, 2015), <http://www.nytimes.com/2015/02/03/us/justice-clarence-thomas-court-decisions-that-set-no-precedent.html> [<https://perma.cc/9ECS-82G9>] (reporting on the debate over unpublished opinions).

⁴ See generally William M. Richman, *Much Ado About the Tip of an Iceberg*, 62 WASH. & LEE L. REV. 1723 (2005) (identifying opinions published in reporter volumes as the iceberg's tip and unpublished opinions as the remainder); 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) (same).

Employee Retirement Income Security Act (ERISA) federal questions remanded the case 63.67 percent of the time. Looking only in Westlaw, the remand rate drops to 46.67 percent, while 100 percent of the submerged cases were remanded.

Beyond just outcome measures, submerging reasoned opinions from public view carries the potential to skew the substantive law and permit inequitable adjudication. Although the small sample gathered here raises far more questions than it has the power to answer, several factors appear relevant to submergence: structure of legal tests, managerial discretion, party sophistication, and insulation from appeal.

Given these observations, there may be an ideal role for submerged precedent to play. As technology democratizes access to court opinions and eliminates traditional justifications for selective publication in bound volumes, these reflections on the balance between submergence and availability acquire even greater urgency. The E-Government Act of 2002 mandated online public access to federal courts' "written opinions,"⁵ catalyzing the federal courts to digitize their dockets and build the Public Access to Court Electronic Records (PACER) database for public access.⁶ BloombergLaw has added a more facile docket search interface for a fee, and the United States Government Printing Office has just branched out into free online access to court opinions through an FDSys pilot project. Yet the march toward unfettered public access to court decisions thus far has sidestepped thoughtful consideration of the interplay between technology, access, and precedent theory, while tacitly permitting submergence of reasoned opinions.

This article responds to this unique moment in the evolution of precedent and the recently-rekindled national debates over precedential values. The analysis proceeds in three parts. Part I surveys the existing empirical evidence about decision-making in district courts and describes the methods for collecting this data set. Part I then establishes the defining features of the submerged precedent identified in this data and compares the sample of district court decisions in Westlaw to those available only on dockets. By this comparison, the study reveals possible forces behind submergence and the potential for inequity and skew in the substantive law these opinions apply.

Part II illustrates submerged precedent's implications for precedent theory and for district courts' role in shaping law. Part II first anchors submerged precedent in precedent doctrine, explaining how submerged precedent's defining features reflect the doctrine's broader systemic goals of efficiency, predictability, and legitimacy. Part II then theorizes the threats that submergence may pose to

⁵ E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899 (2002).

⁶ PACER stands for Public Access to Court Electronic Records. PUB. ACCESS TO CT. ELECTRONIC RECORDS, <https://www.pacer.gov> [<https://perma.cc/9H3J-H4B4>] (last visited Nov. 13, 2015) [hereinafter PACER]. The PACER database provides public access to docket information and documents filed in each federal district and appellate court. *Id.*

those goals and highlights the unique institutional roles that district court opinions play.

Proceeding from Part I's empirical observations and Part II's theoretical foundations, Part III outlines submerged precedent's ideal role. In considering the optimal level of submergence, Part III considers technology's democratizing influence on the future composition of—and interface with—a civil justice system based in precedent. Ultimately, this project concludes that submerged precedent's existence should inform procedural and practical choices affecting the body of decisional law available to the public that it is intended to serve, suggesting that submerged precedent's debut here should presage its demise.

I. DIVING FOR PRECEDENT: OPINIONS OUT OF VIEW

The core subject of this project, “precedent,” has inspired a complex taxonomy⁷ that requires definition before discussion. This article's eponymous new species of precedent, “submerged precedent,” refers to opinions available only on court dockets, beyond the view of conventional research.⁸ I begin by briefly defining each term in the phrase.

I invoke here a broad definition of “precedent,” based on doctrine, rather than hierarchy. In this project, I use the term “precedent” to refer to any written decision supported by reasoned elaboration, commonly known as “opinions.”⁹ Reasoned elaboration long has been considered precedent's defining feature,¹⁰ and supplies a decision's potential utility in deciding future cases. This definition of precedent thus covers written opinions with some potential utility, but without regard to the authoring court's ability to bind future courts.¹¹ Crucially, this definition includes federal district court opinions, which do not formally bind other

⁷ Hillel Levin aptly describes the multilayered categorizations of precedent as a “sophisticated taxonomy.” Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1037 (2013); see also, e.g., Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460–62 (2010) (detailing “A Lexicon of Precedent”).

⁸ Elizabeth Y. McCuskey, *Clarity and Clarification: Grable Federal Questions in the Eyes of Their Beholders*, 91 NEB. L. REV. 387, 427 (2012).

⁹ See *Free Written Opinions*, PACER SERV. CTR. (Oct. 2005), <http://www.pacer.gov/announcements/quarterly/qa200510.pdf> [<https://perma.cc/NU79-MG35>] (promoting the Judicial Conference definition for “written opinion” as any decision with accompanying “reasoned explanation”); see also Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1334–35 (2008) (highlighting the role of reasoned elaboration in judicial legitimacy).

¹⁰ See, e.g., K. N. LLEWELLYN, *THE BRAMBLE BUSH* 158 (2d ed. 1951) (“[W]here the reason stops, there stops the rule.”); GLANVILLE WILLIAMS, *SALMOND ON JURISPRUDENCE* 223 (11th ed. 1957) (“The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large.”); see also *Precedent*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“An action or official decision that can be used as support for later actions or decisions; esp., a decided case that furnishes a basis for determining later cases involving similar facts or issues.”); *infra* Part II.A.

¹¹ E.g., Dobbins, *supra* note 7, at 1460 (defining “precedent” as “any prior decisions that might be deemed to have some positive utility in deciding later cases”).

courts.¹² Still, district court opinions offer considerable utility as persuasive precedents, as discussed more fully in Part II, below. This project therefore focuses on the reasoned opinion as putative “precedent.”

The utility of reasoned elaborations as precedent, however, depends functionally on the opinions’ accessibility for future courts and litigants. The study presented here found a mass of reasoned opinions available only on court dockets, and not available on Westlaw, or Lexis. These putative precedents are essentially submerged from public view and therefore excluded from consideration among the body of precedential law. I refer to them as “submerged” precedent, describing the decisions’ relative obscurity by alluding to the portion of an iceberg below the water’s surface and thus invisible to the eye.¹³

With the reasoned opinion as the building block for the precedential system, effectively excluding some portion of those blocks from use thus carries at least the potential to skew or destabilize the system itself.¹⁴ To tackle some soaring questions about operationalizing precedent doctrine, this article begins with empirical observation on the ground. The study presented here investigates which reasoned decisions are reserved for the parties’ consumption and which also are available for posterity’s use as precedent. The remainder of this Part describes the method used to collect and sample these submerged precedents in light of prior studies, and then compares the submerged precedents to those opinions available in Westlaw. Part II will connect these observations to precedent doctrine.

A. *Navigating District Court Decisions*

This project aims to contribute to empirical understanding of removal jurisdiction in the federal district courts, and ultimately to open a broader discussion connecting the realities of public access to precedent’s doctrinal foundations. Initially, this project sought to study how district courts handled federal-question jurisdiction remands before and after Supreme Court resolution of a circuit split, which poses the question of where and how to begin. The methodologies for studies of district courts are often far less straightforward than for appellate

¹² *Id.* at 1461–63.

¹³ *See, e.g.,* Siegelman & Donohue, *supra* note 4 (describing formally published opinions as the iceberg’s tip and unpublished opinions as the iceberg’s remainder; using statistical analysis to reveal significant differences between published and unpublished employment discrimination opinions); *see also* David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 687 (2007) (acknowledging the same idea); Richman, *supra* note 4. For submerged precedents, see McCuskey, *supra* note 8, at 390, 427.

¹⁴ *See generally* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004).

courts, owing to institutional differences between the courts.¹⁵ Fortunately, studies of district courts now can build on a burgeoning wealth of empirical evidence about procedure and decision-making that has sharpened scholarly knowledge of both, as well as evolved the methods for studying them.

Three major methodological considerations have emerged in district court studies. First, the study of district courts demands that research identify which of the courts' numerous functions will be relevant to the inquiry—for district courts adjudicate merits, fact, and procedure, as well as manage, delegate, and direct.¹⁶ It has been suggested that researchers can obtain the most accurate picture of district-court functioning only through docketology—inclusion of non-opinion data and documents like orders, settlements, pleadings, and the troves of other information about cases revealed from their docket sheets.¹⁷ Figuring out what function to study is thus an important inquiry.

Second, research must identify what products or data points likely will yield information about the chosen district-court function. Even a singular focus on the core function of “deciding”—as in this project—belies significant heterogeneity in district court work. District courts decide a multitude of issues ancillary to a case's merits,¹⁸ and may decide on a case's ultimate disposition multiple times under a variety of standards, procedures, and predicates.¹⁹

District courts' decisions also take many forms including opinions, orders oral statements on transcripts, or even letters to the parties.²⁰ “Written opinions,” defined by the Judicial Conference as all decisions accompanied by “reasoned elaboration,” are the decisions that offer the most public value.²¹ But many cases produce no decisions, many decisions produce no written record, and many written decisions contain no reasoning. As workloads have increased in the past three decades,²² district court judges managing more cases and disputes have less time

¹⁵ Pauline T. Kim et al., *How Should We Study District Judge Decision-Making*, 29 WASH. U. J.L. & POL'Y 83, 94 (2009) (“In short, judging on the federal district courts is fundamentally different from appellate judging.”).

¹⁶ See Hoffman et al., *supra* note 13, at 682; Kim et al., *supra* note 15, at 90–94.

¹⁷ See Hoffman et al., *supra* note 13, at 682.

¹⁸ Such as discovery disputes, admissibility rulings, requests for oral argument, and even scheduling. See Kim et al., *supra* note 15, at 90.

¹⁹ Such as judgments on the pleadings under Rules 12(b)(6), 12(c), and 50(a), and judgments on both pleadings and evidence under Rules 56 and 50. Christina L. Boyd, *Opinion Writing in the Federal District Courts*, 36 JUST. SYS. J. 254, 258, 265 (2015). See generally Oldfather, *supra* note 9.

²⁰ See FED. JUDICIAL CTR., JUDICIAL WRITING MANUAL, 2–3 (1991), [http://www.fjc.gov/public/pdf.nsf/lookup/JudiWrit.pdf/\\$file/JudiWrit.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/JudiWrit.pdf/$file/JudiWrit.pdf) [<https://perma.cc/4AWS-UVLN>] (outlining considerations for federal judges on when to write a “full-dress” published opinion, a memorandum opinion, an unpublished opinion, or a summary order).

²¹ See *Free Written Opinions*, *supra* note 9.

²² Cf. Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 25 (1996); Mitu Gulati & C.M.A. McCauliff, *On NOT Making Law*, 61 L. & CONTEMP. PROBS. 157, 158 (1998) (investigating workload and opinion-writing

to devote to the discretionary task of opinion writing, which would generate potential precedents, as well as useful data.²³ And judges select very few of the opinions they do take the time to write for inclusion in the printed reporters.²⁴

In the study of district court decisions, then, it matters *what* you search for and *where* you look—the third consideration. Just focusing on the single function of “deciding” requires consultation of orders (available only on dockets) and opinions (available on dockets and mostly on commercial databases) to make holistic observations about outcomes.²⁵ If you care about the bases for decisions, then you should consult opinions, which might be published in reporters (i.e., “reported” decisions)²⁶ or might not. And these reported and unreported opinions are housed in various places—chiefly in the federal courts’ PACER docket database and the leading commercial electronic databases, Westlaw and Lexis.

It is well-documented that district-court opinions selected for the print reporter volumes (the Federal Supplement and Federal Rules Decisions) may not be representative of decision-making, and that therefore reliance solely on reported decisions to study judicial behavior risks biased results.²⁷ Nor do reported opinions represent all of *the law* from a doctrinal standpoint because precedential

in the federal appellate courts; starting from the fact that “[t]here has been a dramatic increase in the federal appellate caseload since the 1960s, estimated at as much as 1000%.”)

²³ See generally Boyd, *supra* note 19.

²⁴ See generally *id.*

²⁵ See, e.g., Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 147 (2007) (“Thus, it seems that, for now, the only accurate method to determine whether summary judgment has supplanted jury trial as the dominant method of federal dispute resolution is to conduct docket research.”); McCuskey, *supra* note 8, at 422–23.

²⁶ I call them “reported” because they are in a Reporter, rather than “published,” which has a constantly-shifting usage.

²⁷ 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 13, 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.”); Lizotte, *supra* note 25, at 108, 146 (“[P]ublished opinions represent an incomplete and distorted view of actual summary-judgment activity in the federal trial courts;” “researchers cannot rely on Lexis and Westlaw to estimate the incidence of summary-judgment practice in the federal courts.”); Peter Siegelman & John J. Donohue, *supra* note 4, at 1133 (employment discrimination cases); see also, e.g., Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213, 234–36 (2009) (noting that the “vast majority of . . . opinions remain unpublished” and advising that “future scholars should not continue to ignore the rich source of information available in unpublished opinions.”); Kim et al. *supra* note 15, at 86 (outlining how researchers should take “advantage of the electronic docketing system now operating in all federal district courts.”); Boyd, *supra* note 19, at 271 (explaining that legal and institutional constraints on decision-making become observable “once we move away from studying published outcomes and only highly salient cases in district courts.”); McCuskey, *supra* note 8, at 433–35 (tracing remand rates through docket data).

potential is defined by reasoning and hierarchy, rather than availability.²⁸ At least at the district court level, all opinions—reported or unreported—carry the same initial potential to supply precedent because use of and citation to any opinion is fair game.²⁹ Publication in a reporter simply signals the authoring judges' and West editors' view that an opinion may have greater import or power to persuade than other opinions on the issue.³⁰

Once a district court exercises its discretion to write a reasoned opinion, Westlaw and Lexis capture all of the opinions designated for reporter publication and now capture most, but not all, of the unreported opinions. Among opinions (as opposed to decisions in all forms), Westlaw thus over-represents those selected for the reporters, the potential for selection bias.³¹ Issue-by-issue and district-by-district, however, Westlaw's collection percentage varies.³² Several prior studies of decisions found Westlaw's reported and unreported opinions were close to representative of the entire body of decisions on certain measures, minimizing the risk of biasing results on those particular topics.³³

These observations, coupled with electronic docketing, have enabled researchers to study district courts from large, deep data sets. Recent studies have

²⁸ See Part II, *infra*.

²⁹ This is in contrast to several Circuits' rules stating that only opinions designated as "precedential" may be considered precedent in that court. See generally, Kim et al., *supra* note 15; Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217 (2006). Cf. FED. R. APP. P. 32.1.

³⁰ See Lizotte, *supra* note 25, at 140–42.

³¹ See Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127, 131–32 (2012) (identifying potential selection bias based on past studies). Cf. Boyd, *supra* note 19 at 261–62 (explaining that collection through commercial electronic databases, even when guided by PACER docket sheets, "errs on the side of undercounting the presence of opinions—by its very nature, it does not include [sic] written orders that have not been classified as opinions.").

³² See Lizotte, *supra* note 25 at 130–38.

³³ Those topics include *Twombly* dismissals, for example, Dodson, *supra* note 31, at 134–35 (explaining that Westlaw databases may be "probative" in the study of Rule 12(b)(6) decisions and that even if Westlaw databases are unrepresentative, "it is not at all clear that they over represent dismissals"); dispositive motion decisions in complex cases, for example, Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement*, 29 J.L. ECON. & ORG. 898, 908 n.13 (2013) (using hand-collected data from Westlaw's Trial Pleading Database based on "reason to believe that the Westlaw-drawn data," as opposed to raw docket data, "do allow [the authors] to get as close as is practical" to a true sample of veil-piercing complaints in federal courts); and ideology expressed in opinions, for example, Keele et al., *supra* note 27, at 228, 233 (studying 479 opinions involving the U.S. Forest Service, identified through dockets, and explaining that "[i]deology was not significantly associated with district court judges' decisions in either published or unpublished opinions.").

illuminated the influences, processes,³⁴ and practical results of district court decision-making,³⁵ often in the context of dispositive motions.³⁶ Despite academic consensus on including both reported and unreported cases, and the statistical power that large data sets can offer, each new study presents some innovation on methods for collecting and sampling decisions. And each new study justifies its inclusion and methods in terms of the specific substantive or procedural iceberg studied, suggesting that consensus on the standard for accessing district court decisions remains elusive.³⁷

³⁴ Boyd, *supra* note 19 at 257–58 (identifying legal and institutional constraints on district judges’ decision whether to write opinions); Boyd & Hoffman, *supra* note 33 at 905 (identifying influence of various information exchanges on the likelihood of settlement). *See generally* Christina L. Boyd, *The Hierarchical Influence of Courts of Appeals on District Courts*, 44 J. LEGAL STUD. 113 (2015) (providing insight into how judging significantly differs by court level); Chad M. Oldfather et al., *Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship*, 64 FLA. L. REV. 1189 (2012) (employing automated content coding to assess appellate court opinions’ responsiveness to parties briefing); *cf.* Christina L. Boyd et al., *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, 10 J. EMPIRICAL LEGAL STUD. 253 (2013) (using cluster analysis to identify patterns in presentation of pleadings).

Bert Huang and Tejas Narechania developed a particularly useful and unique data set of Illinois state appellate opinions, which, although not directly relevant to federal district courts, sheds fascinating insight into courts’ publication of opinions. *See* Bert I. Huang & Tejas N. Narechania, *Judicial Priorities*, 163 U. PA. L. REV. 1719 (2015).

³⁵ The impact of *Twombly* and *Iqbal* has been particularly piquant. *See, e.g.*, Jill Curry & Matthew Ward, *Are Twombly & Iqbal Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH L. REV. 827 (2013) (using empirical study to dispute supposition that plaintiffs would file more frequently in notice-pleading states after *Twombly*); Dodson, *supra* note 31 (studying the effect of *Tw-Iqbal* on dismissal of claims for legal or factual insufficiency); David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013) (offering a critique of then-existing empirical studies of *Twombly*); Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. (forthcoming 2016) (studying plausibility pleading from the summary judgment standpoint and illustrating the potential immeasurability of any quality-screening effects from *Twombly*); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 8 VA. L. REV. 2118, 2138 (2015) (examining more than 4,000 motions to dismiss decisions culled from PACER dockets).

³⁶ *See generally, e.g.*, Burbank, *supra* note 27 (summary judgement); Lizotte, *supra* note 25 at 132–38 (summary judgment); articles cited *supra* note 35 (motions to dismiss).

³⁷ By contrast, judges and practitioners have reached de facto consensus that legal research may competently be done by consulting Westlaw or Lexis alone. *See* McCuskey, *supra* note 8 at 441 (discussing Rule 11 competence standards for legal research). This practitioner consensus is based on professional standards of competence, like Federal Rule 11 and ABA Model Rule 1.1, that seek only the “thoroughness . . . reasonably necessary for the representation,” not for scientific, statistical, or holistic conclusion. MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 1983). Notably, these professional standards are satisfied as long as the lawyer competently looks wherever his adversary and the presiding judge would look in that particular case. *See* Lawrence D. MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers’ Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 612–17 (2000). Yet the volume of available law makes conventional research a substantial endeavor. *See id.* The judicial consensus is reflected in the broad deference to “professional competence” in the judicial code of conduct.

Against this rich empirical backdrop and rising tide of decision data, this article turns to doctrinal questions about the body of law being developed under these influences and processes and to a study of removal jurisdiction. Particularly, this project raises several questions about the remand opinions *not* collected by the commercial electronic databases—the opinions I call submerged precedent—and their impact on the precedential system and those it serves most urgently: courts and practitioners.

B. *Choosing an Iceberg*

This project samples only one iceberg in the vast sea of legal precedents: remand decisions in embedded federal-question removals. Embedded federal question removals are those in which the defendant alleges that one or more state-law claims filed against him turn on a substantial question of federal law and thus qualify for federal-question jurisdiction under 28 U.S.C. § 1331 and the Supreme Court’s synthesis in *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*.³⁸ In *Grable*, the Supreme Court resolved a circuit split over the scope of embedded federal-question jurisdiction, holding that the existence of a federal private right of action was relevant to, but not dispositive of, the federal question’s requisite substantiality.³⁹ The Court’s prior opinion in *Merrell Dow v. Thompson* had concluded that:

the congressional determination that there should be no federal remedy for the violation of [a] federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently ‘substantial’ to confer federal-question jurisdiction.⁴⁰

Several Circuits had interpreted *Merrell Dow* to forbid embedded federal-question jurisdiction unless the federal statute in question had a private right of action, while others treated it as simply a plus factor in the “substantial[ity]” analysis.⁴¹ *Grable* clarified that, “*Merrell Dow* should be read . . . 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.”⁴²

I collected the data employed here for an earlier project looking at remand outcomes before and after *Grable*’s moment of clarity.⁴³ In that data collection, I attempted to collect all remand decisions from a sample of district courts on either side of the circuit split *Grable* resolved in the three years before and after *Grable* to get a snapshot of the decision-making landscape.⁴⁴ I just wanted a solid

³⁸ *Grable & Sons Metal Prods. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005).

³⁹ *Id.* at 314.

⁴⁰ *Merrell Dow Pharm. v. Thompson*, 478 U. S. 804, 814 (1986).

⁴¹ *See Grable*, 545 U.S. at 314.

⁴² *Id.* at 318 (quoting *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 810 (1986)).

⁴³ McCuskey, *supra* note 8.

⁴⁴ *See id.* at 453–54 (Appendix 2: Remand Rate Coding Information & Variables).

count of outcomes (percent remanded) before and after. My method for collecting these data and some features I observed in it prompted this second project.

Grable decisions, as a procedural topic, do not necessarily make an ideal sample from which to study precedent, for reasons discussed below. But this data set still offers some insight into the availability of district court decisions and potential impacts on the development of precedent.

The *Grable* data set contains 185 decisions from two district courts (the Northern District of Illinois and Eastern District of Virginia) in cases filed between January 1, 2002 and December 31, 2008. I initially selected these two districts based on their established positions on either side of *Grable*'s circuit split and their relatively high case loads, hoping to draw a good number of decisions.⁴⁵

In my effort to capture all instances of *Grable* decisions in these courts, I sought every case in which the issue was decided in whatever manner, suspecting that some number of *Grable* decisions would be memorialized in orders or statements too short to be included in Westlaw or Lexis's commercial databases. I did, however, only attempt to capture observable decisions—those written in some form.⁴⁶ My collection therefore used a docket-based approach, rather than a random sampling from Westlaw. Using PACER and the BloombergLaw interface with PACER, I collected dockets for every case meeting the following criteria: (1) filed between January 1, 2002 and December 31, 2008 and (2) docketed under 28 U.S.C. § 1441 removal as “cause of action” and “federal question” as the basis for jurisdiction.⁴⁷

I culled the dockets to capture only those cases in which the court actually decided an issue of *Grable* jurisdiction in the context of removal and remand. By reading the docket entries and underlying documents, I therefore excluded all instances in which the court never reached the jurisdictional question,⁴⁸ and those that adjudicated jurisdiction over federal claims, as opposed to state-law claims.

I then compared the set of decisions culled from dockets to those decisions captured by a Westlaw search.⁴⁹ I searched Westlaw's databases containing each

⁴⁵ See *id.* at 418–26 (describing data collection).

⁴⁶ By setting the outer boundary at *written* decisions, I have excluded those reasoned decisions announced orally and all reasoning confined solely to the decision-maker's mind. The concept of precedent is not confined to written work. See generally Oldfather, *supra* note 9 (offering a thorough and incisive exploration of decisions *whether* to write an opinion at all). Nor is precedent defined by publication or availability, though publication and availability play pivotal roles in bringing precedent to courts' and litigants' attention.

⁴⁷ 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.

⁴⁸ For example, if the case settled before resolution of a remand motion, or had no remand motion at all.

⁴⁹ See McCuskey, *supra* note 8, at 424. Satisfied with the parity between Westlaw and Lexis, I chose only one database for efficiency. See *id.* (tracing the evolution of the competing databases and their functionally identical case content). Of the two, I chose Westlaw based on my experience and some historical factors. See *id.*

district court for embedded federal-question decisions during the sampled time period and cross-referenced the results with my docket list.⁵⁰ This sifting produced 185 unique decisions.

Each of the 185 decisions included in the data set was coded for the following fields, among others:⁵¹

- Source (Westlaw / docket only)
- Depth (Order / Opinion)
- Publication (Published in a reporter / Not published in a reporter)
- Nature of Suit (PACER Code)
- Outcome (Remand / No Remand / Partial Remand)⁵²
- Judge (Name)
- Reliance on *Grable* factors (in reasoning).

For the Depth field, the coding relied on the Judicial Conference’s definition of “written opinion[.]” as “*any* document issued by a judge . . . that sets forth a reasoned explanation for a court’s decision.”⁵³ Thus decisions that supplied detailed reasoning for the result reached were coded as “opinions,” while simple statements of the result were coded as “orders.” Detailed reasoning had to include citation to and discussion of legal authorities and application to the instant complaint. Decisions relying only on the removal and jurisdiction statutes, parties’ briefing, or both, were classified as “orders.”

Those decisions not available in Westlaw but containing enough reasoning to satisfy the Judicial Conference’s definition of “written opinion”⁵⁴ constitute the *submerged precedent* at the heart of this project.

The labor involved in finding these submerged precedents is what *submerges* them from the view of conventional research. While decisions in Westlaw and Lexis are finely indexed, digested, tagged, and categorized by experts, the world of court dockets is not. PACER renders dockets and the documents on them available to the public for a per-page fee or for free.⁵⁵ But PACER is barely field-searchable and cannot search across jurisdictions or years. Relative to Westlaw

⁵⁰ See *id.* at 453. Using the search terms (REMOV! “ARISE UNDER” & REMAND! & “1441” “REMOVAL JURISDICTION” & (“FEDERAL QUESTION” “FEDERAL QUESTIONS”)) in the FED7-ALL database for the NDIL and FED4-ALL for the EDVa. *Id.* at 453. The Westlaw embedded federal question search did not produce any unique opinions—all were also docketed. Data on file with author.

⁵¹ For a detailed description of the coding process, see *id.* at 420–30, 453–55 (Appendix 2).

⁵² This study found no instances of “Partial Remand” among the 185 cases. Data on file with author.

⁵³ *Free Written Opinions*, *supra* note 9.

⁵⁴ See *id.*

⁵⁵ PACER, *supra* note 6. Except for court opinions tagged in PACER as “Written Memoranda” by the court. Those are free. See *Free Written Opinions*, *supra* note 9.

and Lexis, PACER remains quite raw. As Hillel Levin aptly described it, to effectively search PACER “one would have to know what to look for in order to find it.”⁵⁶

The sifting process is even more onerous with dockets because it requires an additional layer of review: discovering whether the court actually decided an issue involving embedded federal-question jurisdiction. While the docket sheet may have the requisite terms—“removal,” “remand,” and “federal question”—those terms may appear in the context of numerous activities other than a decision on the issue.⁵⁷ Notably, PACER makes a separate collection of those decisions tagged in its database as “Written Opinions.” PACER’s Written Opinions collection not only culls decisions from the myriad other docket items, but also makes those Written Opinions available for free, pursuant to a statutory directive from the E-Government Act of 2002.⁵⁸ None of the court orders and not every opinion are tagged as an Opinion, so a full count still requires docket research.

To aid my docket research, I searched some relatively new interfaces for PACER’s raw data: the BloombergLaw database and the United States Government Printing Office’s (GPO) FDSys collection. The recent introduction of BloombergLaw has coupled PACER’s content with a deeper search interface.⁵⁹ BloombergLaw enables the user to search multiple courts’ dockets and to conduct keyword searches for those dockets.⁶⁰ Even with Bloomberg, however, you still have to dig because court decisions represent a tiny fraction of all documents on dockets. BloombergLaw also does not update in real time with PACER, leaving out many very fresh dockets and entries.

The even more recent introduction of a federal court opinions collection from the GPO has expanded free availability of opinions, though it remains far from complete at this moment. The GPO, in a collaborative project with the United States Courts Administrative Office (USCAO), makes selected opinions from selected federal appellate, district, and bankruptcy courts available to the

⁵⁶ Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 985 (2008).

⁵⁷ And even a decision by the court is not guaranteed to reach the ultimate issue, even if it bears the search terms. As an example, one judge in the N.D. Ill. frequently issues a stock order days after a removal that dismisses the complaint “without prejudice to the filing of a timely motion to remand or the filing of a proper amended federal complaint” and requires the parties “to fully exhaust all settlement possibilities prior to filing any further pleadings.” Minutes, *Watson v. City of Chicago*, (N.D. Ill. June 30, 2008) (No. 1:08-cv-03581). This decision does not reach embedded federal question issues. And this disposition rarely is followed by the “timely motion to remand” or “amended federal complaint” it contemplates.

⁵⁸ E-Government Act of 2002, Pub. L. No 107-347, § 205(a)(5), 116 Stat. 2899 (2002).

⁵⁹ See *Dockets*, BLOOMBERG L., <http://www.bloomberglaw.com/dockets> [<https://perma.cc/S94B-EAEF>] (last visited Nov. 20, 2015).

⁶⁰ See *id.*

internet-going public for free on its Federal Digital System (FDSys).⁶¹ While the interface for this system is somewhat less technical than PACER, FDSys does not yet have a comprehensive collection.⁶² Happily for my purposes, however, FDSys does include the Northern District of Illinois and the years encompassed by my study, so I am able to check my results there and include password-free links to some opinions housed there.

Unlike PACER, FDSys contains only opinions, not full dockets, and FDSys allows keyword searches within the opinions across jurisdictions and years, as well as filtering results. It appears from anecdotal testing that the documents the GPO has collected on FDSys are opinions from PACER that the authoring judge has tagged for collection as a “Written Opinion.”⁶³ Although Westlaw and FDSys both appear to draw solely from those PACER “Written Opinion” collections, FDSys does include a very few submerged precedents and does not perfectly track Westlaw’s inclusion.⁶⁴

Finding court decisions and determining whether those docket entries contain a decision about embedded federal-question jurisdiction is more time-consuming outside the Westlaw and FDSys decision-only databases and without Westlaw’s guiding synopses and topical digests. In an effort to compare apples to apples to the greatest extent possible, my sample includes only decisions that directly address the issue of embedded federal-question jurisdiction.

So my small sample of submerged decisions belies a large effort in finding that sample. And that effort is the first part of the problem: that submerged precedents are effectively out of sight through all reasonable and conventional research. My docket searches⁶⁵ in Bloomberg and PACER yielded an average of 8.65 percent positive hits in the Northern District of Illinois dockets and 25.58 percent in the Eastern District of Virginia.⁶⁶ For example, my coder and I sifted

⁶¹ See *FDSys: United States Court Opinions*, U.S. GOV’T PUB. OFF. (GPO) <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=USCOURTS> [<https://perma.cc/T3Z6-R9WF>] (last visited Feb. 23, 2014).

⁶² See *id.* (including only forty-four district courts in a collection dating back to 2004).

⁶³ See, e.g., *Illinois v. McGraw-Hill Cos.*, No. 13-C-1725, 2013 WL 1874279 (N.D. Ill. May 2, 2013) (Memorandum Opinion and Order also available at http://www.gpo.gov/fdsys/pkg/USCOURTS-ilnd-1_13-cv-01725/pdf/USCOURTS-ilnd-1_13-cv-01725-0.pdf [<https://perma.cc/V7GT-JEVN>]); *Anco v. Acco Brands, Inc.*, No. 10-C-4275, 2010 WL 3034732 (N.D. Ill. Aug. 3, 2010) (Statement Opinion also available at http://www.gpo.gov/fdsys/pkg/USCOURTS-ilnd-1_10-cv-04275/pdf/USCOURTS-ilnd-1_10-cv-04275-0.pdf [<https://perma.cc/GB3Z-CRD9>]).

⁶⁴ See, e.g., *Clarke v. Cmty. Unit Sch. Dist. 303*, No. 11-cv-2210 (N.D. Ill. May 26, 2011), http://www.gpo.gov/fdsys/pkg/USCOURTS-ilnd-1_11-cv-02210/pdf/USCOURTS-ilnd-1_11-cv-02210-0.pdf [<https://perma.cc/28UL-KBFJ>]; McCuskey, *supra* note 8, at 427–30 (comparing coverage of online opinion-collection services). See generally Part III.B.

⁶⁵ I searched within the specified courts for docket text including “federal question” and “removal” and “remand” and reasonable iterations of those terms.

⁶⁶ A positive hit is a docket containing an actual decision about embedded federal-question jurisdiction. The resulting positive hits were distributed somewhat more evenly between the two districts with about 60 percent coming from Illinois and 40 percent from Virginia.

through 228 dockets and identified 27 decisions on embedded federal questions for 2008 alone.⁶⁷ This study currently includes seven years (2002–2008) and 185 decisions from dockets and Westlaw.

C. *The Submerged World*

I compared the docket decisions on embedded federal-question jurisdiction with those results available on Westlaw and tracked the various characteristics through the coding fields. This section uses that coding to compare the jurisdictional decisions submerged on court dockets with their more widely-available counterparts included in Westlaw.

1. *Opinions Versus Orders*

Looking purely at decisional outcomes (to remand or not), dockets make a difference in this study, as in others.⁶⁸ The overall remand rate in the Illinois court for this seven-year span was 76 percent remanded. In the decisions available on Westlaw, the remand rate was only 62 percent. In the decisions submerged on dockets, the remand rate was 85 percent, suggesting that Westlaw's overall picture of remand probabilities is rosier than the docketed reality across all categories. About 60 percent of all the *decisions* in the database were submerged on dockets, so the iceberg metaphor still holds true for remand decisions considered as a whole, including both explained opinions and unexplained orders.⁶⁹

Just over half of the decisions (56 percent) came with reasoned elaborations. The majority (70 percent) of those reasoned elaborations are available on Westlaw.⁷⁰ But nearly 30 percent of the reasoned explanations are available only on dockets. These submerged precedents—reasoned opinions available only on dockets—thus comprise 17 percent of all remand *decisions* and 30 percent of those *opinions* with putative precedential value in this sample, as reflected in Figure 1.

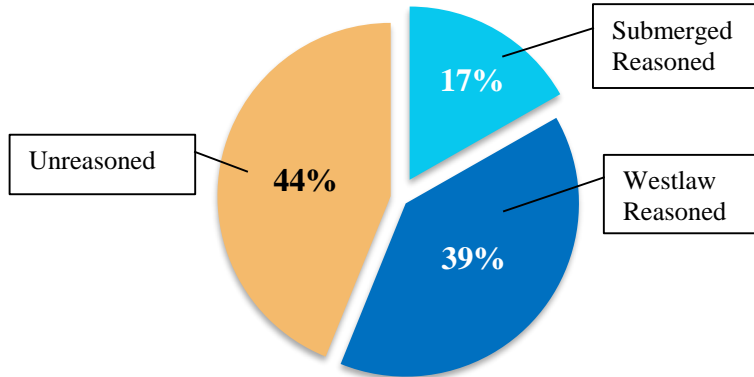
⁶⁷ In real numbers, this translates to, for example, 185 hits in Illinois for the year 2008, with 16 positive hits resulting. For the same year, Virginia had 43 hits with 11 positive hits resulting. The database covers 2002–2008.

⁶⁸ See, e.g., McCuskey, *supra* note 8, at 421 n.191, 439–40 (surveying other prior studies including docket data); Siegelman & Donohue, *supra* note 4 (employment law research involving dockets).

⁶⁹ In the Northern District of Illinois, the ratio was 60.65 percent to 39.35 percent. In the Eastern District of Virginia, the ratio was 58.33 percent submerged to 41.67 percent on Westlaw. See also McCuskey, *supra* note 8, at 440 (finding 60 percent submergence rate in previous analysis, as well). Brian Lizotte's study of 607 summary judgment grants similarly found that 60 percent of those grants had no corresponding entry in Westlaw or Lexis. Lizotte, *supra* note 25, at 129, 134. (describing the remaining 40 percent of decisions on Westlaw and Lexis as "available"). The Northern District of Illinois was among the courts in his study, with 52 percent of its decisions available, while the Eastern District of Virginia was not. *Id.* at 131, 144. Lizotte's study does not differentiate among bare orders and opinions, so does not calculate submergence of opinions.

⁷⁰ All of the decisions on Westlaw contain reasons.

FIGURE 1: REASONING IN ALL REMAND DECISIONS SAMPLED



To shift focus from mere outcomes to potential precedents, the remainder of this project compares reasoned opinions found in the submerged 17 percent with the Westlaw 39 percent, omitting the bare orders, which make up the remaining 44 percent of all adjudications.

2. *Substantive Law Applied*

The purpose of comparison here is to investigate whether submergence may influence the path of precedent by skewing the substantive law. At the appellate level, quantitative evidence exists “that publication decisions, when combined with [now mostly defunct] limited-citation rules, do affect the substance of precedential law.”⁷¹ But this small sample did not demonstrate the power to answer the question,⁷² because the decisions it captures were spread out over too many substantive areas. Deeper content analysis of the sample does, however, suggest the *potential* for submerged precedent to skew substantive law.

The types of cases raising embedded federal-question jurisdiction issues include a range of underlying substantive disputes. For an initial classification of the type of underlying dispute, the coding captured the Nature of Suit (NOS) numeric code associated with each docket, selected by the filing party at the time

⁷¹ Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 120 (2001); see also FED. R. APP. P. 32.1(a) (“A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions . . . designated as ‘unpublished’ . . . [or] ‘non-precedential’ . . .”). Although Rule 32.1 lifted the citation restriction in 2007, courts retain the power to designate certain opinions as “non-precedential.” See generally Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705 (2006).

⁷² See generally LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 159–65 (2014) (explaining use of p-value and α to measure confidence intervals).

of filing.⁷³ My sample captured decisions with 32 different NOS designations among PACER's 100 NOS codes.⁷⁴

The decisions are fairly spread out across the diverse categories.⁷⁵ Only a few codes have an observably higher portion of decisions in the collection: miscellaneous federal statutes (22.7 percent), ERISA (16.21 percent), miscellaneous civil rights (10.81 percent), miscellaneous contract (8.11 percent), airplane personal injury (4.32 percent), insurance (4.32 percent), and miscellaneous fraud (3.24 percent) cases.⁷⁶ Sorting by the subject-matter of the litigation reveals some superficial information about how embedded federal-question jurisdiction fares in that substantive context and whether those decisions are submerged.

Table 1, below, tracks the submergence rate and remand rate across these popular categories, illustrating this sample's diffusion and the small sample available in each nature of suit category (the *n*). Even the most populous category is "Miscellaneous Federal Statutes."

⁷³ See *Civil Cover Sheet*, U.S. CTS., <http://www.uscourts.gov/uscourts/FormsAndFees/Forms/JS044.pdf> [<https://perma.cc/AJW4-MKHP>] (last visited Nov. 16, 2015). On first filing in a federal district court, the filing party must fill out a Civil Cover Sheet form designating tracking and routing information for the clerk's office. The form requires the filing party to designate the single most appropriate "Nature of Suit" code describing the litigation. See *id.* ("If the cause fits more than one nature of suit, select the most definitive."); see also *Nature of Suit*, PUB. ACCESS TO CT. ELECTRONIC RECORDS, [hereinafter *PACER NOS Codes*], <http://www.pacer.gov/documents/natsuit.pdf> [<https://perma.cc/7LPN-ASH5>] (last visited Nov. 16, 2015). My coding simply accepts the removing defendant's selection of the single most appropriate code to describe the litigation. I did not compare the selected Nature of Suit code with the open-field "Cause of Action" information. But review of any resulting remand decision's content often helped establish a finer understanding of the dispute.

⁷⁴ The list includes 100 codes, several of which have now been eliminated. *PACER NOS Codes*, *supra* note 73.

⁷⁵ At the most general level of classification, I found approximately 19 percent labor, 15 percent civil rights, 13 percent torts, 12 percent contract, 3 percent intellectual property, and 1 percent each real property and habeas corpus cases. The remaining 33 percent was defined by particular federal statutes. *Id.*

⁷⁶ The remaining codes have less than 3 percent of the decisions, and often only one decision, associated with them. *Id.*

TABLE 1: SUBMERGENCE BY SUBJECT MATTER OF DISPUTES

Nature of Suit Code	<i>n</i>	Submergence Rate ⁷⁷	Remand Rate ⁷⁸	Remand Rate in Submerged ⁷⁹	Remand Rate in Westlaw ⁸⁰
Misc. Federal Statutes	42	73.68%	81.58%	89.29%	60.00%
ERISA	30	31.82%	63.64%	100.00%	46.67%
Misc. Civil Rights	20	72.22%	88.89%	100.00%	60.00%
Misc. Contract	15	54.55%	72.73%	83.33%	60.00%
Airplane Injury	8	62.50%	87.50%	100.00%	66.67%
Insurance	8	80.00%	80.00%	100.00%	0.00%
Misc. Fraud	6	50.00%	83.33%	100.00%	66.67%

Submergence varies widely among the most popular subject matters, with ERISA decisions being the most often collected by Westlaw. In each of these popular categories, Westlaw continues to paint a rosier picture of remand probabilities than submerged precedent does, with the exception of the Telephone Consumers Protection Act,⁸¹ which has a 100 percent remand rate in both Westlaw and submerged opinions.⁸² If, however, a party searched Westlaw for precedents in an ERISA or civil rights removal, it might appear from the case outcomes that he had a 50/50 shot at being remanded. If the same party looked at those opinions only available on dockets, he might conclude that remand is nearly certain. The truer outcome measure, therefore, would include both submerged and available opinions.

But parties and their lawyers rarely will care about outcome counts at this level of generality, and outcomes themselves do not contribute to precedent. Instead the reasoning behind those outcomes determines which are relevant to the calculation in any particular case and which are inapplicable. Only the quality and content of an opinion's reasoning can determine whether the application of the law is skewed by submergence.

Coding the content of these opinions proved much more difficult than the features and outcomes. Although the coding was inconclusive on the skew calculations, some examples of submerged reasoning compared with Westlaw reasoning suggest that the potential for skew is not zero.

⁷⁷ The portion of decisions within each Nature of Suit Code that appear only on dockets.

⁷⁸ The portion of decisions within each Nature of Suit Code that remand the case.

⁷⁹ The portion of submerged decisions within each Nature of Suit Code that remand the case.

⁸⁰ The portion of the decisions available in Westlaw that remand the case.

⁸¹ 47 U.S.C. § 227 (2012).

⁸² Data on file with author.

3. Content Coding

The content coding for this database painfully illustrated the nuanced nature of precedent, as well as the effort required to identify it. Due largely to the complex legal test captured in this sample, the content coding remains inconclusive as to whether submerged precedent actually skews the development of the law. *Grable* synthesized the test for embedded federal-question jurisdiction, permitting federal-question jurisdiction over state-law claims where “a state-law claim [1] necessarily raise[s] 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.”⁸³ The four-factor legal test and layered analysis in *Grable* resulted in significant ambiguity in coding, arguably reflecting some of *Grable*’s inherent complexity.

Initially, it is difficult to distinguish among *Grable*’s four factors in many opinions—whether submerged or available in Westlaw. Even opinions with obvious holdings and clear delineation of factors may base the result on failure of multiple factors. Thus, the opinions exercising jurisdiction often have more obviously-stated bases than those remanding because exercising jurisdiction requires satisfactory analysis of all four factors.

Still the most formidable obstacle to making a reliable conclusion about skew in the law from this sample is the context-specific analysis of embedded federal-question jurisdiction itself. The *Grable* inquiry analyzes both the “substantiality” of the embedded federal issue and the “necessity” of its relationship to the state substantive law claim asserted.⁸⁴ While isolating one defined legal issue (embedded federal-question jurisdiction) at one procedural juncture (removal and remand), the legal issue in this study incorporates a wide variety of substantive law relevant into its application. *Grable* provides the jurisdictional law, and submerged precedent explaining *Grable*’s application may skew the interpretation and clarification of the ambiguities in *Grable*’s factors. But *Grable*’s application at least partly depends on the source of the federal question alleged.

For example, the most useful precedent for *Grable* jurisdiction over a state-law contract claim raising an issue of federal copyright law would involve both interpretation of what *Grable*’s “substantiality” factor means generally and an analysis of Congressional intent for the federal copyright statute specifically. *Grable*’s “substantiality” factor always requires analysis of the federal issue’s import to the federal system, judged by Congressional intent.⁸⁵ But the analysis

⁸³ *Grable & Sons Metal Prod., Inc. v. Darue Eng’g. & Mfg.*, 545 U.S. 308, 314 (2005). See Andrew D. Bradt, *Grable on the Ground: Mitigating Unchecked Jurisdictional Discretion*, 44 U.C. DAVIS L. REV. 1153, 1160–76 (2011) (enumerating *Grable*’s factors).

⁸⁴ See, e.g., Lumen N. Mulligan, *You Can’t Go Holmes Again*, 107 NW. U. L. REV. 237, 282 (2012) (describing embedded federal question jurisdiction as “coupling state law causes of action with federal rights”).

⁸⁵ *Grable*, 545 U.S. at 314 (“[T]here must always be an assessment of any disruptive portent in exercising federal jurisdiction.”).

of whether the federal copyright issue has import would be only partially relevant (or wholly irrelevant) to whether issues about civil rights, environmental, or ERISA had import. The copyright analysis may offer useful reasoning about how to determine Congressional intent for substantiality purposes, but more likely will turn on statute-specific reasoning persuasive only in context of copyright removals. And, even then, substantiality is only one of the *Grable*'s four factors.⁸⁶

Although the precedent for applying the embedded federal question tests itself constitutes a body of law, each application's meaningfulness for future cases will vary significantly based on the source of the federal law alleged to be embedded. In this study, coding for the Nature of Suit code in each case illustrated this variation because it captured the removing party's initial characterization of the source of the federal law alleged to be embedded. All of the opinions in this sample provide precedent for embedded federal-question analysis, generally. But very few opinions landed in each category of *Grable* analysis and a particular federal question alleged.⁸⁷

Opportunities to more precisely test submerged precedent's effects on substantive law abound for further study.⁸⁸ Some additional areas of that law which might prove especially fruitful could be (1) a rarely-appealed procedural juncture in one substantive area of law and (2) dispositive motions in one substantive area of law. These might, for example, be found among motions for pre-complaint discovery in antitrust cases and motions to dismiss in civil rights cases.

D. Possible Submerging Forces

Analysis of the data collection here reveals some recurring features of submerged opinions. Those features suggest that particularly strong submerging forces come from judges' managerial discretion, the technology used to collect and access case law, the structure of the substantive law applied, a decision's appealability, and the sophistication of the parties. This section remains observational and does not attempt to demonstrate statistical correlation between these factors and submergence. This is partly in respect of the small sample size and mostly due to the difficulty encountered in coding the decisions' content.

⁸⁶ See *id.* (establishing four-part test for embedded federal-question jurisdiction).

⁸⁷ In the embedded copyright question mentioned above, for example, there were only four total decisions, all of which were submerged. Each opinion appeared to be based on a different aspect of the four *Grable* factors, making it a question of legal research, not empirics. See, e.g., Table 1, *supra* (displaying very small *n* even for the largest grouping).

⁸⁸ See, e.g., studies collected at notes 27 and 33, *supra*, which successfully study both procedure and the substantive law context in which it operates.

1. Discretion and Technology

On a managerial level, district court judges maintain broad authority to manage how litigation unfolds in their courtrooms.⁸⁹ In their role as decision-makers, judges must decide whether to write, how much to write, what form their writing should take, and whether to broadcast their writing, all of which respond to the circumstances of individual cases and invoke judges' discretion to manage cases.⁹⁰ Caseload has proven to be a particularly salient force in choosing whether to write,⁹¹ or at least the justification for exercising that choice.⁹²

The initial choice to hold hearings or decide an issue on paper has some bearing on the submergence of any decision resulting from this choice. The dataset compiled here includes numerous instances of an unexplained order coupled with a notation that the accompanying reasons or explanations were stated orally at a hearing.⁹³ In these instances, the court announced potentially precedential reasoning, but did so "in open court" without an accessible written record.⁹⁴

Courts frequently justify granting a hearing based on the complexity of the issue presented and the desirability of hearing argument from the parties beyond what is stated in their briefing.⁹⁵ So, while oral argument on a motion offers litigants a physical satisfaction of having their "day in court," in the remand order

⁸⁹ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982).

⁹⁰ See generally Boyd, *supra* note 19.

⁹¹ See *id.* at 6–7.

⁹² Pether, *supra* note 14, at 1442–65 (unearthing the origins of appellate court unpublication as a reaction to distaste for *pro se* prisoner postconviction appeals, rather than general workload considerations).

⁹³ See, e.g., Order, Skomra v. Cordier, No. 1:08-cv-0720 (E.D. Va. Aug. 15, 2008) (denying remand motion "[f]or the reasons stated in open court").

⁹⁴ *Id.* While district courts record hearing on transcripts, those transcripts are not part of PACER's public access system. To view a transcript, one must purchase the transcript separately and at much higher cost than PACER's \$0.10/page document fee. If plaintiff raises the remand issue in a motion, the accompanying briefing by the parties offers some context to the arguments advanced on either side. See, e.g., Plaintiff's Motion to Remand, Skomra v. Cordier, No. 1:08-cv-0720 (E.D. Va. 2008) (arguing for remand because removal failed on two grounds: (1) it did not satisfy the three elements for a "federal officer" removal under 28 U.S.C. § 1442(a)(1), (2) it failed to establish immunity under federal common law).

⁹⁵ See Vaughn v. Astrue, 412 F. App'x 559, 560 (4th Cir. 2011) (dispensing with oral argument on appeal "because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process"); see also FED. R. APP. P. 34(a)(2) (requiring oral argument unless the panel agrees it is unnecessary because "(A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."); FED. R. BANKR. P. 8019 ("Oral argument must be allowed . . . unless . . . the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."); Order, J.T. v. Fairfax Cty Sch. Bd., No. 1:08-cv-717 (E.D. Va. 2008) ("Because the parties agree that oral argument is unnecessary [on the remand

context, oral argument as the sole repository of a court's reasoning raises concerns for the development of clarifying precedent in close cases.

A judge's initial, discretionary decision to write her decision triggers the next potentially submerging force: discretion in the commercial databases' collection process. PACER and, by proxy, BloombergLaw, contain raw data. These databases simply make available all of the documents filed by all of the parties in all of the cases and proceedings before each federal district court. Bloomberg provides an interface to make it easier to find those raw data.⁹⁶ However, Bloomberg does not perform an editorial function in determining what will be available through the interface.

Westlaw and FDSys add levels of filtration to the contents of their databases.⁹⁷ FDSys purports to contain only opinions, not mere orders or other docket documents. Westlaw contains both opinions and a selection of docket documents such as pleadings and briefs. Westlaw's opinion-acquisition methods vary by jurisdiction and court.⁹⁸

District judges can, to a great extent, determine which "decisions should comprise the visible [body of putative] precedent[s]."⁹⁹ District judges are not required to send Westlaw and Lexis their opinions. They may, however, designate decisions for publication in a reporter, send them to Westlaw, or tag them as "Written Opinions" in PACER, determining the cost and ease of access.

Although federal district court decisions remain more difficult to acquire than federal appellate decisions,¹⁰⁰ Westlaw does include federal district court unreported decisions "based upon editorial determination."¹⁰¹ In particular, Westlaw makes a concerted effort to collect all decisions tagged as "Written

motion] and because the facts and legal contentions are adequately set forth in the existing record, oral argument is dispensed with, as it would not aide the decisional process.").

⁹⁶ BLOOMBERG L., <http://www.bloomberglaw.com> [<https://perma.cc/5C8E-2VMS>] (last visited Feb. 22, 2016).

⁹⁷ THOMSON REUTERS WESTLAW, <http://www.westlaw.com> [<https://perma.cc/4EMC-AF8Z>] (last visited Feb. 22, 2016); FDSys, U.S. GOV'T PUBL'G OFF., <http://www.gpo.gov/fdsys> [<https://perma.cc/FAV9-Z88Z>] (last visited Feb. 22, 2016).

⁹⁸ See E-mail from Katherine MacEachern, Attorney Editor, Westlaw Judicial Editorial Operations, to author (Sept. 6, 2013, 17:14) (on file with author).

⁹⁹ McCuskey, *supra* note 8, at 429; *see also* Levin, *supra* note 56 (noting that district court judges are not required to send LEXIS or Westlaw their opinions). *See generally* Siegelman & Donohue, *supra* note 4 (explaining the different publication requirements for district courts).

¹⁰⁰ Federal appellate courts must, by law, make all published and "unpublished" opinions available on their court websites. E-Government Act of 2002, Pub. L. No 107-347, § 205(a)(5), 116 Stat. 2899 (2002). (requiring court websites to provide "[a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format"); *see also* McCuskey, *supra* note 8 (finding that all appellate opinions sampled were included in Westlaw).

¹⁰¹ See E-mail from MacEachern, *supra* note 98.

Opinions” during the docketing process.¹⁰² PACER makes it easy to find opinions with this tag and provides them for free. Largely whatever is free in PACER is available in Westlaw. While the Judicial Conference defines “Written Opinion” as “*any* document issued by a judge . . . that sets forth a reasoned explanation for a court’s decision,” the responsibility for labeling decisions with this administrative designation rests with the authoring judge.¹⁰³ Notably, all of this data set’s opinions from Westlaw also had the “Written Opinion” tag in PACER.¹⁰⁴

District judges also choose the form any written explanation will take, and this choice may influence its availability or submergence from view. For example, the Northern District of Illinois from 2005 to 2014 used an “Order Form (01/2005),” which allowed a judge to enter docket text, as well as a separate single-spaced “Statement.”¹⁰⁵ Many, but not all, of the submerged opinions in the Northern District appear in this form. Conversely very few decisions issued on the form made their way to Westlaw.¹⁰⁶

Judges docketed reasoned opinions of considerable length in this form, rather than as a “Written Opinion” or the customary typed, double-spaced order with a fully-formatted caption.¹⁰⁷ Use of this particular form is confined to the judges in the Northern District of Illinois (NDIL)¹⁰⁸ and it does not appear in the Eastern District of Virginia sample. This form of order was introduced in the

¹⁰² *See id.*

¹⁰³ *Free Written Opinions, supra* note 9 (emphasis added).

¹⁰⁴ But the converse is not true—at least a few of the opinions submerged in PACER also had the “Written Opinion” tag.

¹⁰⁵ *E.g.*, Document 8, *James v. Ill. Bell Tel. Co.*, No. 1:08-cv-01500 (N.D. Ill., 2008).

¹⁰⁶ *See, e.g.*, Document 13, *Munoz v. Ekl, Williams & Provenzale LLC*, No. 1:13-cv-01454 (N.D. Ill. 2013), http://www.gpo.gov/fdsys/pkg/USCOURTS-ilnd-1_13-cv-01454/pdf/USCOURTS-ilnd-1_13-cv-01454-0.pdf [<https://perma.cc/PJ52-E5K5>].

¹⁰⁷ In *Omnicare, Inc. v. Walgreens*, the court submerged a 1,240-word remand opinion analyzed at length the legal question whether parties could prospectively waive their right to remand in a contract’s forum-selection clause. *See* Document 31, *Omnicare, Inc. v. Walgreens Health Initiatives, Inc.*, No. 1:08-cv-03901 (N.D. Ill. 2008) (holding that the parties’ contract did waive removal and therefore remanding) (reprinted in Appendix 1). The remand opinion submerged on *Marion v. Bank of America* docket was over 2,000 words long, cited more than 20 authorities, and tackled an array of issues from ERISA preemption, diversity jurisdiction, and *Erie* to the technical requirements of 28 U.S.C. § 1446(c). *See* Document 30, *Marion v. Bank of Am.*, No. 1:08-cv-03867 (N.D. Ill. 2008); *see also* Document 37, *Marion v. Bank of Am.*, No. 1:08-C-03867 (N.D. Ill. 2008) (1,500-word submerged opinion granting motion to dismiss). Because the opinion considered only preemption, not embedded federal question, as a basis for jurisdiction, it is not included in the embedded federal question calculations here.

¹⁰⁸ *But see* *United States v. Miller*, No. 08-CR-84/07-C-795 (E.D. Wis. Sept. 10, 2009), <http://docs.justia.com/cases/federal/district-courts/wisconsin/wiedce/1:2009cv00795/50728/4/0.pdf?1270246219> [<https://perma.cc/U848-AQ7T>] (“Order Form” decision issued by the United States District Court for the Eastern District of Wisconsin by NDIL Judge Philip G. Reinhart, sitting by designation).

NDIL in 2005 and phased out by 2014.¹⁰⁹ Although intended for efficiency and ease of docket entry, the form does seem to encourage writing a “Statement” supporting an order and therefore may encourage reasoned elaboration.¹¹⁰ Court administrators discontinued its use because judges who used the form were not being credited properly in their judicial statistics as having generated opinions.¹¹¹ But its bureaucratic status as a numbered “form” also may make it seem less appropriate for public consumption and therefore encourage submergence.

The form is only a contributing factor, though. It does not dictate submergence. More crucially, judges must weigh the time it takes to write an opinion with the utility of having a written, reasoned elaboration accompany each decision.¹¹² Easy cases and cases not likely to be reviewed by an appellate court can tip the balance away from reasoning—or at least away from elaborating reasoning in sufficient depth and refinement to be a candidate for publishing.¹¹³

District judges thereby play two determining roles in Westlaw’s collection process: initially choosing whether to memorialize their decisions as written, reasoned elaborations, and then suggesting which of those written decisions Westlaw should collect for public consumption.¹¹⁴ The coding features of the decisions and analysis of their content suggests some additional forces that may influence these initial choices.

2. *Structure, Complexity, and Appealability*

The structure of the applicable law may steer the decision whether and how to memorialize a decision. Intuitively, it makes sense that more demanding legal analysis would more likely produce a reasoned opinion and this intuition has borne out empirically in other studies. Christina Boyd’s work found that dispositive motions correlated with increased opinion-writing, but that motions for summary judgment—as opposed to motions to dismiss—increased both opinion-writing and the length of the opinions generated.¹¹⁵ She attributed this finding to

¹⁰⁹ Memorandum from Krysten E. Beech to author (Feb. 18, 2015) (on file with author) (memorializing conversations with NDIL PACER Administrator, on file with author). *See, e.g.*, Document 135, *Gonzalez Jr. v. City of Chicago*, No. 1:11-cv-08356 (N.D. Ill. March 28, 2013).

¹¹⁰ Memorandum from Krysten E. Beech, *supra* note 109.

¹¹¹ *Id.*

¹¹² Chad Oldfather has illuminated the nuanced relationship between writing and judging, examining the initial decision *whether* to supply reasoned explanations and the consequences of that choice. Oldfather, *supra* note 9, at 1283. Fortunately, this article largely avoids the existential questions of *whether* and *when* to offer reasoning by focusing only on those decisions with reasoning—that is, those with potential precedential value. In Part III, I discuss some implications of submerged precedent on the volume of written opinions.

¹¹³ *See generally* Boyd, *supra* note 19.

¹¹⁴ *Accord* Lizotte, *supra* note 25 (observing that the “dramatic underavailability [of decisions in the commercial databases] hardly seems to be the fault of Lexis or Westlaw”).

¹¹⁵ *See* Boyd, *supra* note 19.

the more demanding legal standard of Federal Rule of Civil 56 and the rigors of applying law to fact.¹¹⁶

Embedded federal-question remand, while not dispositive in the truest sense, has a lopsidedly demanding analytic structure. *Grable*'s four elements are conjunctive: all four elements must be satisfied for court to exercise jurisdiction, while failure to satisfy only one dictates remand.¹¹⁷

It seems an efficient choice, then, to write little when remanding based on the failure of one factor. By the same token, if a court must go through the effort of finding all four elements satisfied, then a written, reasoned elaboration seems a good return on that investment. It is not surprising that Westlaw would have a lower remand rate—it contains more of those decisions that take more effort.¹¹⁸

The ease with which a court may dispose of a case under the structure of the applicable law is distinct from the concept of an “easy case.” The structure of the applicable law merely establishes how many hurdles a case must clear to stay in federal court. The “easy case,” by contrast, describes a set of facts or arguments that have a straightforward application of the law leading to an obvious and predictable result.¹¹⁹

In easy cases, existing precedent and/or positive law fully and unequivocally determines the outcome.¹²⁰ Many convincing legal arguments stand on their own ground, needing little or no precedential foundation because the arguments are based on logic, uncontested statutory definitions, or a straightforward and foreseen application of law to fact. The sample captured in this study bore out the expectation that opinions in easy cases more often ended up submerged from

¹¹⁶ *Id.* She did not, however, acknowledge Rule 56's suggestion that written explanation accompany a grant of the motion.

¹¹⁷ *Grable & Sons Metal Prod., Inc. v. Darue Eng'g. & Mfg.*, 545 U.S. 308, 314 (2005).

¹¹⁸ Not all hurdles are set at the same height. In *Grable*, hurdles (3) and (4) require much more complex and discretionary analysis than hurdle (2). *See, e.g.*, Bradt, *supra* note 83, at 1160–76; McCuskey, *supra* note 8, at 405–09 (tracing each strand of *Grable*'s test). And hurdle (1), the time-honored well-pleaded complaint rule, has quite a lot of clarifying precedent supporting it, yet still requires a detailed examination of the allegations in each new complaint. *See, e.g.*, McCuskey, *supra* note 8, at 405. A remand based solely on failure to satisfy the well-pleaded complaint requirement could be explained almost entirely by reference to the instant complaint and signals that defendant simply misread the complaint or threw a Hail Mary pass at removal. A remand based on lack of substantiality or imbalance in the federal system, however, would most likely involve some construction of federal laws and statutes, as well as consideration of federalism and other jurisdictional grants.

¹¹⁹ *See generally* Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985).

¹²⁰ *See* Thomas C. Grey, *Holmes on the Logic of the Law*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 140–47 (Steven J. Burton ed., 2000) (describing the Holmesian view of “the logic of easy cases”); Mitu Gulati & C.M.A. McCauliff, *supra* note 22 at 161 (assessing the use of shorthand adjudication in deciding “easy” appellate cases); *see, e.g.*, LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 66 (1997) (categorizing cases as either “easy” or “hard” for purposes of analysis); FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* 275 (1994) (same); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 132–33, 157, 161 n.1 (1990); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 805–07 (1982).

view, likely owing to the authoring court's discretion in determining whether an opinion contributes enough to warrant public consumption. Content analysis for the sample suggested that dispositive applications of the well-pleaded complaint rule ended up submerged more often than the more complicated analysis of *Grable* factors.

Certainly, some easy *Grable* cases produced opinions captured by the databases. Several of those easy cases appear to have a teaching function aimed at a pro se litigant in the case. Judge Milton Shadur's unequivocal remand opinion in *Leventhal v. Handeland*¹²¹ stands as an example of an easy well-pleaded complaint violation. The defendant had attempted to remove his divorce proceedings from state to federal court, alleging the state court's sanctions against him violated his constitutional rights.¹²² The removal easily runs afoul of the well-pleaded complaint. The fact that the court acted sua sponte and issued its opinion only four days after removal emphasizes the ease of its decision.¹²³ And the opinion's language also underscores this ease: the opinion hints at a "number of fatal flaws" in the removal, but targets defects which "*conclusively* negate federal subject matter jurisdiction," citing "black-letter law" that "has been established and repeated by a host of cases."¹²⁴ This removal was not pushed from the edge of jurisdiction into the remand abyss; it "plainly" lacked jurisdiction.¹²⁵

So why write a memorandum opinion in such an easy and predictable case? Judge Shadur's opinion suggests that he writes for the pro se defendant's own edification.¹²⁶ And the dockets reveal the need to convey the futility of removal to this particular defendant. Leventhal removed his divorce proceedings twice and was remanded twice before his third removal was assigned to Judge Shadur.¹²⁷

Judge Shadur is not alone; the data set includes several instances of pointed opinions on easy issues for pro se parties.¹²⁸ Judge Mark S. Davis, writing for

¹²¹ *Leventhal v. Handeland*, No. 09-C-01929, 2009 WL 928900, at *1 (N.D. Ill. Apr. 3, 2009).

¹²² *Id.*

¹²³ *See id.* (noting sua sponte nature of opinion); Mem. Op. & Order, *Leventhal v. Handeland*, 1:09-cv-01929 (N.D. Ill. Apr. 3, 2009) (issuing sua sponte opinion and ordering remand to state court four days after removal).

¹²⁴ *Leventhal*, 2009 WL 928900, at *1 (emphasis added) (citing *Caterpillar v. Williams* 482 U.S. 339 (1987) and *Vaden v. Discover Bank*, 556 U.S. 49 (2009)).

¹²⁵ *Id.* at *2.

¹²⁶ *See id.* at *1 ("Leventhal should not assume that, even if he were somehow able to surmount [jurisdictional] defects, he could still bring the state court lawsuits into the federal court system.").

¹²⁷ *See* Min. Entry, *Leventhal v. Handeland*, 1:08-cv-07374 (N.D. Ill. Jan. 20, 2009) (remanding removal grounded on diversity after order to show cause); Min. Entry, *Leventhal v. Handeland*, 1:08-cv-01547 (N.D. Ill. Mar. 18, 2008) (remanding for failure to attach state-court pleadings to notice of removal).

¹²⁸ *See, e.g.*, Remand Order, *Graham v. Davis*, 4:08-cv-00078 (E.D. Va. July 30, 2008) (explaining in a four-page opinion that the court remands for lack of a federal question over a simple promissory note dispute and that the pro se defendant's removal was untimely).

the Eastern District of Virginia in *Agner v. Shapiro*, emphasized to the pro se defendant that the court was deciding only jurisdiction and “not” the merits of his dispute and that his case must return to state court because his federal Social Security issue arose “as a defense to Plaintiff[s] claim.”¹²⁹ As in *Leventhal*, the court in *Agner* issued a reasoned explanation after shorter orders failed to deter defendant from filing.¹³⁰ *Leventhal* does stand out as one of the very few such cases in Westlaw. Most are submerged, like *Agner*.

Leventhal and *Agner* illustrate how a reasoned opinion on an “easy” issue may serve didactic and communicative functions directed at pro se litigants. The opinion may attempt to deter further filings by the pro se party by explaining why he is being thrown out of court. This is especially important in cases where pro se litigants remove cases based explicitly on concerns for injustice being done to them in the state-court system. When the court decides to remand without a hearing, the reasoned written opinion also functions as formal communication between the court and the removing party.

While these didactic opinions in easy pro se cases may serve several expressive purposes within the instant case, they offer relatively little to the advancement of doctrine and clarification of law for future litigants and jurists. That is, this class of opinions offers relatively little precedential value under the classic view of precedent. The didactic opinion’s deterrent power is hampered however, when submerged from view. In theory, the more available these didactic opinions are, the more powerful they can be at deterring erroneous pro se removals.¹³¹ In practice, of course, finding these “easy” opinions takes some direction and training that most pro se parties lack. Relatedly, studies of appellate opinions have suggested that appellate courts often demote decisions involving disadvantaged litigants, such as *pro se* prisoners and civil rights plaintiffs, to “unpublished”

¹²⁹ Order, *Agner v. Shapiro*, 2:08-cv-00620 (E.D. Va. Feb. 18, 2009).

¹³⁰ Compare Order, *Agner v. Shapiro*, 2:08-cv-00620 (E.D. Va. Dec. 24, 2008) (remanding with short explanation that federal question jurisdiction was lacking based on the well-pleaded complaint rule) with Order, *Agner v. Shapiro*, 2:08-cv-00620 (E.D. Va. Feb. 18, 2009) (denying motion for reconsideration with a longer, more emphatic explanation of the federal defense). *But cf.* Order, *Morris v. Cherry*, 2:08-cv-00433 (E.D. Va. Jan. 30, 2009) (A few months after winning a remand motion, the state court plaintiff, proceeding pro se, filed a motion requesting the federal court reverse the state court’s dismissal of his case. In its one-paragraph remand order, the district court explained: “As Plaintiff is well aware, there is no federal question presented, and thus, this Court has no jurisdiction over this matter. Plaintiff’s only option is to appeal within the state court system.”).

¹³¹ The pro se-education function of remand precedent appears more urgent in the light of data suggesting that between twenty-five and thirty-seven percent of federal civil litigants appear pro se. See Melodee C. Rhodes, Comment, *The Battle Lines of Federal Rule of Civil Procedure 8(a)(2) and the Effects on a Pro Se Litigant’s Ability to Survive a Motion to Dismiss*, 22 ST. THOMAS L. REV. 527, 531–32 (2010).

status on the self-serving justification that such disputes involve lengthy consideration of a factual record, rather than complex or novel legal questions.¹³²

Opinions not eligible for appellate review may also be seen as less fit for public consumption. This consideration applies most forcefully to remand orders because the jurisdictional statute prevents appellate review of district court decisions to remand for lack of subject-matter jurisdiction.¹³³ The same provision has been held to bar district courts from reconsidering their own remand orders.¹³⁴

In addition to Congress's foreclosure of appeal, the judicially-created presumption against jurisdiction in removed cases helps curb the number of cases proceeding in the federal courts.¹³⁵ The Supreme Court endorsed strict construction of the remand statute,¹³⁶ relying on the Congressional purpose in the 1887

¹³² See generally JOE S. CECIL & DONNA STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS (1987). By contrast, business litigation, including antitrust and securities appeals, more frequently receive oral argument and published opinions in the federal courts of appeals, owing to their supposed legal complexity. See Pether, *supra* note 14, at 1438–39, 1505–07 (articulating ways in which “the practices of private judging in the U.S. courts have had the systematic effect of disadvantaging the powerless, the marginalized, and the ‘one-shotter,’ of whom the paradigm . . . is the *pro se* prisoner litigator.”).

¹³³ 28 U.S.C. § 1447(d) (2012).

¹³⁴ See, e.g., *In re Lowe*, 102 F.3d 731, 734 (4th Cir. 1996); *Three J Farms, Inc. v. Alton Box. Bd. Co.*, 609 F.2d 112, 115 (4th Cir. 1979) (“Unquestionably, the statute not only forecloses appellate review, but also bars reconsideration of such order by the district court.”). *But cf.* *Agostini v. Piper Aircraft Corp.*, 729 F.3d 350, 356 (3d Cir. 2013) (upholding district court’s denial of motion to reconsider remand and upholding the district court’s jurisdiction to do so before sending a certified copy of the remand order to the state court); *Order, Agner v. Shapiro*, 2:08-cv-00620 (E.D. Va. Feb. 18, 2009) (denying reconsideration of remand order on the motion’s merits without considering the procedural bar to reconsideration).

¹³⁵ The fee-shifting provision in 28 U.S.C. § 1447(c) (2012) 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) (2012) “is not a sanctions rule; it is a fee-shifting statute, entitling the district court to make whole the victorious party.” *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000). Thus, removals carry the possibility of fee-shifting, even if they otherwise satisfy Rule 11 of the *Federal Rules of Civil Procedure* and are in good faith.

¹³⁶ 28 U.S.C. § 1441 (2012).

amendments.¹³⁷ Circuit Courts have cited significant federalism concerns justifying the strict construction and the presumption against jurisdiction.¹³⁸ This presumption further tips the scale toward remand in doubtful and debatable cases,¹³⁹

¹³⁷ 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.”).

¹³⁸ 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.”); *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365–66 (5th Cir. 1995) (“[B]ecause the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns [and requires strict construction.]”); *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) (“Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction.”); see also *Adams v. Aero Servs. Int’l, Inc.*, 657 F. Supp. 519, 521 (E.D. Va. 1987) (“Removal of civil cases to federal court is an infringement on state sovereignty.”); *Shamrock Oil*, 313 U.S. at 109 (“Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.” (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934))).

¹³⁹ See, e.g., *Giles v. Chi. Drum, Inc.*, 631 F. Supp. 2d 981, 985–88 (N.D. Ill. 2009) (explaining the application of the *Grable* standard for the exercise of federal jurisdiction); *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) (“The district court was required to resolve all doubts about federal jurisdiction in favor of remand.”); *Gaus v. Miles Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (“Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.”); *Cheshire v. Coca-Cola Bottling Affiliated, Inc.*, 758 F. Supp. 1098, 1102 (D.S.C. 1990) (“If federal jurisdiction is in doubt, such doubt must be resolved in favor of state court jurisdiction and the case remanded.”); cf. *Hartman v. Caraco Pharm. Labs., Ltd.*, 789 F. Supp. 2d 701, 703 (S.D.W. Va. 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.”); *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.” (citation omitted)). But see *McKinney v. Bd. of Trs. of Mayland Cmty. Coll.*, 955 F.2d 924, 927 (4th Cir. 1992) (warning against “assuming that there is something inherently bad about removal and ‘defeating’ the plaintiff’s choice of forum” and explaining that, “[t]o the contrary, by providing for removal in the first place, Congress seems to believe that the defendant’s right to remove a case that could be heard in federal court is at least as important as the plaintiff’s right to the forum of his choice”); *id.* (“Rather than favoring plaintiffs or defendants, . . . the removal procedure is intended to be ‘fair to both plaintiffs and defendants alike.’” (quoting and affirming district court opinion, *McKinney v. Bd. of Trs. of Mayland Cmty. Coll.*, 713 F. Supp. 185, 189 (W.D.N.C. 1989))). See generally Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 637 (2004).

and remand structurally demands less written reasoning. Practically speaking, presumption tips the balance away from producing written, reasoned elaborations, and 1447(c)'s foreclosure of appeal puts a thumb on the scale. It seems an increasingly bad investment of scarce time to write an opinion when the outcome is more easily reached and will never see an appeal.

Appellate review offers an avenue for a few submerged district court opinions to emerge in Westlaw, but often with little effect on publicizing reasoning or on the volume of opinions that remain submerged. For example, in *Wetlands Board v. Ware*, the district court issued an eight-page memorandum opinion remanding a state zoning petition that allegedly raised substantial federal questions about the Clean Water Act and a federal injunction.¹⁴⁰ In its submerged opinion, the district court elaborates on its conclusion that the federal injunction does not present a substantial question, citing nine cases and several statutory provisions.¹⁴¹ The defendant appealed and the Fourth Circuit's unpublished (and therefore non-precedential) opinion, available in Westlaw, properly dismissed the appeal for lack of appellate jurisdiction, barred by § 1447(c) from considering any of the federal-question analysis below.¹⁴²

This study found that appellate decisions reached submerged trial court opinions less frequently than they review conventionally-available opinions. This may result partly from the substantive law applied and the fact that jurisdictional remands are not appealable,¹⁴³ while decisions to exercise removal jurisdiction are. But it also suggests that the theoretical availability of appellate review does not fully solve the problem of submerged precedent.

II.

CHARTING A COURSE: WHY SUBMERGED PRECEDENTS MATTER

These observations beg the question whether we should care about district court opinions submerged from our view and obscured from future consideration. Connecting submerged precedent to precedent theory and the unique institutional features of district courts reveals several reasons to care deeply. First, submerged precedents contain reasoned elaborations, the hallmark of precedent theory. Reasoned elaborations from district courts play an important role in precedent doctrine, often ignored by appellate-centric precedent theory. Next, submerged precedent highlights the heterogeneity in trial court decision-making and district courts' distinctive contributions to the body of interpretive law. Due to their hierarchical position as original filing courts, district courts often produce

¹⁴⁰ Mem. Order & Op., *Wetlands Bd. v. Ware*, 4:08-cv-00107 (E.D. Va. Feb. 18, 2009) (reprinted in Appendix 2).

¹⁴¹ *Id.* Notably, the court cites *Merrell Dow* for the embedded federal question standard and does not cite *Grable*, which was issued the year before the district court's decision.

¹⁴² *Cty. of James City v. Rogers*, 360 F. App'x 439, 441 (4th Cir. 2010) (dismissing appeal and stating that "because the district court's remand was premised on its lack of subject matter jurisdiction, the district court's order is not subject to review.").

¹⁴³ 28 U.S.C. § 1447(d) (2012).

the first and only words on how to implement law and procedure. Ultimately, submerged precedent implicates the role information dissemination plays in shaping law.

By mooring submerged precedent to these theoretical underpinnings and institutional considerations, this section highlights some of the value and uniqueness of district court decisions—that is, the world of district court precedents.

A. *Hierarchy and the Hallmarks of Precedent*

District courts occupy a place in precedent hierarchy that is at once constraining and liberating. District courts first are constrained by hierarchy in that they are bound to follow the precedent of their circuit courts of appeal and the Supreme Court.¹⁴⁴ Likely for this very good reason, much theoretical work on precedent focuses on the appellate courts, whose opinions formally bind numerous trial courts, as well as the authoring appellate court itself.¹⁴⁵

By the same token, their inability to bind, vertically or horizontally, liberates district courts from the pressures and prioritization of making law for numerous others. District courts' status at the origin of court hierarchy means that they decide a multitude of different issues—some unappealable—and enjoy additional

¹⁴⁴ See Dobbins, *supra* note 7.

¹⁴⁵ See, e.g., Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 777–81 (1995); Thomas Healy, *Stare Decisis As a Constitutional Requirement*, 104 W. VA. L. REV. 43, 73–78 (2001) (presenting historical critique of Eighth Circuit's *Anastasoff* opinion on Circuit's unpublished precedents); Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125, 134 (1972). See generally, e.g., WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* (2013) [hereinafter *INJUSTICE ON APPEAL*]; Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325 (2013); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179 (2014); Marin K. Levy, *Judicial Attention As a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401 (2013); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281 (1990); Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014); 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 (1978); Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737 (2013). *But cf.* Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 73–80 (2015) (articulating arguments that federal district court interpretations of federal law should bind state courts in some instances); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 222, 222 n.6 (1999) (extolling “the public value of precedent” that may be circumvented at the district court level).

degrees of freedom in deciding *whether* to write reasoned elaborations for decisions and what format or length to use.¹⁴⁶ Though their opinions have only persuasive horizontal force, district court opinions still implicate the precedent system's animating principles: fairness, efficiency, and predictability.¹⁴⁷

District courts' hierarchical status and institutional influences diverge meaningfully from the appellate-precedent model. Yet, the core considerations of reasoning, relevance, and classification persist in the theory behind district court precedent.

1. *Reasons' Virtues*

The first reason to care about submerged precedents is that they contain reasoning, the currency of a precedential system. A system of precedent employs past court decisions to inform resolution of current conflicts.¹⁴⁸ Reasoned elaboration separates opinions explaining a result (comprising 56 percent of the decisions sampled in this study) from orders merely formalizing a result (44 percent of the sample).¹⁴⁹ Although a decision's result may offer some information about a preceding case,¹⁵⁰ reasoned elaboration remains the hallmark of precedent and its doctrine. Reasoned elaborations serve the historical and abiding¹⁵¹ justifications for the precedential system: consistency, predictability, and legitimacy,¹⁵² which are briefly surveyed here.

¹⁴⁶ Many of the issues that district courts regularly decide never will be subjected to appellate review, and many of those that are reviewed vertically receive deferential standards of review, *see* discussion *infra* Part II.B.

¹⁴⁷ *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–96, 599 (1987).

¹⁴⁸ *See* KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 5–9 (1989) (summarizing the origins and evolution of the case-law system).

¹⁴⁹ *See* Oldfather, *supra* note 9, at 1327 (“From the lawyer’s perspective, the most visible role that judicial opinions play is that of being the raw material of precedent.”); Steinman, *supra* note 145, at 1792 (explaining that reasoning, rather than result, triggers stare decisis). *See generally*, *Precedent* BLACK’S LAW DICTIONARY (9th ed. 2009) (defining precedent as an action or official decision that can be used as support for later actions or decisions; esp., “[a] decided case that furnishes a basis for determining later cases involving similar facts or issues.”).

¹⁵⁰ Levin, *supra* note 7 at 1041 (“[T]he *existence* of a precedent is a reason in itself for a court to hold one way or another.” (emphasis added)).

¹⁵¹ *See, e.g.*, Thomas Healy, *supra* note 145 (tracing the transfer of the British precedential system to the American colonies before and after the American Revolution); T. Ellis Lewis, *History of Judicial Precedent*, 46 L. Q. REV. 341 (1930).

¹⁵² *E.g.* FED. JUDICIAL CTR., *JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES 1* (2nd ed. 2013), <http://www2.fjc.gov/sites/default/files/2014/Judicial-Writing-Manual-2D-FJC-2013.pdf> [<https://perma.cc/5RZ2-83YE>] (“Judicial opinions serve three functions. First, written opinions communicate a court’s conclusions and the reasons for them to the parties and their lawyers. Second, when published, opinions announce the law to judges, academics, other lawyers, and the interested public. Finally, the preparation of a written opinion imposes intellectual discipline on the author, requiring the judge to clarify his or her reasoning and assess the sufficiency of precedential support for it.”); *see, e.g.*, Schauer, *supra* note 147, at 595–98.

Precedent's prime directive to "[t]reat like cases alike," stems from concepts of fairness and stability.¹⁵³ Precedent provides an analytical rule which demands that judges treat like cases alike. "To fail to treat similar cases similarly, it is argued, is arbitrary, and consequently unjust or unfair."¹⁵⁴ Precedent doctrine ultimately can be viewed as a fairness doctrine, emphasizing consistency in adjudication and equality among similar cases.¹⁵⁵ Transmission of reasoning enables consistent treatment of similar circumstances over time.

If fairness is the most compelling among precedent's justifications, then predictability and efficiency may be its most useful, and most used, ones.¹⁵⁶ The predictability principle exists largely for the benefit of parties to litigation—or, with optimal predictability, folks who can successfully avoid becoming parties to litigation.¹⁵⁷ The logic of predictability-through-precedent states that people, on their own or through their lawyers, can read past decisions to extract broadly-applicable principles and analogous or distinctive factual considerations. These extracted principles enable people to predict how the law will apply to actions or

¹⁵³ See Schauer, *supra* note 147, at 595.

¹⁵⁴ *Id.* at 595–96.

¹⁵⁵ See Levin, *supra* note 7, at 1049 ("[T]he equality justification [for precedent] is attractive because it offers a strong moral foundation for the doctrine."). Note that it is simpler, of course, to treat identical cases alike. One would need only a minimum of relevant information about the issue and facts of the prior case to prove identity, plus the outcome of the prior case to reach identical treatment. Reasoning has value in the more frequent situation of a similar, not identical case.

¹⁵⁶ Justice Holmes notably characterized the common-law system of precedents as "[t]he prophecies of what the courts will do in fact." O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). Justice Brandeis went further, posing that, "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (including "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise" among the "[v]ery weighty considerations" underlying *stare decisis*); Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 627 (1990) (unearthing the reasons for adhering to precedent, Judge Aldisert also highlighted the "predictability factor in law"); Thomas S. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 235–37 (1965) (listing stability, protection of reliance, efficiency, and equality as values supporting the system of precedent). See generally Schauer, *supra* note 147, at 597–99.

¹⁵⁷ See, e.g., Lederman, *supra* note 145 (highlighting the "public value of precedent" is that "[p]recedent helps non-litigants shape their conduct"); H. Lee Sarokin, *Justice Rushed Is Justice Ruined*, 38 RUTGERS. L. REV. 431, 433 (1986) ("Judicial decisions . . . resolve the immediate dispute between the parties [and] often provide some guidance for future conduct."); Schauer, *supra* note 147, at 597 ("When a decisionmaker must decide this case in the same way as the last, parties will be better able to anticipate the future. The ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown.").

transactions they are considering and to make strategic decisions in the course of litigation.¹⁵⁸ As Chad Oldfather observed:

The greater clarity with which a court states the propositions that led it to its decision, the greater the certainty with which those who wish to structure their affairs in compliance with the law will be able to do so. The same applies to judges who must act in accordance with the law articulated in those opinions and to lawyers who must make arguments and advise clients on the basis of them.¹⁵⁹

Reasoned elaboration enables a more accurate prediction and thus can encourage citizens' reliance on past decisions to order their lives.¹⁶⁰

The efficiency justification follows similar logic, but focuses on conservation of judicial resources. The efficiency justification assumes that the judicial system functions more efficiently when judges are relieved of having to consider from scratch each decision they must make in the course of a case.¹⁶¹ For busy judges, precedent decisions provide ready-made legal analyses, as well as a directive to rely on those analyses,¹⁶² and a quick means of communicating with counsel and fellow jurists.¹⁶³

¹⁵⁸ See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 950 (1979) (explaining how parties consider existing law in settling disputes); see also Clayton P. Gillette, *The Path Dependence of the Law*, in THE PATH OF THE LAW AND ITS INFLUENCE 245 (Steven J. Burton, ed., 2000) ("Precedent . . . permits the law's subjects to predict the consequences of their conduct.").

¹⁵⁹ Oldfather, *supra* note 9, at 1330–31.

¹⁶⁰ The phenomenon of submerged precedent adds to the very recent arguments in precedent theory championing reliance. See, e.g., Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1469 (2013); Levin, *supra* note 7, at 1039. Hillel Levin extends the predictability principle to propose a "reliance approach" to ascertaining precedential value among horizontal precedents that resembles promissory estoppel. *Id.* at 1054 (Judicial decisions "generate understanding on the part of the governed . . . as to what is required of them," and "[w]hen members of society take action based on understandings generated from judicial opinions, those decisions generate reliance interests.") He argues that public reliance on a past decision should be "the primary factor" for a court "deciding whether and when to adhere to [horizontal] precedent." *Id.* at 1039. Randy Kozel highlights ambiguities and ambivalence in arguments for protecting reliance interests on precedent. *Id.* at 1039–54 He has suggested using reliance in a prospective manner, defining precedent by reference to "forward-looking interest in managing the disruptive impacts of adjudicative change for society at large." *Id.* at 1459.

Levin's reliance theory focuses on whether the public *has* relied on past decisions to determine a precedent's use in a current analysis. Submerged precedent instead focuses on improving the body of law on which the public *may* rely in developing litigation strategy. I favor a broad and reflectively diverse pool of decisions from which to draw precedent. Which decisions from that pool ultimately emerge as bases for future decisions depends on the chance factors of factual variation, advocates' skill, and the relative strengths and weaknesses of the original decision as written.

¹⁶¹ See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921); Levin, *supra* note 7 at 1047 ("[T]he doctrine of precedent allows judges to conserve judicial resources rather than to constantly reinvent the wheel.").

¹⁶² Schauer, *supra* note 147, at 599.

¹⁶³ Shapiro, *supra* note 145 ("[A]ppellate courts and the lawyers that serve them spend an overwhelming proportion of their energies in communicating with one another, and that the

Of course the efficiency rationale has some counterweights. First, the creation of precedent—through opinion writing—consumes judicial resources of the authoring judge, which may prove inefficient in that case, even if it will create decisional rules or templates useful to future cases.¹⁶⁴ Second, reliance on past opinions can create undesirable path-dependence and inefficiency if those past decisions themselves announce or promote undesirable rules or faulty analyses.¹⁶⁵ But the efficiency rationale focuses on aggregate efficiency and largely disregards the desirability or correctness of the rules creating reliance.¹⁶⁶

The efficiency rationale acquires particular urgency at the district court level. District courts, on the front lines of litigation, see the highest volume of cases and the broadest set of issues within each case.¹⁶⁷ Appellate decisions offer the most efficiency with their ability to bind vertically and thereby set rules for numerous courts with a single writing. But the relative sparsity of appellate court opinions leaves plenty of decisional work for district courts to do without binding guidance, as discussed below in Part II.B. District courts' prior opinions offer some efficiency horizontally by establishing possible templates for numerous legal and factual issues of first impression and supplying non-binding reasoning for other district judges to consider when faced with a similar issue.

Fairness and efficiency values contribute to the third justification for the precedent system: perceptions of judicial legitimacy. Precedent as a constraint on judicial decision-making is meant to bolster public confidence in the judiciary by signaling both neutrality in the judicial process and theoretical consistency in the outcomes of that process.¹⁶⁸ The assumed neutrality, consistency, and effects

judicial opinion, itself conforming to the style of *stare decisis*, and then manipulated along with others according to the rules of *stare decisis*, is the principal mode of communication.”)

¹⁶⁴ See Lizotte, *supra* note 25, at 140; Oldfather, *supra* note 9 at 1317.

¹⁶⁵ See, e.g., *Erie R. Co. v. Thompkins*, 304 U.S. 64, 72 (1938) (undoing nearly a century of federal common law in diversity cases based on “the more recent research of a competent scholar, . . . which established that the construction given to [the Rules of Decision Act] by the [prior] Court was erroneous”); Gillette, *supra* note 158 (explaining undesirable path-dependence from precedent); see also Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109 (2012) (considering how elaboration on grants of summary judgment may contribute to a body of “losers’ rules”); Maggie Gardner, *Parochial Procedure*, SOC. SCI. RES. NETWORK, (Aug. 20, 2015), <http://ssrn.com/abstract=2651453> [<https://perma.cc/G9T2-PZKL>] (exposing “ossification” of undesirable rules in international litigation precedents”).

¹⁶⁶ See Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1859, 1862 (2013).

¹⁶⁷ In contrast to the Circuit Courts of Appeal, who have some discretionary control over their workload and who answer a systematically-limited set of legal issues, district courts have considerably less overt control of their dockets and are tasked with both fact-finding and law-applying legal functions.

¹⁶⁸ See generally Levin, *supra* note 7, at 1044 (citing Justice Lewis F. Powell, Jr., Lecutre, *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281 (1990)); Schauer, *supra* note 147, at 600.

on public confidence, remain unproven and riddled with problems.¹⁶⁹ But the presence of reasons in past decisions and the imperative to explain current decisions in terms of precedent are intended to prevent judges from deciding cases based on illegitimate personal preferences.

Submerged precedent, within the confines of this study, appears to be a phenomenon limited to district courts.¹⁷⁰ As such, submerged precedent has only horizontal, or persuasive, force and does not bind other courts vertically.¹⁷¹ But the consistency, predictability, and legitimacy values still inure to district court reasoning and amplify its persuasive potential.¹⁷² Appellate courts may contribute to consistency across the district courts they bind, but internal consistency is just as important to district courts and district judges,¹⁷³ and “[j]udges may find it inherently desirable,” from a consistency and legitimacy standpoint, “to find support in aspects of prior decisions even if they are not bound to do so.”¹⁷⁴ Reasoning thus promotes fairness in adjudication, wherever it may be found.

¹⁶⁹ Instances of tortured precedent to reach politically-charged results call attention to how selective use of precedent may be used to arrive at inconsistent or foolishly-consistent outcomes. *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). Hillel Levin sums up the logical problem underlying the assumption of public confidence in consistency: “[W]hom would *you* likely trust more, the individual who admits to past mistakes or the one who insists that there have been none?” Levin, *supra* note 7, at 1046. And, as just noted, *stare decisis* demands consistency only for a particular district judge, not the whole district.

¹⁷⁰ *See also* McCuskey, *supra* note 8, at 436 (finding all relevant appellate opinions available on Westlaw).

¹⁷¹ *See* Oldfather, *supra* note 9, at 1292, 1340 (“Trial court rulings . . . do not bind future courts in any strict sense.”). *But see* Caminker, *supra* note 145; Kozel, *supra* note 160; *cf.* Frost, *supra* note 145 (articulating arguments that federal district court interpretations of federal law should bind state courts in some instances).

The only formally binding applications of district court precedent are claim or issue preclusion, *see* *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (describing how claim and issue preclusion prevent relitigation of certain claims or issues once decided by the trial court), and *stare decisis* within the same district, *Nw. Forest Res. Council v. Dombeck*, 107 F.3d 897, 900 (D.C. Cir. 1997) (“*Stare decisis* does not mandate that a district court in this circuit follow the decision of a district court in another circuit.”). “The district courts, like the courts of appeals, owe no obedience to the decisions of their counterparts in other districts, nor to the decisions of the courts of appeals in other circuits.” *Id.* at 901 (citing JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 0.402 (2d ed.1996)).

¹⁷² Oldfather, *supra* note 9, at 1340 (Trial court opinions may “certainly serve as persuasive authority in any future court.”); *see also* Frost, *supra* note 145, at 80 (arguing that state courts should follow federal district court interpretations of federal law).

¹⁷³ Indeed, the “core idea of precedent ascribed to Article III . . . is simply that courts must start with *their own* precedent, even if there are varying ideas about the binding nature of that precedent.” *See* Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 84 (2000) (emphasis added).

¹⁷⁴ Steinman, *supra* note 145, at 1772 (explaining further that “judges may believe their opinions will be better received (by whatever audience) if they can invoke and claim consistency with non-binding aspects of prior decisions”). Similarly, at the individual-litigant level, reason-giving even in interim decisions may confer on the losing party a sense of legitimacy for that loss. *See, e.g.*, Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 58 n.102 (2002) (identifying a

2. *Submerged Precedent's Vices*

Reasoning animates precedent doctrine's central virtues of fairness, efficiency, and legitimacy. Effectively removing reasoned elaborations from consideration in future cases thus threatens those virtues. The phenomenon of submerged precedent, then, may influence future use of reasoning by making some opinions widely available and others practically invisible to all but the instant parties. In other words, submerged precedents could frustrate those navigating the civil justice system and disrupt the system itself.¹⁷⁵ As Penelope Pether most memorably and forcefully argued, "private judging," which selectively removes some adjudications from the body of precedent, creates "scandal" in a system ostensibly committed to equality in adjudication.¹⁷⁶

As a threat to fairness, submerged precedent obscures the ability to determine whether judges actually are treating like cases alike, as well as a judge's ability to determine whether courts previously have decided a case like the one before her. Further, judges potentially can get away with inconsistent adjudication, whether intentional or unintentional, when they submerge some reasoning and make other reasoning accessible.¹⁷⁷ The obscurity of submerged precedents prevents development of effective policies to deal with any resulting inequities. Having only a portion of past reasoning effectively accessible therefore implicates the normative principle of consistency.

Potential erosion of consistency, in turn, threatens predictability and legitimacy. Submerged precedent may thwart predictability because precedent opinions are the data litigants (through their lawyers) use to make those predictions.¹⁷⁸ The creation of precedent enhances the predictive power for parties and their lawyers. Leaving aside the individual lawyer's skill, a prediction of the correct outcome is accurate only to the extent that the underlying data are reliable. So, the reasoning of precedent cases factors into the accuracy of any prediction.¹⁷⁹

judicial perspective that "justice requires that the losing party is entitled, in the very least, to an explanation as to why she has come out on the short end").

¹⁷⁵ See Pether, *supra* note 14, at 1486 (arguing that "unpublication . . . obscures inconsistent treatment of similarly situated litigants [and] raises fundamental questions about the U.S. doctrine of precedent," while noting that those fundamental questions remained "beyond the scope of her article.").

¹⁷⁶ *Id.*

¹⁷⁷ Granted, supplying reasoning in some cases (opinions) and not in others (orders) also threatens an imbalance. But decisions which engender reasoned elaborations seem more "alike" than those fit for simple orders.

¹⁷⁸ See Oldfather, *supra* note 9, at 1328.

¹⁷⁹ McCuskey, *supra* note 8, at 397; *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). And predictability most directly characterizes "easy" cases. *Cf.* Schauer, *supra* note 119, at 409 (offering as one measure for "easy" cases those "decisions seemingly compelled by the application of relatively settled doctrines").

Beyond predictability for future parties and constraint on future decision-makers, precedents can contribute incrementally to the development and clarification of the law itself. A court's explanation when implementing and applying legal rules plays an important role in promoting clarity—or at least consistency—through clarification of doctrine.¹⁸⁰ There can be value in having many courts consider an issue over a range of scenarios before announcing a wide-ranging precedent, as reflected in the Supreme Court's certiorari process.¹⁸¹

Precedent thus confers benefits on the public.¹⁸² If precedent is categorized as a public good with a public, predictive purpose,¹⁸³ then it would seem that the precedent system should be as free as possible from pressures discouraging both the generation of reasoned opinions and their availability for use in prediction. When adjudicating disputes, courts are building law. The submergence of reasoned elaborations on the law could skew the law's development in unintended and undesirable ways.¹⁸⁴

Certainly some of the submerged opinions in this sample are in “easy” cases, which, by definition, make minimal contributions to substantive law, at best. From a legitimacy perspective, however, reasoned elaboration in the “easy” cases bolsters systemic goals. First, what may seem mechanical to a seasoned jurist may not be so apparent to the parties or their lawyers. Second, the perceived legitimacy of our civil justice system flows from its treatment of both hard cases and easy cases. While reasoned elaborations “serve only imperfectly to ensure that judicial decisions are legitimate in the sense of being based in appropriate authority,” they still “provide some such assurance”¹⁸⁵ in individual cases. Over time, the collection of decisions can trace aggregate consistency and legitimacy.¹⁸⁶

Precedent, and especially public reasoning by jurists, further preserves the rule of law and bolsters judicial legitimacy.¹⁸⁷ If reasoned elaborations are kept effectively private between the authoring judge and the instant parties, the judge

¹⁸⁰ McCuskey, *supra* note 8, at 397.

¹⁸¹ Though incremental development of precedent also may create undesirable path-dependence.

¹⁸² Lederman, *supra* note 145, at 256 n.226. (“The public interest in preserving the work product of the judicial system should always at least be weighed in the balance before such a motion [vacatur] is granted.” (alteration in original) (quoting *Izumi Seimitsu Kogyo Kabushiki Kaishi v. U.S. Phillips Corp.*, 510 U.S. 27, 41 (1993) (Stevens, J., dissenting))).

¹⁸³ *See id.* at 227 (“public resources are used to provide courts—and a court's opinion serves as precedent—a public good”).

¹⁸⁴ *See id.*

¹⁸⁵ Oldfather, *supra* note 9, at 1335.

¹⁸⁶ *See id.* at 1336 (“By looking at a court's performance over time, observers can determine whether the court really has treated like cases alike.”).

¹⁸⁷ Pether, *supra* note 14, at 1483–84 (explaining the “rule of law” problems with private judging).

releases herself from the “discipline” of airing her reasoning for critique and erodes her accountability for that reasoning.¹⁸⁸

Publicly-available opinions also enhance social perceptions of civil justice as legitimate. Assessing litigants’ satisfaction with their case outcomes depends largely on their impression of the process by which the justice system reaches those outcomes.¹⁸⁹ When a court makes a decision and offers its reasoning, it can contribute to the parties’ satisfaction that they have had their “day in court.”¹⁹⁰ And a reasoned elaboration can provide legitimacy not just for the parties seeking the decision, but for posterity as well.

The fairness, efficiency, and predictability values constrain interpretive law in a precedential system, allowing it to proceed incrementally, analogizing, distinguishing, and honing reasoning and rules of law through repeated application in evolving circumstances.¹⁹¹ The doctrine of precedent thus percolates substantive law over the simmering heat of time and circumstance. While reasoning animates precedent’s essential values and hierarchy constrains them, only time determines these values’ evolution.¹⁹²

3. *Problems with Prospective Classification*

Precedent’s essence lies in its potential future utility, transmitted through reasoned elaborations.¹⁹³ A decision’s precedential *potential* exists at the moment it is entered on a docket with accompanying reasoning. But its true precedential *power*—persuasive or binding—is realized only in hindsight, as an opinion becomes legally and factually relevant in a future case.¹⁹⁴ In light of the

¹⁸⁸ *Id.* at 1441, 1483 (“[T]he practices of private judging in the courts imperil the legitimacy of the judicial system and thus the rule of law.”); Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 768 (1983).

¹⁸⁹ *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 242 (1988); *see also* Oldfather, *supra* note 9, at 1336–37 (citing Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 882–83 (1997) and Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 820–26 (2001)).

¹⁹⁰ *See* Ackerman, *supra* note 174, at 58 (“Employed properly, litigation can have a therapeutic effect on the community.”); Oldfather, *supra* note 9, at 1337 (“By providing a reasoned explanation for its decision, a court will, at a minimum, give the parties a basis for concluding that, whether they won or lost, each side received an appropriate hearing of their grievances.”).

¹⁹¹ *See* RONALD DWORKIN, *LAW’S EMPIRE* 228–38 (1986) (describing the development of precedent as analogous to writing a chain-novel).

¹⁹² *See generally*, Black & Spriggs, *supra* note 145; *Re, supra* note 145.

¹⁹³ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366–67 (1978).

¹⁹⁴ *See Precedent*, BLACK’S LAW DICTIONARY (9th ed. 2009); WILLIAM M. LILE ET AL., *BRIEF MAKING AND THE USE OF LAW BOOKS* 288 (3d ed. 1914) (“In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law.”); Dobbins, *supra* note 7, at 1460 (highlighting the relevance dimension to precedent); *see also*

retrospective nature of precedential value, advocates have fought fiercely to prevent the courts of appeal from designating their opinions as prospectively non-citable, or non-precedential.¹⁹⁵ Removing judicial opinions—especially appellate ones—from the body of accessible precedent has been forcefully cast as “private judging,” scandalizing our public system of precedent.¹⁹⁶

At the district court level, submerged precedent presents a more lurking problem of prospective classification. Submergence obscures the process of precedent and the law itself. Submerging a reasoned decision on a docket serves as an instantaneous decision (conscious or not) about whether that reasoning may be considered in the future at all. Confining an opinion to its docket effectively classifies that opinion at the moment it is issued as beyond future consideration, but does so invisibly and effectively prevents access to that reasoning, not just use of it.

Prospective classification poses problems in a system that defines its precedents not only hierarchically, but practically and retrospectively.¹⁹⁷ While an opinion’s place in the hierarchy of vertical precedents is set at the time of writing, its applicability and merit emerge only over a lifetime.¹⁹⁸ The events, scenarios, and developments in future cases that render an opinion analogous, distinct, and persuasive from a consistency perspective cannot be appreciated fully at the mo-

Lederman, *supra* note 145, at 221 n.3 (defining “precedent” as “case law that can influence a later decision in the same court or a lower court”). Precedent enjoys a dual grammatical life—as an adjective and a noun. While “precedent” the adjective describes the system of common law and statutory interpretation produced through reliance on certain past decisions, “precedent” the noun refers to those decisions themselves. *Compare Precedent*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “precedent,” adjective, as “Preceding in time or order”), with *id.* (defining “precedent,” noun, as “1. The making of law by a court in recognizing and applying new rules while administering justice [and] 2. [a] decided case that furnishes a basis for determining later cases involving similar facts or issues.”). Precedent the noun is the product of the precedential system and the currency within that system. See Schauer, *Precedent*, *supra* note 147, at 571 (“An appeal to precedent is a form of argument, and a form of justification . . .”).

¹⁹⁵ Although the federal appellate courts for a time used un-publication as a prohibition on precedential power and use, the revision to Federal Appellate Rule 32 clarifies that publication is now a plus-factor, not a prerequisite to citation precedential value. See FED. R. APP. P. 32.1(a) (“A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been . . . designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like . . . after January 1, 2007.”). *But see* Keele et al., *supra* note 27, at 218 (noting studies finding that published and unpublished opinions “do not vary in precedential value”).

¹⁹⁶ Pether, *supra*, note 14, at 1436.

¹⁹⁷ See Gillette, *supra* note 158, at 245 (exploring the “assumption . . . that precedent is primarily a retrospective doctrine”); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CAL. L. REV. 1, 4 (1974).

¹⁹⁸ See Pether, *supra* note 14, at 1519 (surveying critiques of prospective classification in appellate opinions).

ment of writing, or even shortly afterward. Thus, classifying an opinion as potential “precedent” or “not” at the time of writing short-circuits the evolutionary character of the precedential system.¹⁹⁹

In the federal appellate courts, the authoring judge’s or judges’ *ex ante* labeling is obvious, consequential, and hotly debated. The labels “published” and “unpublished” reflect some vestigial practical justifications with doctrinal implications, as discussed below.²⁰⁰ In the federal appellate courts, the public can see all opinions and cite to them, though the circuits maintain control over an opinion’s usage, based on its publication status. “Unpublication,” in Penelope Pether’s appellate lexicon, “means that an opinion is not designated for publication in the jurisdiction’s official reporter . . . ; to a greater or lesser extent it makes the opinion difficult to find; it limits or destroys the precedential value of the opinion.”²⁰¹

When circuit courts restricted parties’ ability to cite unpublished opinions available in the Federal Appendix and in Westlaw, it ignited a firestorm,²⁰² culminating in a revision to Federal Rule of Appellate Procedure 32.1.²⁰³ But this battle left undisturbed the circuit courts’ ability to label prospectively a decision as “precedential” or “not” at the time it is issued.²⁰⁴ The comparisons between precedential and non-precedential labeled decisions may, at times, be maddening.²⁰⁵ But at least we know enough to be outraged.

Prospective classification in the federal district courts, however, is an even more opaque process that has gone mostly unnoticed and unscrutinized. Even

¹⁹⁹ And it creates decisions beyond the reach of the systemic imperative to treat like cases alike. *See, e.g.*, Plumley v. Austin, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting) (lamenting that “an unpublished opinion . . . preserves [the appellate court’s] ability to change course in the future”).

²⁰⁰ *See infra*, Part III.A.

²⁰¹ Pether, *supra* note 14, at 1437; *see also* William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y.L. SCH. L. REV. 429, 429 (2003).

²⁰² *See, e.g.*, Martha Dragich Pearson, *Citation of Unpublished Opinions As Precedent*, 55 HASTINGS L. J. 1235, 1235–36 (2004); Michael B.W. Sinclair, *Anastasoff Versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695 (2003); Stephanie Francis Cahill, *Don’t Issue Citations for Citations: Court Committee: Courts Should Allow Citing Unpublished Opinions*, A.B.A. J. EREPORT (Dec. 13, 2002), <http://www.nonpublication.com/DONTISSUE.htm> [<https://perma.cc/BQ8T-XT8Y>]; *see also* Oldfather, *supra* note 9, at 1285. *Compare* Anastasoff v. United States, 223 F.3d 898, 905 (8th Cir. 2000), *vacated*, 235 F.3d 1054 (2000) (holding Circuit Court Rules denying precedential value to unpublished decisions violated the Constitution), *with* Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) (upholding constitutionality of the Ninth Circuit’s rule prohibiting citation and denying precedential value to unpublished decisions).

²⁰³ FED. R. APP. P. 32.1(a) (permitting citation to unpublished decisions issued on or after January 1, 2007).

²⁰⁴ *See, e.g.*, Richman, *supra* note 4, at 1724; *see also, e.g.*, INJUSTICE ON APPEAL, *supra* note 145, at 79–80.

²⁰⁵ *See, e.g.*, Plumley v. Austin, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting) (criticizing use of the “non-precedential” label); Gant, *supra*, note 71 at 705; Liptak, *supra* note 3.

though they may elevate some opinions' status by designating them as "published" in the Federal Reporter, district judges do not label their opinions as "precedential" or "not" like appellate judges do; the published/unpublished distinction does not have the same effect.²⁰⁶ Though this label-free treatment of opinions at the district court may seem more egalitarian, it instead obscures a prospective classification process that effectively removes one class of opinions from public view and thereby prevents any citation to or consideration of those opinions. Submerged precedents represent the "non-precedential" classification at the district-court level—without such obvious labeling. Submerged precedent thus implicates both transparency in decision-making and the systemic directive to treat like cases alike.²⁰⁷

It is quite likely that the submergence of many district court opinions results from a far less conscious sorting process than that of forced labeling at the appellate level.²⁰⁸ Yet there remains the mismatch of prospective decisions about an opinion's future availability as precedent and precedent doctrine's emphasis on evolution and situational application.

The effective inability to use certain district court opinions as precedent may seem less pernicious both because those opinions cannot bind in a vertical sense and because some opinions ultimately may receive appellate review. Yet district court opinions serve vital functions in the precedent system, and the inability to even compare those restricted opinions from the available ones is possibly even more troubling because it has prevented debate.

B. *Value in District Court Precedent*

While reasoned elaboration has its own value serving precedents' normative goals, district court opinions make some unique contributions to the body of precedent and the processes in a precedential system. In the spaces where no appellate guidance exists or is likely to exist, district courts effectively generate the law in an important, if informal way. District judges' expertise and leadership on trial-court issues can enhance the persuasive power of their precedents. And district court decisions play a crucial role in implementing law. For these reasons, submerging district court opinions may rob the system of more value than their hierarchical status would suggest.

²⁰⁶ The evolution of the terms "published" and "unpublished" for district court opinions paralleled appellate courts. But district courts did not have citation restriction rules for traditionally "unpublished" opinions—either before or after the commercial services acquired electronic capabilities and migrated to remote access. See generally Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 L. LIBR. J. 475, 478 (2004); So district courts' "unpublished" opinions effectively became citable the moment they became available.

²⁰⁷ See Price, *supra* note 173, at 83 (identifying these two values "at stake in the work of appellate courts").

²⁰⁸ See *supra* Part I.C.

1. Issues Isolated from Appeal

Civil litigation calls on district courts to decide a multitude of legal issues, memorialized in a variety of forms on a continuum of formality: published opinions, unpublished opinions, orders, oral statements, and letters to the parties. In the course of a single litigation, a district court may be called on to decide numerous motions on varied issues, from the dispositive (like summary judgment) to the mundane (like motions for extension of deadlines). District courts thus make hundreds of thousands of decisions each year,²⁰⁹ not all of which warrant reasoned elaboration.

The realities of dispute-resolution coupled with the strictures of appellate jurisdiction ensure that some large portion of district courts' decisions will not receive appellate review.²¹⁰ Mootness and standing doctrines prevent appellate review in several common scenarios: settlement, judgment in favor of an interim motion's loser, or judgment against an interim motion's winner.²¹¹ For example, a district court may deny a defendant's motion for summary judgment and proceed to trial. If the defendant goes on to win in the final judgment, he ordinarily has no standing to appeal the summary judgment denial.²¹² If instead, the defendant reaches a settlement with plaintiff before trial, he moots an appeal.²¹³

²⁰⁹ The Administrative Office of the Federal Courts does not track the number of motions filed or decided. But a low estimate of court decisions on motions is based on the available data on case dispositions. The federal district courts saw 238,646 private civil cases commenced, *Table C-1: U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2012*, U.S. CTS., <http://www.uscourts.gov/statistics/table/c-1/federal-judicial-caseload-statistics/2012/03/31> [<https://perma.cc/JBC2-7GHN>] (last visited Mar. 4, 2016). Of the 288,151 civil cases terminated in the federal district courts in the year spanning April 1, 2011 to March 31, 2012, a total of 233,142 were terminated by court action. *Table C-4: U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending March 31, 2012*, U.S. CTS., <http://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2012/03/31> [<https://perma.cc/CWP7-X49E>] (last visited Mar. 4, 2016). Thus, the district courts must make some decisional action in over 200,000 cases per year. More likely, the courts exceed this number of decisions before disposition.

²¹⁰ See Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 VILL. L. REV. 1, 35 (2008) ("Important legal questions can recur in litigation numerous times without being appealed.").

²¹¹ See generally, 19-205 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 205.02[2] (3d. ed. 1999); 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3902 (2d ed. 1987).

²¹² *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333–34 (1980) ("Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom.").

²¹³ See, e.g., *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128–29 (9th Cir. 2005) (settlement in which plaintiff relinquishes all claims moots appeal, even despite parties' separate agreement to press appeal of district court's personal jurisdiction ruling).

The final judgment rule further protects many interim decisions from appeal,²¹⁴ particularly when the party aggrieved by that decision has little motivation to contest it after final judgment.²¹⁵ This is particularly true of interim discovery decisions, like denials of motions for protective orders holding requested documents not protected by a privilege.²¹⁶ A district court's denial of privilege protection is not immediately appealable under the collateral order doctrine.²¹⁷ While appellate review technically exists,²¹⁸ required disclosure gives an adversary access to the information in the meantime.²¹⁹

So the interim nature of many district court decisions practically prevents many of them from receiving appellate review. Some formal obstacles may further prevent review, such as the statutory insulation from appeal for jurisdictional remands.²²⁰ These forces deprive the appellate courts of some opportunities to generate binding precedent on numerous procedural issues. Particularly on interim issues of discovery and procedure, district court precedent is the only guidance that exists.

2. Dissemination by District Courts

“The link between courts and the public is the written word. With rare exceptions, it is through judicial opinions that courts communicate with litigants, lawyers, other courts, and the community.”²²¹ While not formally binding, district court opinions can play a crucial role in shaping law by disseminating it.²²² As trial courts, district courts are tasked with implementing law and explaining

²¹⁴ 28 U.S.C. § 1291 (2012).

²¹⁵ The collateral order doctrine and 28 U.S.C. § 1292 certification procedure capture relatively few of these interim decisions for review and are not reliably available. See Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L. J. 423, 452 (2013).

²¹⁶ See 15B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3914.23 (2d ed. 1991).

²¹⁷ *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009).

²¹⁸ *Id.* at 110. (“In our estimation, postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.”).

²¹⁹ See *id.*; see also Lammon, *supra* note 215, at 458.

²²⁰ See *supra* Part I.D.2. (discussing 28 U.S.C. § 1447(c)'s foreclosure of appeal for jurisdictional remands, while preserving for appeal those decisions exercising jurisdiction).

²²¹ FED. JUDICIAL CTR., *supra* note 152, at vii.

²²² Cf. Joan M. Shaughnessy, *Unpublication and the Judicial Concept of Audience*, 62 WASH. & LEE L. REV. 1597 (2005) (explaining, generally, the range of audiences who read judicial opinions).

what appellate opinions mean for litigants in real situations, as well as future parties.²²³

Some district judges may speak more forcefully than others in this role and may transcend their formal place in the precedent hierarchy by virtue of their outsized experience on certain issues, or simply by getting the first crack at novel issues and the most opportunities to opine on longstanding ones. And district court opinions attract numerous citations, despite their inability to formally bind.²²⁴

Some individual district court judges may attain a prominence that attracts deference (or at least additional attention) from practitioners, fellow district judges, and appellate courts. Expertise, experience, and willingness to raise the profile and ambit of their decisions amplifies the influence of these prominent trial-court judges and extends the reach of their writings.²²⁵ The written opinions of high-profile judges establish a kind of “super” district court presence with heightened power to persuade intra-district, inter-district, and up the appellate hierarchy.²²⁶ When these judges speak, they have a larger audience, and the reasoning issued in these super-precedents often carries farther, even if solely to be distinguished.²²⁷

²²³ See McCuskey, *supra* note 8, at 396. (articulating the role of district courts in clarifying doctrine).

²²⁴ See Martin, *supra* note 210 (“Decisions of the U.S. District Courts, including many not published in print, are widely cited and relied upon even though they are not binding precedent.”).

²²⁵ See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 140–43 (1995) (highlighting utility considerations in judges’ opinion-writing); Shaughnessy, *supra* note 222, at 1605.

²²⁶ Other authors have examined the phenomenon of *super* precedent in the context of stare decisis in Supreme Court opinions. See, e.g., *Superprecedent*, BLACK’S LAW DICTIONARY (9th ed. 2009); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205 (2006); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249, 251 (1976) (coining “superprecedent”); Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 363 (2007). William Eskridge has identified a similar phenomenon among “super-strong” statutory precedents. See William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (explaining that overruling precedents interpreting federal statutes may prove particularly difficult in part because those decisions may “enjoy a super-strong presumption of correctness”). Super-strong statutory precedent describes courts’ increasingly deferential reliance on precedents of statutory interpretation in contrast to regular common-law or constitutional precedents. See *id.* at 1366; see also GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31–32 (1982) (highlighting how judicial opinions may update anachronistic statutes).

²²⁷ Judge Jack Weinstein of the Eastern District of New York offers a prominent example of district judge dissemination through super precedent, particularly on issues of aggregate litigation and discovery. Judge Weinstein’s decisions have been cited with explicit notation of his authorship 98 times by district courts outside New York and 77 times by courts of appeals outside his Circuit. Calculated from a Westlaw Search in the ALLFEDS database for (“weinstein, j.” % AU(weinstein) % (weinstein /3 dissent!)). Judge Louis Pollak of the Eastern District of Pennsylvania attracted deference on trial-court issues, too. See, e.g., *Plymovent Corp. v. Air Tech. Sols., Inc.*, 243 F.R.D. 139, 144 (D.N.J. 2007) (citing, with author notation, Judge Pollak’s unreported opinion in *In re Painted Aluminum Prods. Antitrust Litig.*, No. CIV. A.

While these super-opinions by district judges are unlikely to remain submerged on dockets, they reinforce the idea that district court opinions may disseminate reasoning both vertically and horizontally.

Submerged precedent threatens precedent doctrine's core tenets of fairness, efficiency, and legitimacy by obscuring some reasoned elaborations, but making others easily accessible. The observation that submerged precedent appears confined to the district-court level of the precedent hierarchy does little to diffuse these threats to the rule of law.

III. BUOYING PRECEDENTS: TOWARD OPTIMAL SUBMERGED PRECEDENT

Acknowledging that submerged precedent has the potential to skew the law, frustrate consistency, and erode legitimacy, this Part pursues an ideal ratio of submerged precedent, balancing justice and efficiency and capturing the value in district court opinions.

Most urgently, submerged precedent requires attention to fulfill the statutory mandate in the E-Government Act of 2002.²²⁸ The Act requires free online public access to “the substance of all written opinions issued by the [federal courts in text-searchable format], regardless of whether such opinions are to be published in the official court reporter.”²²⁹ And, while the Act does not define “written opinions” further, submerged precedents as defined here fit the Judicial Conference's definition.²³⁰ The Act does not specify what level of public access suffices, but many of the submerged precedents identified in this sample are not “free” in the PACER database because they are not tagged as “written opinions.”

Addressing the phenomenon of submerged precedent to fulfill the statutory mandate requires a conscious consideration of theory's interaction with technology—of the role that access to information has in serving our precedent system's animating values. This Part considers technological, statutory, procedural, and existential ways to build a better iceberg, or better navigational tools.

A. *The E-Government Act of 2002*

Can we safely navigate district court precedent with better sonar? Is it enough to recognize submerged precedents' existence, or must we gather complete information about their size, shape, and position? The small sample in this

95-cv-6557, 1996 WL 397472 at *1 (E.D. Pa. July 9, 1996) as the relevant “case law” on the proper scope of interpretation for Rule 26(b)(4)(B)). And notations of prominent authors can be useful when highlighting important analyses distinct from the instant case. *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.*, 457 F. Supp. 2d 65, 75 (D. Mass. 2006) (citing *California v. Powrex Corp.*, Civ-S-05-01216, 2006 WL 997717 (E.D. Cal. Apr. 14, 2006) with the author notation “(Levi, J.)”).

²²⁸ E-Government Act of 2002, Pub. L. No 107-347, § 205(a)(5), 116 Stat. 2899 (2002).

²²⁹ *Id.*

²³⁰ *See supra* Parts I and II. (defining “precedent” to include written opinions supported by reasoned elaboration, in keeping with the Judicial Conference's definition).

study offers only the questions, not the answers. If the content and reasoning in the submerged body of opinions mirrors the available ones, then Westlaw has a representative sample and it may be both safe and efficient not to wade through the details of submerged precedents. But different samples based on different areas of law or procedural postures may offer different conclusions about representativeness—or additional inconclusiveness, as described above.²³¹

We do not need empirical proof of skew to catalyze action, for Congress has already spoken and mandated access to all written opinions. The E-Government Act of 2002 already requires every federal district, appellate, and bankruptcy court to maintain a website with “[a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.”²³²

While the federal courts have faithfully implemented the statutory directive and serve as models of public access, the ease and economy with which technology has expanded access to precedents makes the persistence of submerged precedents more disturbing. Congress appeared to require zero submergence thirteen years ago in the E-Government Act’s mandate for courts to make available to the public for free “all written opinions.”²³³ The phenomenon of submerged precedent suggests that the mandate remains unfulfilled at the district court level in ways only now coming to light. Notably, the prospective classification of putative precedents—that vestige of a book-and-paper era—persists at some level through the Judicial Conference’s definition of “written opinions” as any “reasoned explanation”²³⁴ and the district courts’ application of this definition.²³⁵ Not all written decisions fitting the Conference’s definition are made publicly available for free. Some remain on dockets without the “written opinion” tag, and thereby also evade detection by the commercial electronic databases.²³⁶

PACER revolutionized docket access and has achieved enormous success at implementing the directive of online electronic public access. Further, PACER has made all of the tagged “Written Opinions” available for free. Although all decisions are technically “available” and those “Written Opinions” so designated by the authoring court are also free, these distinctions suggest that the intent of that directive remains unfulfilled so long as some written opinions are not as available as other “Written Opinions” at the author’s discretion.

²³¹ See *supra* Part I.C.2.

²³² E-Government Act of 2002, Pub. L. No 107-347, § 205(a)(5), 116 Stat. 2899 (2002).

²³³ *Id.*

²³⁴ *Free Written Opinions*, *supra* note 9.

²³⁵ Cf. Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855, 862 (2008) (“Improved access to the law as embodied in a court’s rulings in individual proceedings . . . by those having a desire to know and apply it was the apparent target [of the written opinions requirement].”)

²³⁶ See *supra* Part I.A.

If access is the goal and a distinction among opinions' classifications is expressly eschewed in implementing that goal, then maintaining any fee/free distinction seems illogical and inconsistent with the goal. Thus, in light of this Congressional directive toward unclassified access to precedents, doing nothing is not an attractive option. That leaves doing everything or doing only something as viable courses of action.

B. Zero Submergence

Faced with uncertainty about skew but a Congressional directive toward availability, the safest course would be to proceed with full access to *all* opinions—zero submergence. A zero-submergence solution has two obvious virtues in addition to fulfilling the Act's mandate. First, it would be relatively easy to achieve, thanks to technological advances. Second, it would fully dismantle the vestigial prospective selection of potential precedents, untethering precedent doctrine from logistical concerns and inequitable effects of discretion.²³⁷

Technology is both a solution to our remaining access problem, and its historical source. Two centuries ago, the logistics of printing copies and disseminating them across a frontier landscape drove the decision to make available only a portion of those reasoned decisions issued by the federal courts.²³⁸ The printed, bound volumes of the Federal Reporter and Supplement could hold only so many printed pages. Based on this physical reality, only the opinions selected for publication in the reporters were widely available across the circuits.²³⁹ Those opinions selected for dissemination in the reporters, by necessity, constituted the available precedent. Anyone searching for precedent would need access either to the courthouse or the books.

Although technology initially created the published/unpublished caste system for opinions, technology more recently has offered solutions to that problem by broadening the pool of available decisions and expanding public access to them. In the 1980s and 90s, Westlaw and Lexis began to diversify from print by storing case law in electronic databases capable of holding reported as well as unreported opinions.²⁴⁰ By the mid-1990s, one needed only paid access to the CD-ROMs to search through reported opinions and thousands of unreported ones. By 2000, the internet made those databases readily available remotely, with only a contract, login, and internet connection required to view hundreds of thousands of opinions.²⁴¹

²³⁷ See Pether, *supra* note 14 at 1535 (proposing that “[a]n alternative to stopping the practices of private judging would be to effectively publish all opinions”). Cf. Peter W. Martin, *Abandoning Law Reports for Official Digital Case Law*, 12 J. APP. PRAC. & PROCESS 25 (2011) (detailing state efforts in this vein).

²³⁸ See Price, *supra* note 173, at 112.

²³⁹ *Id.*

²⁴⁰ *Id.* Note, however, that Westlaw is also the publisher of the Federal Supplement volumes.

²⁴¹ See Martin, *supra* note 210, at 9.

Thus, by the mid-1990s, the march of technology had rendered the term “published” versus “unpublished” a misnomer in all federal courts, and many state courts.²⁴² The “publication” distinction now describes only which opinions are printed in the bound Reporter volumes and which are not.²⁴³ Although the federal appellate courts still maintain a precedential/non-precedential distinction based on a decision’s selection for publication in the Federal Reporter volumes, all “unpublished” opinions from the appellate courts are readily available to the public on the courts’ own websites, as well as in commercial services.²⁴⁴ The district courts have not tried to maintain a similar precedential distinction based on reporter inclusion or exclusion.²⁴⁵

The federal courts themselves contributed mightily to public access to precedent in establishing the electronic PACER system.²⁴⁶ The E-Government Act of 2002 mandated online public access to “the substance of all written opinions” by the federal courts in text-searchable format, “regardless of whether such opinions are to be published in the official court reporter.”²⁴⁷ As implemented in PACER, only a login and internet connection are required to view all these statutorily-protected “written opinions.”²⁴⁸ So the trend, certainly, has been for technology to democratize precedent over the past fifty years.

And the federal courts have kept their foot on the gas. Pilot projects currently underway further collect and sort written opinions, available for free without a login, through the Government Printing Office’s Federal Digital System (FDSys) collection.²⁴⁹ Simultaneously, the Administrative Office has been rolling out the NextGen updates to the PACER system with significant improvements in functionality, including the ability to conduct multi-jurisdictional searches from a

²⁴² *Id.* at 33.

²⁴³ See K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and The Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 398 (2001). “Reported” versus “unreported” would be a more accurate label pair under modern circumstances, but the “published / unpublished” terms persist.

²⁴⁴ And, as explained earlier, the precedential/non-precedential treatment remains hotly contested, all the way to the Supreme Court. See *supra* Part II.A.3 (discussing *Plumley v. Austin* and its February 2015 coverage in the news media).

²⁴⁵ See *supra* Part II.A.3.

²⁴⁶ See generally Martin, *supra* note 235, at 860–61 (tracing PACER’s origins).

²⁴⁷ E-Government Act of 2002, Pub. L. No 107-347, § 205(a)(5), 116 Stat. 2899 (2002).

²⁴⁸ *Free Written Opinions*, *supra* note 9 (promoting the Judicial Conference definition for “written opinions” as any decision with accompanying “reasoned explanation”).

²⁴⁹ See *FDSys: United States Court Opinions*, *supra* note 61. FDSys “provides free online access to official publications from all three branches of the Federal Government.” *About FDSys*, U.S. GOV’T PUBL’G OFF., <http://www.gpo.gov/fdsysinfo/aboutfdsys.htm> [<https://perma.cc/RA87-J7D7>] (last visited Mar. 4, 2016).

single login portal.²⁵⁰ The federal courts originally built their electronic case filing system to benefit judges and court administrators, not parties or the public.²⁵¹ Thus many of the technological updates to those systems reflect management of the growing workload in the federal courts, rather than tracking doctrinal goals for precedent. And “keen observers of the legal information marketplace recognize that the government has never performed well in the role of a legal publisher.”²⁵²

Still, at least as the volume of precedents being generated has grown, so has our access to them.²⁵³ Based on the infrastructure built by PACER and the E-Government Act, several smaller online collections of opinions recently have proliferated, offering quicker and/or cheaper alternatives.²⁵⁴ The table in Appendix 3, below, briefly catalogues some of the most recent entrants to the market for online precedent and compares them to Westlaw and BloombergLaw. The results show a mixed bag of comprehensiveness, with Westlaw, FDSys, BloombergLaw Opinions, and Google Scholar clustered at the top for comprehensiveness.²⁵⁵ Because they are more accessible but less comprehensive than Westlaw, however, these limited collections appear unlikely to offer solutions to submerged precedent.

This comparison suggests that none of these online services captures submerged precedents, likely because the most comprehensive services still appear to draw almost entirely from PACER’s free collection of tagged “written opinions.” Even FDSys, the GPO’s collection, maintains the same layer of editorial selection by drawing from those PACER opinions already tagged “written opinion.”

The diversification in online opinion access services has promise in theory. Practically, however, all the current services perpetuate submerged precedent, to

²⁵⁰ See *Implementation of NextGen CM/ECF*, PACER (Oct. 2014), <https://www.pacer.gov/announcements/quarterly/qa201410.pdf> [<https://perma.cc/83ZS-B5KU>] (highlighting NextGen implementation in the Second and Ninth Circuits).

²⁵¹ See Martin *supra* note 235 at 864 (explaining that the federal courts built electronic filing and document management systems to help judges and court personnel, though lawyers benefited from remote access to them).

²⁵² Mills, *supra* note 201, at 446.

²⁵³ See, e.g., Martin, *supra* note 235 at 855 (citing the Administrative Office of the U.S. Courts’ 2001 proclamation that, “[T]he advancement of technology has brought the citizen ever closer to the courthouse.”); 25 Years Later, PACER, *Electronic Filing Continue to Change Courts*, U.S. CTS. (Dec. 9, 2013), <http://www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts> [<https://perma.cc/ZSQ3-FZP4>].

²⁵⁴ These include Cornell’s Legal Information Institute, Leagle, Fastcase, Findlaw, Public Library of Law, Google Scholar, and the Law Library of Congress. See *Researching Judicial Decisions*, LIBR. CONGRESS, <http://www.loc.gov/law/help/judicial-decisions.php#intro> [<https://perma.cc/3L9F-DKBD>] (last visited Mar. 4, 2016).

²⁵⁵ But one comparison is stark: the highest number of Northern District opinions captured by any service over those *nine* years is 31 (FDSys), while only *three* years of results (2006–2008) from the same court incorporating submerged precedent produced 40 opinions. See *infra* Appendix 3.

some extent, as long as they draw their collections from the free federal PACER database, which permits pre-classification of opinions as available or submerged. Creating the best possible source data through PACER enables other collections to develop and evolve on a more solid foundation. Plus, a PACER-level solution augments implementation of Congress's stated priority for public access and promotes transparency.²⁵⁶

The deeper question of discretion in availability persists as long as docket clerks or other humans associated with the author bear responsibility for sifting orders from opinions. A relatively easy technological solution would be to capture all orders, perhaps in a form, and make them all available, for free, in a collection. Or the federal courts could make available for free every decision above a certain word count to remove the opportunity for discretionary selection.²⁵⁷

If all *decisions* were available for free in text-searchable format—and preferably with search capabilities to filter by court, date, and keywords—then researchers would have the full data set from which to identify those decisions that have sufficient reasoning and similarity to constitute precedents. And non-governmental collections would have the full set of decisions from which to cull their particular subsets or access platforms. FDSys would be a particularly good platform for the zero-submergence collection because it already isolates opinions from mere docket entries.²⁵⁸ Additionally, FDSys's advanced search functions allow users to text-search terms across all courts, as well as all other government authors, capturing case law, statutes, and regulations.²⁵⁹

Similarly, Westlaw could change its collection policy to capture all decisions without editorial discretion.²⁶⁰ Chief among the merits of a zero-submergence

²⁵⁶ As the chief of staff for the Administrative Office's Department of Program Services observed in 2013:

"Twenty-five years ago, the vast majority of cases were practically obscure. Today, every Third Branch court is using CM/ECF and PACER . . . That means that all dockets, opinions, and case file documents can be accessed world-wide in real time, unless they are sealed or otherwise restricted for legal purposes. This level of transparency and access to a legal system is unprecedented and unparalleled."

25 Years Later, *supra* note 253.

²⁵⁷ One-hundred words might be a reasonable place to start. In Christina Boyd's large study of opinion-writing using Westlaw data, the observation with the fewest words was 51. *See* Boyd, *supra* note 19, at Table 1 (listing minimum observation for "Opinion Length" variable as 51 words).

²⁵⁸ And the table entitled "Comparison of Online Case Law Services" shown in Appendix 3, shows that FDSys had a slightly more comprehensive collection of opinions from the Northern District of Illinois. *See infra* Appendix 3.

²⁵⁹ *See Advanced Search*, U.S. GOV'T PUBL'G OFF., <http://www.gpo.gov/fdsys/search/advanced/advsearchpage.action> [<https://perma.cc/VW27-PJZU>] (last visited Mar. 4, 2016).

²⁶⁰ Both Westlaw and Lexis profess to collect all decisions from PACER that are "substantive", excluding only "procedural orders." *See* McCuskey, *supra* note 8, at 430 n.236 (recounting correspondence with database representatives); *see also* Lizotte, *supra* note 25, at 134–35

solution through Westlaw is that the newly-expanded body of decisional law could be sifted with Westlaw's more finely-tuned search fields and filters. The downsides of a Westlaw-based solution are the cost of a Westlaw subscription (which might increase if Westlaw had to pay PACER fees for additional opinions) and the fact that Westlaw builds its database directly from PACER anyways.

As a precedent purist, I favor the zero-submergence solution because it would create a public body of precedent, which includes all decisions bearing the hallmark of putative precedential value: reasoned elaboration. A zero-submergence collection of decisions would thereby release precedent theory from the logistical confines of discretionary pre-selection, the conscious or unconscious biases that may manifest through this discretion, and inevitable technological changes. Creating an accessible, zero-submergence collection furthers the systemic values of predictability and legitimacy by making all data points available to the public in one comprehensive body of case law. The technology animating the published/unpublished caste system has changed, and so should the system itself. The many doctrinal species of precedent will endure,²⁶¹ sorting the relevant from the irrelevant, horizontal from the vertical, and persuasive from the mandatory—along theoretical lines, unimpeded by slippery logistics and opaque judicial preferences.

For all its virtues, however, zero submergence is not inherently costless. This is especially true if zero submergence is achieved through the over-inclusive route of making every *decision* available, regardless of reasoning. Concerns linger that zero submergence may erode any efficiency gained from enhanced predictability and may induce paralysis—both for researchers analyzing precedent and courts deciding issues.²⁶² The next section addresses those concerns and considers some ways to better manage a non-zero level of submergence.

C. *Some Submergence*

To strike the perfect balance of quality and quantity in the body of precedent, the ideal percentage of submerged precedent may be above zero. Technology already has made decisions more widely and readily available. But this democratization of information also runs the risk of drowning out the signal of the law with the noise of individual decisions,²⁶³ as well as possibly deterring courts from writing out their reasoning at all.

Throughout the technological evolution of access to decisional law, we have accepted the premise that some reasoned decisions are not suitable to be included

(explaining collection policies circa 2007 and noting that “Lexis and Westlaw representatives reported no substantial differences in how the two services obtain content”).

²⁶¹ See *supra* Part II.A.2.

²⁶² See Pether, *supra* note 14, at 1445–47; Price, *supra* note 173, at 110.

²⁶³ See MacLachlan, *supra* note 37, at 616.

in precedent. The ratio of exclusion we are willing to accept and the mechanism for where to draw the line has shifted outward with each innovation.²⁶⁴ The question posed by this project is who should make the initial cut: the authoring judge, docket clerks, Westlaw editors, or individual researchers (future courts, litigants, and analysts) on an as-necessary basis.

The erosion of predictability and legitimacy implicated by submergence of some precedents may be offset to some degree by enhanced efficiency.²⁶⁵ If fewer decisions are available, then parties and future judges expend less effort wading through them to find relevant and persuasive precedents. Of course, if that initial selection for availability is skewed, then parties' predictions will be inaccurate, producing inefficiency.²⁶⁶ Wholesale importation of reasoned decisions into the pool of available precedents will overcome skew, but create more work for those researching precedents by increasing the volume of potential precedent without sifting for quality.

Or we could keep some precedents submerged on dockets but include dockets in a new standard for competent research by lawyers.²⁶⁷ Parties to litigation already might consider a targeted search for submerged precedents if there are no other cases available to aid their predictive efforts. And, of course, once a judge is assigned to the case, it makes sense to search that judge's own opinions to get predictive information on that decision-maker's precedent and reasoning. But requiring parties to sift through submerged precedent in the normal course of research is not practical or efficient with the current state of technology.

²⁶⁴ In the English system we inherited, the ratio heavily favors exclusion because judges usually speak, rather than write, their decisions and reasoning. *See generally* Healy, *supra* note 145 (summarizing evolution of the precedent system in England, the American colonies, and in the post-Revolutionary War period). This system represents the smallest volume of written precedent and the highest degree of discretion over what decisions become part of precedent. In the earlier years of the United States, the physical limitations of print, the lower workload of the judiciary, and the geographic expanses of our jurisdictions contributed to acceptance of the Reporter system and its degree of discretion in selecting the opinions that would be made available. *See generally* Price, *supra* note 173 (tracing the precedential system after the founding of the United States). With database technology in the 1980s and internet delivery in the late 1990s, our written precedent shed the physical limitations of print. Database technology could hold much more and could adapt more quickly to new information, which was good timing because the federal courts' workload was increasing, too. Just as in the print Reporter days, judges exercised discretion to include opinions in the database, and the database editors exercised discretion whether to include opinions not selected by judges. *See generally* Martin, *supra* note 210, at 9. Thus, as the volume of opinions increased, the discretionary power judges had over determining available precedent decreased (shared with database editors—and all available on PACER).

²⁶⁵ *See, e.g.*, Lizotte, *supra* note 25, at 120.

²⁶⁶ *See* Mills, *supra* note 201, at 446.

²⁶⁷ *Cf.* McCuskey, *supra* note 5, at 441 & n.273 (“Commercial database research in Westlaw or Lexis has become not only *de rigueur*, but also required to establish professional competence and avoid Rule 11 sanctions.”).

The fact that the submerged precedents identified in this project are district court decisions raises arguments for and against maintaining some submergence. On the one hand, because district court opinions offer non-binding horizontal precedent, it becomes even more important to eliminate the potential noise created by having too many non-binding opinions in the pool of possible precedents. This suggests that maintaining a thoughtfully-curated level of submergence might be desirable. On the other hand, because district court opinions do not formally bind other courts in the vertical hierarchy, some wider variety in the opinions available does not cloud the law for other courts. This suggests that zero submergence would be relatively harmless.

To inch toward that aspirational balance of efficiency and fairness, perhaps not every elaborated decision needs to be available on Westlaw. It is possible that too much information in the form of too many available decisions could create noise or undesirable skew in the law's development. Submerged precedent's ideal role in the precedent system thus must account for efficiency, predictability, and legitimacy.²⁶⁸

Thinking about an ideal role for submerged precedent requires consideration of the costs and benefits of written opinions generally. The considerations in whether to write at all are relevant to the appropriateness of submerging precedent once written. If the judge has exercised the discretion to write, we may not want to discourage that decision.²⁶⁹ So submerging precedent may be more appropriate or desirable to accommodate the factors underlying the exercise of discretion. Or, at much greater effort, we could require judges to offer reasoned elaboration with every written decision and publicize them all. But unstable federal court budgets²⁷⁰ and increasing workloads²⁷¹ may make judicial efficiency even more urgent in the near term. Instead, management and administrative innovations like the Northern District of Illinois's order form may be encouraged to promote the speedy and inexpensive system to resolve disputes.²⁷²

The creation of a publication panel within each district or circuit could offset some of the submergence problems with authoring judges' prospective classification in the current system. This could be achieved informally by action of the

²⁶⁸ See *supra* Part II.A.

²⁶⁹ See Oldfather, *supra* note 9, at 1290.

²⁷⁰ See Judith Resnick, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1824–25 (2014) (highlighting the federal courts' prioritization of budgetary pressures starting in 2010). Cf. *Fiscal Year 2014 Funding for the Judiciary*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/annual-report-2014/funding-budget.aspx> [<https://perma.cc/9NQD-JAMH>] (last visited Mar. 4, 2016) (referencing cuts and emergency measures implemented in 2013 and 2014, while acknowledging that the 2015 budget returns to adequate funding levels).

²⁷¹ See *Judicial Caseload Indicators: Judicial Business 2014*, U.S. CTS., <http://www.uscourts.gov/Statistics/JudicialBusiness/2014/judicial-caseload-indicators.aspx> [<https://perma.cc/7KHY-5QRJ>] (last visited Mar. 4, 2016).

²⁷² See FED. R. CIV. P. 1.

district's chief judge or formally by promulgating a local rule or internal operating procedure.²⁷³ A publication panel could be tasked with periodically sorting through the opinions that remain submerged on dockets and selecting those that should be promoted to the commercial databases. This task retains some troubling amount of discretion and prospective selection of precedent, but potentially removes biases from the opinions' authors and the parties involved. Any publication panel should draw membership from the judiciary, practitioners, scholars, and citizens beyond those roles to more fully serve the precedent system's range of constituents.²⁷⁴

Rather than simply exposing existing putative precedents using technology, we could also consider ways to encourage courts to generate more of the "written opinions" that contribute to development of precedent. To expand the whole iceberg, in this metaphor, would have its benefits and costs too.

Procedural and pragmatic pressures can subtly or unsubtly guide the decision whether to write, as well as whether to make writing publicly available. The most settled factors in exercising discretion to write include time, the nature of the case, procedural rules or customs directing exercise of discretion likelihood of appeal, and the court's institutional role.²⁷⁵

The time invested in writing a reasoned elaboration can be offset by the return on that investment. Writing consumes judicial time and energy that might more efficiently be allocated to other functions,²⁷⁶ especially in the modern era of ever more thinly-stretched judicial resources.²⁷⁷ Submergence, like unpublication, could represent a modification of custom to deal with docket pressure—

²⁷³ See 28 U.S.C. § 2071(a)–(b) (2012) (Rules Enabling Act); FED. R. CIV. P. 83 (district court local civil rules); FED. R. CRIM. P. 57 (district court local criminal rules). And, of course, any such rules would themselves have to be "published" on the court website under Section 205 of the E-Government Act. See E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899 (2002).

²⁷⁴ See Pether, *supra* note 14, at 1535 (offering British and Australian models for such a delegation).

²⁷⁵ See Oldfather, *supra* note 9, at 1291–92; cf. Pether, *supra* note 14, at 1445 (questioning the "dominant contemporary justification for unpublication" as workload issues and arguing that systematic bias against *pro se* prisoner post-conviction claims instead drives the appellate courts' unpublication practices). See generally Boyd, *supra* note 19.

²⁷⁶ Even if the time and energy are expended by judicial law clerks rather than judges themselves, these law clerks could also devote their time to supporting other judicial functions. See Richard A. Posner, *Foreword, A Political Court*, 119 HARV. L. REV. 32, 61 (2005) (highlighting the role of law clerks in ghostwriting appellate court opinions); Oldfather, *supra* note 9, at 1344 ("[I]t is rarely the case that [federal] judges . . . are the initial authors of the opinions that go out under their names.").

²⁷⁷ Federal civil filings increased 2 percent in 2013 and 6.3 percent over the past nine years. Compare *U.S. District Courts—Judicial Business 2013*, U.S. CTS., <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-district-courts.aspx> [https://perma.cc/75R8-YDJ A] (last visited Mar. 4, 2016), with *Federal Judicial Caseload Statistics 2013*, U.S. CTS., <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013/caseload-summary.aspx> [https://perma.cc/4JLY-ELWP] (last visited Mar. 4, 2016). The increase has been even more dramatic in the past 25 years. See *Caseload Increases Stress Need*

allowing the judge to devote *some* time to writing a reasoned explanation, but relieving her of the burden to perfect and otherwise ready that writing for broader public consumption. The judge might see reasons to exercise her discretion and write. But she may view the writing as useful only to the parties involved or place greater weight on the need for speed than thoroughness and elegance.²⁷⁸ In those instances where submergence of written opinions results from efficiency considerations, bringing those opinions to the surface theoretically could deter the initial decision to write, thus depriving the parties and posterity of reasoned elaboration and its benefits.

The nature of the case can vary the return on investment for trial courts deciding to write opinions. Complex cases may require more effort to decide and writing can sharpen that analysis.²⁷⁹ Complex cases or highly-contested issues also may require writing to effectively communicate the decision to the loser.²⁸⁰ Similarly, decisions on unsettled and/or dispositive issues may warrant writing to communicate to the appellate court when appellate review seems likely. Submergence largely prevents these communications from reaching a wider audience. If the possibility of public consumption would deter courts' communication to the parties and appellate reviewers, then we might lose this important communicative function.

But deterrence presupposes discretion. And rules can constrain discretion.²⁸¹ Procedural rules or customs directing written opinions ensure that courts com-

for *New Federal Judgeships*, U.S. CTS. (Sept. 10, 2013), <http://news.uscourts.gov/caseload-increases-stress-need-new-federal-judgeships> [<https://perma.cc/CNL5-KQ6E>] (advocating for creation of more judgeships because "filings have risen 39 percent in federal district courts, and 34 percent in the courts of appeals" since 1990). See generally Oldfather, *supra* note 9, at 1288.

²⁷⁸ For example, a district court granted a motion for leave to amend the complaint using a concise, but reasoned "Memorandum Opinion" in *Womack v. Home Depot, USA, Inc.*, No. 3:06-cv-00285-D (N.D. Tex. July 14, 2006), [http://www.gpo.gov/fdsys/pkg/USCOURTS-txnd-3_06-cv-00285-0.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-txnd-3_06-cv-00285/pdf/USCOURTS-txnd-3_06-cv-00285-0.pdf) [<https://perma.cc/42TR-8NAS>]. In its elaboration, the court construes federal and state rules of procedure, identifies a lingering ambiguity in an *Erie* question, cites *Wright & Miller*, and three of its own prior opinions. *Id.* Yet the author notes initially:

Under § 205(a)(5) of the E-Government Act of 2002 and the definition of "written opinion" adopted by the Judicial Conference of the United States, this is a "written opinion[] issued by the court" because it "sets forth a reasoned explanation for [the] court's decision." It has been written, however, primarily for the parties, to decide issues presented in this case, and not for publication in an official reporter, and should be understood accordingly.

Id. at 1 n.1. While tagged "written opinion" under the statutory directive, the opinion is not available in Westlaw.

²⁷⁹ Oldfather, *supra* note 9, at 1291.

²⁸⁰ *Id.* But see generally Gertner, *supra* note 165 (describing how focus on explanations for losers at the summary judgment stage may skew development of precedent).

²⁸¹ See generally Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995); cf. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577-80, 590-93 (1988).

municate at a minimum with parties and appellate reviewers in particular decisions.²⁸² Where rules have supplanted discretion with direction to write, submergence of those compelled writings may restore some of the authoring court's discretion over how her reasoning is deployed. This would ring especially true where writing rules are explicitly aimed at communication with parties and appellate reviewers.²⁸³ This, in fact, may be why the Rule 56(a) amendment preserved district courts' discretion over the "form and detail" of the required statement of reasons in the summary judgment context,²⁸⁴ after eroding their discretion over whether to offer reasons.

Trial courts' position as courts on the front lines of civil litigation can encourage writing to serve institutional functions beyond simply communicating with those the decision directly impacted.²⁸⁵ As explained above in Part II, trial judges may not have the power to bind vertically with their opinions, but the volume of novel issues they decide without appellate review contributes mightily to the development of the law. Under their original jurisdiction, trial courts see new issues and circumstances first, giving them the opportunity to develop templates for future courts and parties facing similar issues or circumstances.²⁸⁶

Analyzing this slice of submerged precedent bolsters Chad Oldfather's conclusion that judicial discretion, as a standard for determining *whether* to write a reasoned elaboration, works at the district-court level.²⁸⁷ For all the reasons that standards may be preferred over rules generally,²⁸⁸ and specifically in the context of Rule 1's announced purposes,²⁸⁹ the decision whether to write should remain largely within the trial court's discretion for the foreseeable future.

While judicial discretion determines whether a judge will offer reasoned explanations,²⁹⁰ procedural exceptions can alter this discretion by requiring or suggesting writing in particular circumstances. For example, the 2010 Amendments

²⁸² See, e.g., FED. R. CIV. P. 56(a) (requiring recorded reasoning for summary judgment motion decisions).

²⁸³ E.g., FED. R. CIV. P. 56(a) advisory committee's notes to 2010 Amendment (explaining that a statement of reasons may "facilitate an appeal" and that "identification of central issues may help the parties to focus further proceedings").

²⁸⁴ *Id.*

²⁸⁵ Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 584 (2009) ("[D]istrict court judges are on the front line of applying the standards on 12(b)(6) motions."); Oldfather, *supra* note 9, at 1291 ("By virtue of being on the legal system's 'front lines,' trial judges enjoy a perspective that appellate judges do not."); see also Levin, *supra* note 56, at 977–80 (arguing that this is why district court opinions matter).

²⁸⁶ Oldfather, *supra* note 9, at 1291–92.

²⁸⁷ See *id.* at 1342 (concluding that his "analysis validates the largely discretionary scheme of current standards relating to judicial writing").

²⁸⁸ See generally McCuskey, *supra* note 8 (summarizing the rules-versus-standards debate).

²⁸⁹ FED. R. CIV. P. 1 (articulating procedural rules' goals of "just, speedy, and inexpensive" resolution of disputes).

²⁹⁰ Oldfather, *supra* note 9, at 1289.

to Federal Rule of Civil Procedure 56 added a direction that district court judges “should state on the record the reasons for granting or denying the motion.”²⁹¹ The Committee Notes to the amendment highlight some advantages for recording reasons in the summary judgment context, including that “a statement of reasons can facilitate an appeal or subsequent trial-court proceedings.”²⁹² While emphasizing that reasons for *granting* the dispositive motion are “particularly important,” the Committee noted that “[t]he statement on *denying* summary judgment need not address every available reason.”²⁹³ The Committee’s direction left “[t]he form and detail of the statement” to the court’s discretion.²⁹⁴

Summary judgment is the lone dispositive motion suggesting recorded reasoned elaboration,²⁹⁵ but a handful of other decisions do direct the exercise of discretion toward reasoning.²⁹⁶ To generate a more useful body of decisional law on the jurisdiction question, we could consider the effect of making a modification to the removal statute directing remand orders be accompanied by explanation—like Rule 11 (required) or 56 (suggested). While this would erode some of the efficiency gained from making remand orders unappealable, it could help correct the imbalance in the precedent that has evolved from that insulation.

Short of structural change to procedure, judicial education on opinion writing and docketing offers another promising avenue for buoying some submerged precedent into the world of visible law. On the generation of precedent, guidance from the Federal Judicial Center, District Chief Judges, and the Circuit Courts could directly suggest that district judges more often use their discretion to write reasoned elaborations on topics particularly important at the trial-court level, like jurisdictional remands.²⁹⁷ On the court’s role in accessibility of precedent, the Administrative Office and district administrators could offer some targeted training on best practices for disseminating opinions, as well as conduct periodic surveys of each court’s docketed opinions and orders to monitor submergence.²⁹⁸

²⁹¹ FED. R. CIV. P. 56(a) advisory committee’s notes to 2010 Amendment (explaining the amendment “adds a new direction that the court should state on the record the reasons for granting or denying the motion”).

²⁹² *Id.*

²⁹³ *Id.* (emphasis added).

²⁹⁴ *Id.*

²⁹⁵ See FED. R. CIV. P. 12 (containing no direction on reasoning for motions to dismiss or for judgment on the pleadings); FED. R. CIV. P. 50(a) (motion for judgment as a matter of law); FED. R. CIV. P. 50(b) (renewed motion for judgment as a matter of law).

²⁹⁶ See FED. R. CIV. P. 50(c)(1) (requiring a conditional ruling on a motion for a new trial accompanying a renewed motion for judgment as a matter of law, and further requiring that the court “must state the grounds for conditionally granting or denying the motion for a new trial,” but not imposing a similar requirement for the motion for judgment).

²⁹⁷ See, e.g., FED. JUDICIAL CTR., *supra* note 152, at 7.

²⁹⁸ See e.g., *Administrative Oversight and Accountability*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/judicial-administration/administrative-oversight-and-accountability> [<https://perma.cc/23D5-QRG9>] (last visited Mar. 4, 2016) (“The Federal Judicial Center (FJC) and the AO offer in-person and web-based training for chief judges

Judicial education, of course, is neither impervious to bias nor without controversy.²⁹⁹ But by targeting opinion dissemination at its source, judicial training could at the very least correct the unintentional submergence of opinions.

If we want *some* discretion in our available precedents to encourage judicial writing and to spare us from the burden of complete access, then we should thoughtfully navigate the procedural and pragmatic pressures on precedent's creation, as well as its submergence. A more conscious evolution of technology in recognition of doctrinal goals is in order at this moment.

CONCLUSION

At last, we have reached a level of technological sophistication that offers us the opportunity to build a body of decisional law reflective of precedent doctrine's amiable goals: fairness, legitimacy, and efficient, stable development of the law. We should seize this opportunity to conscientiously navigate a course to full, meaningful access to court decisions.

The existence of submerged precedent threatens to skew development of the law and disrupt the reliability and legitimacy of our precedential system. Yet ignorance to the existence of submerged precedent poses a more immediate threat. Identifying and acknowledging submerged precedent offers the first counterweight to the phenomenon itself. As of this writing—and your reading—submerged precedent is now a known unknown, which should inform the calculations courts, litigants, and lawyers make daily.

Two other counterweights may deter submerged precedent's threat. First, submerged precedent may encourage written reasoning for individual parties, even if not presented for posterity. And that is good. Explaining the reasons for a decision may increase parties' satisfaction with the legal process resolving their disputes and bolsters the rule of law. By encouraging explanation for the parties, submerged precedent may be better than no precedent at all on measures of fairness and legitimacy. The layers of discretion directing some opinions to public consumption and others to submergence may help isolate the signal of the law from the noise of context-specific decisions.

The question remains whether submerged precedent or no precedent would be more harmful to development of decisional law. Unexplained decisions may

and unit executives on their management and oversight responsibilities. In addition, the Director of the AO has a statutory duty to 'supervise all administrative matters' in the courts.'").

²⁹⁹ See Suja A. Thomas, Opinion, *Via Duke, Companies Are Shaping Discovery*, LAW360.COM (Nov. 4, 2015, 2:41 PM), <https://www.law360.com/articles/723092/opinion-via-duke-companies-are-shaping-discovery-rules> [<https://perma.cc/AMK3-WLBR>] (highlighting the role that private companies play in developing "guidelines" on Rule 26 proportionality and the role those "guidelines" play in judicial education on the new discovery rules). See generally S.I. Strong, *Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?*, 2015 J. DISP. RESOL. 1 (2015) (surveying and critiquing the evolution of private influence on judicial education programs).

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stunt the development of law, while submerged precedent may skew it. Additionally, submerged precedent may contribute to the phenomenon of private judging that can further disadvantage already-disadvantaged parties, while heaping additional strategic advantage on well-funded institutional litigants.

As technology and effort evolve and democratize the availability of all court decisions, the isolation of *the law* from an ever-increasing number of individual decisions may become increasingly complex. But the identification of submerged precedent and the careful consideration of systemic values behind our system of decisional law can help guide that evolution.

The application of precedent theory informed by empirical observation presented here suggests that the time has come for technology to return us to precedent's doctrinal foundations—to make all court opinions accessible as a body of law and let time determine which opinions are destined to become precedent and which decide but one case.

APPENDIX 1 – *OMNICARE, INC. V. WALGREENS*

08-cv-03901 (Dkt. 31) (N.D. Ill. Sept. 25, 2008)

Name of Assigned Judge or Magistrate Judge: Matthew F. Kennelly

DOCKET ENTRY TEXT

For the reasons stated below, the Court grants plaintiff's motion to remand [docket no. 17]. The Clerk is directed to remand the case to the Circuit Court of Cook County, Illinois.

STATEMENT

In May 2007, Omnicare, Inc. sued Walgreens Health Initiatives, Inc. (WHI) in Illinois state court for breach of contract. Omnicare alleged WHI had breached a contract between the two entities relating to the provision of pharmaceutical products and services to participants in Medicare Part D. In December 2007, the state court granted United Healthcare Services, Inc. (UHS) and Comprehensive Health Management, Inc. (CHM) leave to intervene as defendants, on the ground that WHI had contracted with Omnicare on their behalf and that they might be liable if Omnicare prevailed. In May 2008, the state court denied defendants' motion to dismiss Omnicare's complaint and gave Omnicare leave to file an amended complaint. Omnicare did so on June 11, 2008, asserting claims against WHI, UHS, and CHM. CHM then removed the case to this Court, with UHS and WHI both consenting in writing to the removal. The removal was based on CHM's contention that one of Omnicare's claims included allegations that the defendants had breached the contract by failing to comply with various requirements of federal law.

Omnicare has moved to remand the case to state court. It makes several arguments in support of removal, but the Court need address only one of them. Omnicare argues that in the contract, the defendants gave up the right to remove the case. It relies on a contractual provision that reads as follows:

Governing Law. This Agreement will be construed and governed according to the laws of the State of Illinois. The courts of the State of Illinois shall have exclusive jurisdiction over the parties with respect to any dispute or controversy between them arising under or in connection with this Agreement and, by execution and delivery of this Agreement, each of the parties to this Agreement submits to the jurisdiction of those courts, including the in personam and subject matter jurisdiction of those courts, waives any objection to such jurisdiction on the grounds of venue or forum non conveniens, the absence of in personam or subject matter jurisdiction and any similar grounds, consents to service of process by mail or any other manner permitted by law, and irrevocably agrees to be bound by any judgment rendered thereby in connection with this Agreement. These consents to jurisdiction shall not be deemed to confer rights on any person other than the parties to this Agreement.

Compl., Ex. 1 ¶ 7.4.

CHM, joined by WHI, opposes removal. CHM's first argument is that because the contract was between Omnicare and WHI, the quoted provision does not bind CHM. The Court disagrees; CHM was granted leave to intervene in state court based on its representation that in entering into the agreement, WHI was contracting with Omnicare on CHM's behalf. It thus effectively conceded that the contract was executed by a party acting as its agent, making the provision equally binding on CHM. *Cf. Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 352 (2d Cir. 1999) (non-party to contract providing for dispute resolution via arbitration may be bound by arbitration requirement via principles of agency law); *Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc.*, 293 F.3d 1023, 1029 (7th Cir. 2002) (citing *Am. Bureau of Shipping* with approval). But even were the agreement's forum selection provision not binding on CHM, that would not prevent remand. WHI is unquestionably bound by the agreement. For that reason, if the forum selection provision prevents removal of the case to federal court, WHI was contractually barred from joining in the removal. "A petition for removal fails unless all defendants join it," *Roe v. O'Donohue*, 38 F.3d 298, 301 (7th Cir. 1994), *abrogated on other grounds, Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), and thus if WHI could not properly join in the removal, the case could not properly be removed.

The Court therefore turns to the issue of whether the provision precludes removal of the case. A forum selection provision may amount to a waiver of a party's right to remove a case to federal court, but to do so the waiver must be clear and unequivocal. *See, e.g., Oberweis Dairy, Inc. v. Maplehurst Farms, Inc.*, No. 88 C 4857, 1989 WL 2078, at *1 (N.D. Ill. Jan. 10, 1989). This provision meets that requirement. Though it carries the title "Governing Law," the provision clearly states that the contracting parties submit to the subject matter and personal jurisdiction of "[t]he courts of the State of Illinois" and waive any objection to venue in those courts. It thus amounts to both a selection of both jurisdiction and venue, unlike certain of the cases cited by CHM in which there was a consent to the former but not the latter.

The Court rejects CHM's argument that the provision is ambiguous and thus must be construed as something other than a waiver. The title to the provision does not make it ambiguous; the text clearly and unequivocally includes provisions beyond the "governing law." Nor does the absence of a specific statement that the right of removal is forfeited render the clause ambiguous; the fact that a contractual provision arguably could have been drafted with greater specificity does not make it ambiguous. As long as there is language indicating the parties' intent to make venue exclusive – which there is in this case – a forum selection provision of this type is enforced and requires that venue be situated in the chosen jurisdiction. *See Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006).

The Court also rejects CHM's argument that the clause is broad enough to permit venue to be situated in a federal court in Illinois. That is not how the

provision reads. It says that disputes must be litigated in the “courts of the State of Illinois.” A federal court is not a “court of the State of Illinois.” *See, e.g., Amer. Soda, LLP v. U.S. Filter Wastewater Group, Inc.*, 428 F.3d 921, 925-26 (10th Cir. 2005) (provision requiring disputes to be determined in “courts of the State of Colorado” did not permit removal of case to federal court in Colorado). Were the provision worded differently – for example – to provide that disputes are to be litigated in a “court in Illinois,” CHM might have the better of the argument, but the Court can neither rewrite the contract nor twist its meaning to permit the dispute to be litigated in federal court.

Finally, the Court rejects CHM’s argument that the forum selection provision is unenforceable. A forum selection clause is enforceable unless the party opposing enforcement shows that it would be unreasonable or unjust to enforce the provision or that it is invalid, for example due to fraud or overreaching. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). CHM has made no such showing. Its only argument against enforceability amounts to a contention that if adjudication of a claim turns on interpretation of federal law, it cannot get a fair hearing in state court. *See* CHM Resp. at 4. CHM cites no authority, however (nor is the Court aware of any), for the proposition that forum selection clauses requiring cases to be venued in state court are unenforceable in suits involving federal questions.

For these reasons, the Court grants plaintiff’s motion to remand [docket no. 17]. The Clerk is directed to remand the case to the Circuit Court of Cook County, Illinois.

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APPENDIX 2 – *WETLANDS BOARD V. WARE*

4:08-cv-00107 (Dkt. 45) (E.D. Va. Feb. 18, 2009)

MEMORANDUM OPINION & ORDER³⁰⁰

This matter is before the Court on Wetlands Board of the County of James City and The County of James City's ("Plaintiffs") Motion for Remand. Having carefully reviewed the parties' pleadings, the Court finds this matter ripe for judicial determination. For the reasons below Plaintiffs' Motion to Remand is GRANTED.

I. FACTUAL AND PROCEDURAL HISTORY

This action arises out of alleged violations of state and local environmental laws as a result of Defendant's maintenance of a road located on his property. Defendant owns property in James City County identified as 5004 River Drive, Lanexa, Virginia (the "Property"), a portion of which is designated as jurisdictional wetlands. The County of James City (the "County"), political subdivision of the Commonwealth of Virginia, adopted a wetlands ordinance and created the Wetlands Board of James City County (the "Board") to enforce its ordinance.

As a result of litigation initiated by Plaintiffs in 1993, Docket No. 4:93cv 15, Defendant and the Property were subject to a Final Order entered by this Court on July 28, 1995 (the "1995 Order"), which declared that Defendant was in violation of the Federal Clean Water Act, the Virginia Wetlands Act, the County's Erosion and Sedimentation Control Ordinance, and the County's Wetlands Ordinance. (Final Ord. at 4. (Doc # 27)). The 1995 Order found a portion of Defendant's property to be jurisdictional wetlands, ordered Defendant to remove all fill and restore the wetlands, and allowed Defendant to recreate a road through the wetlands to access the Chickahominy River. (*Id.* at 6-8). The Order also required that a monitoring plan be placed in effect and expressly stated that monitoring was not to exceed the date of November 1, 1997. (*Id.* at 8).

In January 2008, Plaintiffs filed a show cause petition in the Circuit Court of James City County (the "Circuit Court") seeking to enforce the Court's 1995 Order. In response to Plaintiff's petition, the Circuit Court declined to exercise jurisdiction, finding that the matter would be more appropriately decided in the court where the Final Order originated. On January 11, 2008, Defendant filed a motion, in federal court, for relief from judgment and the Final Order. Plaintiffs subsequently filed a motion to show cause, asking this Court to require Defendant to show why he should not be held in contempt for expanding his road in excess of the width they claimed was specified in the 1995 Order. The Court held a hearing on the motions on March 10, 2008, and on March 24, 2008, this Court found that Defendant satisfactorily completed the rehabilitation required by the

³⁰⁰ Five footnotes omitted.

1995 Order. (March 24, 2008 Order at 2. (Doc. # 61)). The Court also found that the 1995 Order "no longer applie[d] to Defendant's property, and this Court no longer ha[d] jurisdiction over Defendant's use of his property." (*Id.*).

On October 24, 2008, Plaintiffs filed a Petition in the Circuit Court of the City of Williamsburg and County of James City, this time seeking to enforce a Restoration Order issued by the Board. Count I of Plaintiffs' Petition alleges that officers of the Wetlands Board and the Chesapeake Bay Board observed wetlands violations on Defendant's property. The Petition offers details of the Board's procedure of holding a hearing regarding the alleged violations on the Property and the Board's issuance of a notice to comply to Defendant. Finally, Count I alleges that Defendant failed to submit an acceptable restoration plan, despite such request, and the Board, adopting the County's proposed restoration plan, issued a Restoration Order requesting Defendant's compliance. It is this Restoration Order and, as a result, the alleged violations of the Virginia Wetlands Act, that Plaintiffs seek to enforce in the instant Petition.

On October 30, 2008, Defendant filed a Notice of Removal pursuant to 28 U.S.C. § 1441 based upon federal question jurisdiction. On December 2, 2008, Plaintiffs filed a Motion to Remand and Brief in Support. Defendant filed his Opposition Brief on December 12, 2008, and Plaintiffs filed their Reply Brief on December 29, 2008.

II. LEGAL STANDARD

Under 28 U.S.C. § 1441 (a) (2000), a defendant may remove to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." However, under 28 U.S.C. § 1447(c), "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Where, as here, jurisdiction is asserted by a defendant in a removal petition, the defendant has the burden of establishing that removal is proper. *See Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). Moreover, the United States Court of Appeals for the Fourth Circuit has held that removal jurisdiction is to be strictly construed in light of federalism concerns. *See Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005).

The only possible ground for federal jurisdiction in the instant case is federal question jurisdiction. Under 28 U.S.C. § 1331, federal district courts are vested with original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Generally, a claim "arises under" federal law only if a federal question appears on the face of the plaintiff's complaint. Otherwise, removal is lacking even if the defendant asserts a defense based exclusively on federal law. *Caterpillar, Inc. v. Williams*, 482 U.S. 286, 392 (1987). ("The party who brings the suit is master to decide what law he will rely upon."); *see also Franchise Tax Bd v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10

(1983) ("[A] defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law."). In order to remove a case under federal question jurisdiction, the federal question "must be an element, and an essential one, of the plaintiff's cause of action." *Lontz*, 413 F.3d at 439 (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936)).

In cases where federal law creates the plaintiff's cause of action, federal courts "unquestionably" have subject matter jurisdiction. *Mulcahey*, 29 F.3d at 151. If, however, state law creates the cause of action, the court must determine whether the adjudication of those state law claims "requires resolution of a substantial question of federal law." *Franchise Tax Bd.*, 463 U.S. at 13. The "mere presence" of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction. *Merrell Dow Phann., Inc. v. Thompson*, 478 U.S. 804, 813 (1986). After examining only those allegations which are properly raised in a well-pleaded complaint, a court must then determine whether the substance of those actions raises a federal question. *West 14th St. Comm'l Corp. v. 5 W 14th Owners Corp.*, 815 F.2d 188, 192 (2d Cir. 1986). If the claim arises under federal law, the federal court will re-characterize it and uphold removal. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 294, 298 n.2 (1981).

III. DISCUSSION

Plaintiffs urge the Court to remand the instant action to state court because their Petition only seeks enforcement of a Restoration Order issued by the Board pursuant to state and local environmental laws. Further, Plaintiffs represent to this Court that they did not assert any federal causes of action in the petition and have no intention of pursuing any within the confines of this civil action. Defendant counters that his removal of this action is proper, arguing that the express allegations of the petition establish federal question jurisdiction. Specifically, Defendant contends that Plaintiffs' right to relief depends on construction of federal laws, namely the federal injunction issued by this Court in 1995.

In Count I of their Petition, Plaintiffs attempt to enforce a Restoration Order that was issued in response to Defendant's alleged violations of state and local wetlands laws. Despite Defendant's assertions, nowhere in Plaintiffs' Petition do they allege violations of the Clean Water Act or any other federal law that would provide a basis for federal jurisdiction. Instead, Plaintiffs simply assert that certain state and local wetlands violations were observed on Defendant's property. Specifically, Plaintiffs assert that Defendant placed "riprap rubble within the jurisdictional wetlands and fill[ed] and grad[ed] within the jurisdictional wetlands without a permit from the County." (Brief Supp. Mot. Remand 5). Plaintiffs further allege that Defendant failed to comply with or appeal their Restoration Order. (*Id.*). Although Defendant attempts to characterize Plaintiffs' cause of action as one arising out of federal law, the Petition does not cite any federal statute, nor mention any federal common law cause of action. Applying the well-pleaded complaint rule to the case at bar, the Court finds that Plaintiff's Petition does not, on its face, reveal a federal question.

Defendant also argues that removal jurisdiction exists because any resolution of Plaintiffs' claim would necessarily deal with this Court's 1995 Order. Defendant further supports his "arising under" federal question jurisdiction argument by claiming that the violations at issue are not based on state law but rather concern the twelve foot dimensions allegedly established per the injunction in the 1995 Order. Although Defendant is correct in his assertion that a state court lacks jurisdiction to enforce a federal injunction, *see Baker v. General Motors Corp.*, 522 U.S. 222 (1998), the federal injunction established by the 1995 Order is no longer at issue and is not raised in the Petition currently before the Court.

Defendant relies on Plaintiffs' reference to the 1995 Order in their Petition as sufficient to establish federal jurisdiction, as Defendant claims that Plaintiffs' current action seeks to enforce the 1995 Order. However, Plaintiffs' reference to the 1995 Order in Paragraphs 19 and 20 of their Petition, as pointed out by Defendant, does not serve to state a claim. Rather, those references attempt to distinguish Plaintiffs' current action regarding Defendant's alleged state and local wetlands violations from the previous show cause action concerning Defendant's alleged non-compliance with the 1995 Order.

Moreover, as noted in the March 24, 2008 Order issued by Judge Bradberry, "the [1995] Order did not control the road in question . . . [and] it was not the Court's intention to . . . dictate the exact dimensions of the road throughout the property's existence." (March 24, 2008 Order at 3). Additionally, "the [1995] Order was not intended to be a controlling force throughout the life of the owner or his property." (*Id.*). The Court also noted that Defendant fully complied with and satisfactorily completed the obligations under the Final Order, whose sole purpose was to require rehabilitation of the wetlands. The Court concluded that the Final Order was no longer binding and dismissed the matter for lack of subject matter jurisdiction.

Plaintiffs' Petition in no way attempts to recover through enforcement of the 1995 Order, under the Clean Water Act or any other federal law. A fair reading of the Petition in this case provides no basis for federal question jurisdiction. The Court finds that Defendant has not met his burden of demonstrating that federal question jurisdiction exists over this case. Accordingly, Plaintiffs' Motion to Remand is GRANTED.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Remand is GRANTED. It is ORDERED that this case be, and it hereby is, REMANDED to the Commonwealth of Virginia, Circuit Court of the City of Williamsburg and County of James City pursuant to 28 U.S.C. § 1447(c).

The Court DIRECTS the Clerk to send a copy of this Memorandum Opinion and Order to counsel of record and Plaintiffs.

IT IS SO ORDERED.

Raymond A. Jackson

United States District Judge

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APPENDIX 3 – COMPARISON OF ONLINE CASE LAW SERVICES

The table highlights the extent of each service’s collection, as described on its website, as well as some of the most advanced search functions. To test the limitations of each collection, I searched opinions from January 1, 2006 to December 31, 2014 for the word “Grable” and phrase “federal question.” I performed the search in all district courts, where available, and in the Northern District of Illinois as a comparative sample.

TABLE 2

Service	Fee	Collection Limits	All District Results	N.D.II. Results
Westlaw ³⁰¹	Yes	PACER written opinions, plus some others	1,204	28
BloombergLaw / Court Opinions ³⁰²	Yes	PACER written opinions	>1,000 ³⁰³	27
Google Scholar ³⁰⁴	No	Opinions licensed from an unspecified legal vendor ³⁰⁵	1,010 ³⁰⁶	28
FDSys ³⁰⁷	No	PACER written opinions	650 ³⁰⁸	31
Fastcase ³⁰⁹	Yes	Opinions in federal reporters ³¹⁰	843	26
Leagle ³¹¹	No	Undefined “primary caselaw” released from federal courts ³¹²	101	N/A ³¹³
Findlaw ³¹⁴	No	Undefined	N/A ³¹⁵	N/A
Public Library of Law ³¹⁶	No	Appellate courts only, through Fastcase service	N/A ³¹⁷	N/A
LIJ ³¹⁸	No	PACER written opinions via link to each court’s ECF site	N/A ³¹⁹	N/A

³⁰¹ WESTLAW, *supra* note 97.

³⁰² BLOOMBERG L., https://www.bloomberglaw.com/opinion_search [<https://perma.cc/7FFQ-SLV4>] (last visited Mar. 4, 2016).

³⁰³ BloombergLaw halts results at 1,000, but indicates that there are “1,000+” results. *See id.*

³⁰⁴ GOOGLE SCHOLAR, <https://scholar.google.com> [<https://perma.cc/TAL9-BQQM>] (last visited Mar. 4, 2016).

³⁰⁵ *See Using Google Scholar for Case Law Research*, MD. ST. L. Libr., <http://www.lawlib.state.md.us/researchtools/googlescholar.html> [<https://perma.cc/5JDP-L7V5>] (last visited Mar. 4, 2016) (explaining that the services collects from federal courts back to 1923 and gets its content “from a major legal information vendor”).

³⁰⁶ You can search all federal districts here by selecting all of the federal courts, then unselecting the court of appeals and bankruptcy courts under each circuit.

³⁰⁷ FDSys, *supra* note 97.

³⁰⁸ FDSys is still in pilot stage and does not yet have opinions collected from all the federal district courts.

³⁰⁹ FASTCASE, <http://www.fastcase.com> [<https://perma.cc/V2HN-KHYD>] (last visited Mar. 4, 2016).

³¹⁰ *See Scope of Coverage*, FASTCASE, <http://www.fastcase.com/whatisfastcase/coverage> [<https://perma.cc/ZPV7-UYTS>] (last visited Mar. 4, 2016).

³¹¹ LEAGLE, <http://www.leagle.com> [<https://perma.cc/G74F-EP83>] (last visited Mar. 4, 2016).

³¹² *About Leagle, Inc. and Our Content*, LEAGLE, <http://www.leagle.com/about-us> [<https://perma.cc/24EN-9KDD>] (last visited Mar. 4, 2016).

³¹³ Service does not permit individual jurisdiction searches.

³¹⁴ FINDLAW, <http://www.findlaw.com> [<https://perma.cc/6MTQ-EK8L>] (last visited Mar. 4, 2016).

³¹⁵ Findlaw.com does not permit text searches or searches across all districts.

³¹⁶ PUB. LIBR. L., <http://www.plol.org> [<https://perma.cc/N6Z2-TENC>] (last visited Mar. 4, 2016). Fastcase operates PLOL as a free service. *See id.*

³¹⁷ PLOL does not include district court opinions. To obtain additional results, a user must pay for an account with Fastcase.

³¹⁸ *Federal Law: Judicial Opinions*, LEGAL INFO. INST., <https://www.law.cornell.edu/federal/opinions#other> [<https://perma.cc/4KZN-LYNS>] (last visited Mar. 4, 2016).

³¹⁹ Does not permit searching. Merely links to individual courts' ECF sites.