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Social Movements, Legal Change, and the Challenges of Writing Legal History

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RESPONSE

Structuring Jurisdictional Rules and Standards

Scott Dodson and Elizabeth McCuskey***

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INTRODUCTION

Jonathan Remy Nash's article, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, bravely tackles—and creatively merges—the dual debates over rules versus standards and the ideal contours of federal jurisdiction.¹ He proposes a revised regime in which rules define jurisdictional boundaries at the front end, while standards “migrate” into a discretionary abstention phase at the back end.² This realignment, Nash argues, optimizes efficiency and predictability by placing a bright-line rule at the jurisdictional threshold, while promoting federalism by establishing a safety net

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1. 65 VAND. L. REV. 509 (2012).

2. *Id.* at 518.

that applies standards to claims that cross the threshold.³ In this way, Nash hopes to have his “jurisdictional cake and eat it, too.”⁴

Importantly, Nash does not purport to alter the substance of jurisdictional requirements; rather, he seeks primarily to reorder them and to recharacterize them as either mandatory or discretionary. For federal question jurisdiction, for example, Nash accepts the requirements of existing doctrine: that the well-pleaded complaint must show a substantial federal issue that is central to the claim.⁵ Nash’s primary contribution is to reorganize these features of federal question jurisdiction into front-end, mandatory rules (like the well-pleaded complaint rule) and back-end, discretionary abstention (like parts of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*⁶).

The pursuit of a happy rules/standards coupling is a worthy endeavor. Nash’s creative proposal for coexistence, rather than choosing sides, is profitable not only in its mixing of rules and standards, but also in that it begins to match form to function on a more precise scale by segregating rules and standards into grants and discretionary abstentions. Segregation has the added benefits of making judges apply jurisdictional doctrine more consciously and of improving transparency to litigants and the legal community.

In its details, however, Nash’s proposal for reshaping federal question jurisdiction suffers from underdeveloped premises and unanticipated potential effects. On the premises, Nash’s proposal both uses ambiguous definitions of “rules” and “standards” and assumes that clear and simple “rules” are actually attainable in jurisdictional doctrine. Regarding unanticipated potential effects, the proposal would only work with a broad boundary rule, which would erode efficiency and predictability. In addition, Nash’s proposal to migrate standards to a discretionary abstention stage would generate its own costs at both the district and appellate levels.

We conclude that Nash’s innovative proposal is most valuable as a reclassification of existing federal question doctrine into a more transparent blend of mandates and discretion. We applaud this improved transparency and urge others to read Nash’s proposal in this light.

3. *Id.* at 550–56.

4. *Id.* at 518.

5. *Id.* at 550–51.

6. 545 U.S. 308 (2005).

I. DEFINITIONAL AMBIGUITIES

Because the consequences of Nash's "migration" proposal depend heavily on proper classification of jurisdictional components as "rules" or "standards," the baseline definition of each term acquires additional importance. Nash's proposal would benefit from more stable definitions.

Nash's definition of "rule" begins with Kathleen Sullivan's famous formulation: a rule compels the decisionmaker to respond in a certain way based on delimited triggering facts.⁷ Under this definition, a rule is mandatory and determinate. However, Nash suggests that not all mandatory directives should necessarily be treated as rules. Rather, he believes a mandatory directive should be treated as a standard when it uses a sufficiently "amorphous test for when th[e] result is mandated."⁸ Accordingly, Nash seeks to "limit application of the moniker 'rule' to settings where the legal test is absolutely clear and devoid of any controversy."⁹ This shift results in a new formulation, one that depends less upon a mandatory/discretionary distinction and more upon the related but independent value of clarity.¹⁰ Later, Nash shifts definitions again, suggesting that a rule is "mandatory and clear in terms of when it applie[s] and when it d[oes] not"¹¹ and has an "easy" and "predictable" application.¹² Rules, he poses, are more effective at "constrain[ing] government" actions "[b]y virtue of their clarity and 'all-or-nothing' application . . ."¹³ Combining these descriptions, Nash's conception of a rule embodies uncontroversial tests that are absolutely clear, simple, and predictable, with an all-or-nothing application.

We suspect that few "rules" will satisfy this definition, and that those that do will provide little utility. Nash does not elaborate on what an "absolutely clear" test "devoid of any controversy" is. How is "absolutely clear" different from merely "clear"? Is clarity judged by the design of the rule or by its interpretation? Does the controversy pertain to the meaning, the application, or both?

7. Nash, *supra* note 1, at 520–21.

8. *Id.* at 528. Confusingly, in his evaluative section, Nash says that standard-based decisions under his proposal would be subject to an abuse of discretion standard on appeal. *Id.* at 530.

9. *Id.* at 521.

10. See Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 15–23 (2011). By way of a quick example, the tax code is a rule-based scheme that is anything but clear, while the "reasonable man" standard can be clear in a wide swath of applications.

11. Nash, *supra* note 1, at 532 n.101.

12. *Id.* at 538.

13. *Id.* at 523.

Even the tests Nash expressly identifies as “rules” cannot satisfy his compound definition. For example, Nash states that tests for diversity jurisdiction, supplemental jurisdiction, and CAFA jurisdiction are “rule-like,”¹⁴ but that assertion seems quite wrong under his definition of a rule. The amount-in-controversy requirement of statutory diversity jurisdiction can be extremely difficult to apply, and even the Supreme Court has admitted that the test for corporate citizenship will prove unpredictable in some cases.¹⁵ It is hard to classify § 1367(a)’s “so related” requirement for supplemental jurisdiction as a rule under Nash’s definition, and it appears that § 1367(c)(4) would fall under Nash’s definition of a standard.¹⁶ CAFA explicitly gives district courts standard-like discretion to exercise jurisdiction over certain classes based on the percentages of home-state class members.¹⁷ Even Nash’s poster child for rules, the well-pleaded complaint rule, is neither “absolutely clear” nor completely “devoid of any controversy.”¹⁸ Despite all of Nash’s attempts, we are still unsure what qualifies as a “rule” under his definition.¹⁹

Likewise, Nash begins his definition of “standard” with Sullivan’s formulation: a standard employs the totality of facts and underlying policy to influence a decision.²⁰ Nash then proceeds to characterize standards as “flexible” and “readily adaptable” but difficult to apply and unpredictable.²¹ This elaboration is fair enough (though we are suspicious of the generality that standards are always difficult to apply and unpredictable). Nash later concludes that even a jurisdictional directive can be a standard if “a court applying it must consider policies and facts, proceed on a case-by-case basis, and ultimately employ substantial discretion. Otherwise, it is properly categorized as a rule.”²²

We think we understand the importance of flexibility, policies, and discretion, but we question the comprehensibility of Nash’s

14. *Id.* at 511–12.

15. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010).

16. *See* 28 U.S.C. §§ 1367(a), (c)(4) (2006). Section 1367(c)(4) allows district courts to decline to exercise supplemental jurisdiction “in exceptional circumstances, [for] other compelling reasons.”

17. *Id.* § 1332(d).

18. *See, e.g.,* *Dodson*, *supra* note 10, at 36.

19. Daniel Meltzer, for example, argues that *Younger* abstention has “relatively determinate boundaries,” suggesting that determinacy is not the exclusive feature of a rule and not always missing from abstentions. Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1907 (2004).

20. Nash, *supra* note 1, at 521.

21. *Id.* at 522.

22. *Id.* at 528.

definition as a whole. Don't most rules require the application of facts? Don't many also proceed on a case-by-case basis? And what kind and how much discretion is "substantial" discretion? Nash's definition appears to conflate the traditional definition of a "standard" with related but independent ideas of discretion, complexity, and murkiness.²³ As a result, Nash imports confusion that obscures the contours of his new structure.²⁴ In reality, the actual boundaries between rules and standards are gray. Nash's definitions underestimate the inherent complexity in the classification of any analytical process as "rule" versus "standard."

All this is to say that Nash need not engage the dichotomy of rules and standards to make his point. In a sense, his proposal could be clearer if it were more "standard-like," separating "clear and determinate" jurisdictional boundaries from "discretionary and policy-laden" abstention doctrines. We proceed on the basis of that principle in the sections below.

II. BROADENING BOUNDARIES, ERASING GAINS

Nash seeks to procedurally reorder, but not substantively alter, jurisdictional requirements by pulling mandatory and clear requirements to the front end of the determination and pushing discretionary and standard-based requirements to the back end. Critically, converting standards into abstentions creates a one-way ratchet used only to narrow jurisdiction, not to broaden it. This, in turn, requires that the boundary rule be set broadly to "sweep within federal jurisdiction all cases that *could* have come within federal jurisdiction under the standard."²⁵

This broadening of the scope of the jurisdictional boundary has significant implications for federal question jurisdiction. As Nash concedes, broadening the federal-question-jurisdiction boundary to account for standard-based abstention would need to encompass even cases "where the federal issue merely lurks in the background."²⁶

23. See Dodson, *supra* note 10, at 15–20 (arguing that standards—which traditionally encompass holistic consideration of the facts—may achieve both clarity and simplicity in specific circumstances).

24. See, e.g., Nash, *supra* note 1, at 510–11 (discussing the "connection with maritime activity" test); *id.* at 513 (discussing the lack of clarity in discretionary abstention doctrines); *id.* at 516 (discussing how federal jurisdictional standards allow a federal court to "cherry pick" the cases it wishes to hear); *id.* at 517 n.26 (discussing the well-pleaded complaint rule); *id.* at 518 (discussing discretionary abstention); *id.* at 532–33 (discussing the inefficiency of "[m]urky, standard-based boundaries" to jurisdiction).

25. *Id.* at 550.

26. *Id.* at 550–51.

Resetting the jurisdictional boundary as this broad rule means the presence of *any* embedded federal issue in the plaintiff's well-pleaded complaint would give federal district courts jurisdiction to hear the case, though they would later have discretion to decline to hear a claim in which the federal issue fails the *Grable* test.²⁷

Such a broad rule at the initial boundary is likely to swell federal dockets by bestowing jurisdiction on cases with only a tangential federal ingredient.²⁸ It is not apparent that the threat of dismissal or remand via discretionary abstention (and deferential appellate review) would deter litigants from filing or removing in greater numbers those cases whose federal jurisdiction is doubtful under Nash's abstention phase.²⁹ Even if abstentions rein in this expansive jurisdiction and eventually produce the same allocation of cases as under the current regime,³⁰ that result would be achieved only after the federal courts assumed jurisdiction under broader mandatory rules.³¹ For these reasons, we doubt that Nash's view reflects a more efficient ordering of the federal-question test.

Further, broadening the boundary rule necessitates broadening the exceptions to maintain a constant scope. In other words, instead of the current state of the law, which encompasses a limited grant with few exceptions, Nash proposes a broad grant with many exceptions. Those exceptions, which take the form of Nash's discretionary abstentions, chip away at the value of having a rule-based boundary in the first place. Under Nash's proposal, we expect very little litigation regarding the boundary rule because its breadth would sweep up all of the close cases. Instead, federal question litigation would focus on the discretionary factors, which would have to do the work to properly allocate cases. The resulting primacy of these

27. *Id.* at 551. For discussion of the *Grable* test, see *infra* notes 57–61 and accompanying text.

28. See *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 823 (1824) (holding that Congress may confer federal question jurisdiction over cases with an “ingredient” of federal law). Compare Nash, *supra* note 1, at 541 fig.1B (representing the “no jurisdiction” class of claims under a standard-based jurisdictional boundary at roughly the halfway mark), with *id.* at 544 fig.4 (drawing the “no jurisdiction” boundary line above the halfway mark for the rule-based boundary with discretionary abstention).

29. This is especially true for removed cases, where defendants' increased win rate in federal court alters the cost-benefit analysis in favor of removal despite the threat of remand. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593–95 (1998) (demonstrating that plaintiff win rates are lower in removed cases).

30. See Nash, *supra* note 1, at 555.

31. See *id.* at 550–51.

standards would likely erode many of the supposed efficiency and predictability gains from Nash's new regime.³²

These two changes in breadth are likely to cause new friction with state courts. Nash appears to argue that his proposal will reduce friction by allowing federal courts to "cherry pick" only those cases that truly require federal jurisdiction,³³ but we think he gets it exactly backward. A broad initial boundary creates a larger pool of cases allocated to the federal courts, even if state issues predominate. On the back end, because Nash's abstention is a one-way ratchet, federal courts will only "cherry pick" cases for *dismissal or remand*, not for assumption of jurisdiction (and even then, only if the parties have not already waived the issue). Nash's proposal thus strikes us as empowering federal courts to usurp jurisdiction rather than constraining them.

III. ADDITIONAL COSTS AT THE DISTRICT AND APPELLATE LEVELS

It is not clear to us how shifting or "migrating" jurisdictional standards into a discretionary phase solves the problem of murkiness or enhances overall predictability at the district-court level. Nash states that "[a]lthough discretionary abstention obscures a bit of the predictability of the rule, outcomes still are likely to be fairly predictable overall."³⁴ But this aggregate predictability is not inevitable or necessarily likely. Whether standards are incorporated on the front end or the back end, they still create the same level of uncertainty in the ultimate result, recalling David Shapiro's and Daniel Meltzer's admonitions that "where" matters less than "whether."³⁵

In fact, by moving standards into a separate phase at the back end of the determination, Nash's proposal generates at least three additional uncertainty costs at the district-court level. First, the proposal delays the ultimate jurisdictional decision. If the case has moved forward from the initial acceptance of jurisdiction under the broad rule until the time of discretionary abstention, the costs of a

32. *Id.* at 522 n.40; see also Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 63 (1992) ("[D]ecisionmaking economies from the application of rules, however, will be offset if decisionmakers spend time inventing end-runs around them because they just cannot stand their over- or under-inclusiveness.").

33. Nash, *supra* note 1, at 554.

34. *Id.* at 539.

35. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 561–62 (1985); Meltzer, *supra* note 19, at 1907–15.

finding of lack of jurisdiction may be exacerbated.³⁶ Second, by making the abstention component discretionary, Nash adds a layer of uncertainty, as litigants must try to predict not only *how* the court will exercise its discretion, but also *whether* it will.³⁷ And third, Nash's proposal to change jurisdictional components into discretionary abstention doctrines creates frictional costs with existing removal doctrine, which recognizes a presumption against removal in cases of doubtful jurisdiction.³⁸ If the rules are broadened on the front end of the inquiry to allow more cases to cross the jurisdictional threshold, the additional costs of waiting for the other shoe to drop on the back end in the form of less predictable and discretionary standards strike us as particularly significant.

Nash's proposal to make discretionary abstention waivable may help offset these additional costs.³⁹ But jurisdiction protects systemic values—including docket allocation and federalism—that many deem too important to leave to the whims of the parties or to the efficiencies of a particular case.⁴⁰ Nash briefly addresses this concern by suggesting that abstention could be ordered *sua sponte* by the court or even reasserted by the parties after waiver,⁴¹ but these suggestions then undermine his proposal to use waiver as a cost-saving feature.

At the appellate level, Nash would change the standard of review for standard-based jurisdictional decisions from *de novo* to abuse of discretion.⁴² He would also permit review of some previously unreviewable jurisdictional remands.⁴³ These proposals would have profound consequences for both original and removed cases. We agree with Nash that his new regime's abuse of discretion standard for abstention dismissals likely would reduce appellate costs for litigants and courts in original federal cases.⁴⁴ However, his proposal will

36. See 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & JOAN E. STEINMAN, *FEDERAL PRACTICE AND PROCEDURE* § 3731, at 482–85 (4th ed. 2009) (“The goal is early resolution of the court system in which the case will be heard.”).

37. Nash briefly deals with this overlay, dismissing it with the notion that appellate courts could direct district courts to “feel free” to exercise their discretion. Nash, *supra* note 1, at 555. The “feel free” instruction does not eliminate the preliminary inquiry into whether discretion is warranted.

38. See, e.g., *In re Hot-Hed Inc.*, 477 F.3d 320, 324 (5th Cir. 2007) (“[A]ny doubt about the propriety of removal must be resolved in favor of remand . . .”).

39. See Nash, *supra* note 1, at 538 tbl.1.

40. In general, we are sympathetic to the idea that certain components of jurisdiction could be waivable. See Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1480–82 (2011). But any concrete proposal must grapple earnestly with the countervailing costs.

41. Nash, *supra* note 1, at 555–56.

42. *Id.* at 552–53.

43. *Id.* at 552 n.160.

44. *Id.* at 552–53.

increase the number of potential appeals in removed cases by circumventing 28 U.S.C. § 1447(d)'s prohibition of appellate review. Currently, remand based on any part of a jurisdictional test, including standard-based components, is not reviewable.⁴⁵ Nash's proposal, to the extent it makes abstentions nonjurisdictional, would turn some standard-based remands, currently unreviewable as "jurisdictional" determinations, into reviewable decisions.⁴⁶ And, even in original cases, a reduction in appellate costs might translate to greater costs at the district-court level. If, as Nash proposes, the primary litigation points will be the discretionary and murky abstention components, and if district-court decisions on those points will be reviewable only under the deferential abuse of discretion standard, then district courts and their litigants will lose the clarity-enhancing function of de novo appellate review.⁴⁷

IV. SOME BENEFITS OF TRANSPARENCY

Nash's proposal for rule-based boundaries and standard-based abstentions may be most fitting and useful as a proposal for transparency—not for transformation. In many ways, his regime reflects current doctrine, with modest reclassifications. The current rules for federal question jurisdiction already proceed from a rule-like phase through a standard-like phase. The jurisdictional tests for federal claims, as well as for federal issues in state claims, already articulate the inquiry as a two-step process that first considers rules to be satisfied and then considers standards that can be applied to deny jurisdiction despite satisfaction of the rules.

45. See 28 U.S.C. § 1447(c)–(d) (2006) (providing that a federal-court remand to state court because "it appears that the district court lacks subject matter jurisdiction" is not appealable); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976) ("If a trial judge purports to remand a case on the ground that it was removed improvidently and without jurisdiction, his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." (internal quotation marks omitted)); cf. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F. 3d 321, 326–28, 338 (5th Cir. 2008) (refusing, under § 1447(d), to hear an appeal of a case remanded for lack of subject matter jurisdiction, while reviewing de novo the jurisdictional dismissal of a consolidated original case).

46. See *Thermtron*, 423 U.S. at 344 (holding that abstention based on nonjurisdictional factors is reviewable despite § 1447(d)); see also Andrew D. Bradt, *Grable on the Ground: Mitigating Unchecked Jurisdictional Discretion*, 44 U.C. DAVIS L. REV. 1153, 1194–1207 (2011) (arguing that *Grable's* balancing factor should be treated as an abstention to enable appellate review); James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493 (2011).

47. See Elizabeth Y. McCuskey, *Clarity and Clarification: Grable Federal Questions in the Eyes of Their Beholders*, 91 NEB. L. REV. (forthcoming 2012) (suggesting directive influence of appellate opinions on embedded-federal-question jurisdiction).

For example, even Holmes Rule⁴⁸ cases, in which federal law provides the basis for the claim, initially must cross the jurisdictional threshold established by the well-pleaded complaint rule. If the federal claim arises only as a defense or counterclaim, then there is no jurisdiction and the case cannot cross the threshold into federal jurisdiction.⁴⁹ Nash recognizes the well-pleaded complaint rule as a bright-line rule.⁵⁰ After crossing the rule threshold, courts must then reject those claims “*otherwise within their jurisdiction*” if those claims fail to meet the standard of claim “substantiality.”⁵¹ The Court has, at points, described claim substantiality in terms that resemble abstention, explaining that “claims *otherwise within* [federal court] jurisdiction” lose their jurisdictional status “if they are ‘so attenuated and unsubstantial as to be absolutely devoid of merit’”⁵²

Nash further proposes making jurisdiction over state-law claims raising federal issues, as in *Grable*,⁵³ entirely a matter of discretionary abstention.⁵⁴ Initially, Nash subsumes the whole *Grable* inquiry under the category of “centrality.”⁵⁵ But, unlike the singular well-pleaded complaint and federal-claim substantiality “rules,” *Grable*’s federal-issue test itself includes both rules and standards in a “multifactor” test.⁵⁶ Stated in the conjunctive, a state-law claim implicating a federal question must satisfy each of *Grable*’s four factors, which follow a rules-then-standards progression, microcosmically tracking Nash’s proposed structure for front-end rules and back-end standards.⁵⁷

48. See Nash, *supra* note 1, at 547 (identifying Justice Holmes’s suggestion that “[a] suit arises under the law that creates the cause of action” as “clearly a rule”); see also *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (stating the rule).

49. *Gully v. First Nat’l Bank*, 299 U.S. 109, 112–13 (1936).

50. Nash, *supra* note 1, at 545–46.

51. *Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974) (emphasis added).

52. *Id.* (emphasis added) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904)).

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

54. Nash, *supra* note 1, at 549–50 (classifying the whole *Grable* test as a “centrality” inquiry and advocating that “[i]t would be desirable to migrate” both “centrality” and “substantiality” to abstentions).

55. See *id.* at 545–49 (breaking “arising under” jurisdiction into three components—the well-pleaded complaint rule, the substantiality of the federal claim, and the centrality of the federal issue—and discussing *Grable* under “centrality”).

56. See *id.* at 549 n.151 (explaining that *Grable* “introduced a multifactor balancing test” for centrality).

57. See *Grable*, 545 U.S. at 314 (stating the test for jurisdiction over federal issues embedded in state-law claims as whether “a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities”).

Grable federal questions must first pass (1) the well-pleaded complaint rule and (2) the relatively determinate “necessary” and “actually disputed” rules before progressing to (3) the federal-issue “substantiality” standard to determine whether jurisdiction exists.⁵⁸ After determining the federal issue’s qualifications for federal jurisdiction, a court must assess (4) whether exercising its jurisdiction will disturb “any congressionally approved balance of federal and state judicial responsibilities.”⁵⁹ More descriptively, this federalism factor asks courts to apply standards to determine whether there exists any “good reason to *shirk* from federal jurisdiction” established by the preceding factors.⁶⁰ Although *Grable*’s federalism factor is not explicitly phrased as an abstention phase, other commentators have convincingly argued that it effectively functions as an abstention phase by guiding district courts to remand cases that satisfy jurisdictional requirements if exercising jurisdiction would invite a flood of other federal filings.⁶¹

Therefore, Nash’s proposed structure to a great extent describes the current jurisdictional analyses in more honest terms—recognizing that federal- and state-law claims crossing the well-pleaded complaint threshold are “within [district courts’] jurisdiction” unless the court deems “otherwise” based on various standards.

In Nash’s Figure 4, the standard-based inquiry creates fuzziness at the threshold between jurisdiction and no jurisdiction.⁶² However, the mandatory threshold remains determinate, while the fuzzy standard-based inquiry becomes an abstention phase. Because Nash proposes an initial determination of mandatory jurisdiction based on a rule, followed by a back-end abstention from exercising that jurisdiction based on standards, his Figure 4 might more appropriately show the refrain from exercising jurisdiction as a diminution of the bottom half of the potential jurisdiction area, rather than a muddling of the jurisdictional threshold itself.

The figure below illustrates Nash’s proposed process and the distinction he implicitly draws between a threshold jurisdictional

58. See *id.* Note that the “substantiality” test for federal *issues* under *Grable* is separate and distinct from the “substantiality” test for federal *claims*. Compare *id.* at 313 (using “serious federal interest” as the touchstone for issue substantiality), with *Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904)) (defining claim substantiality by contrast to claims that are “absolutely devoid of merit”), and *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933) (“obviously without merit”).

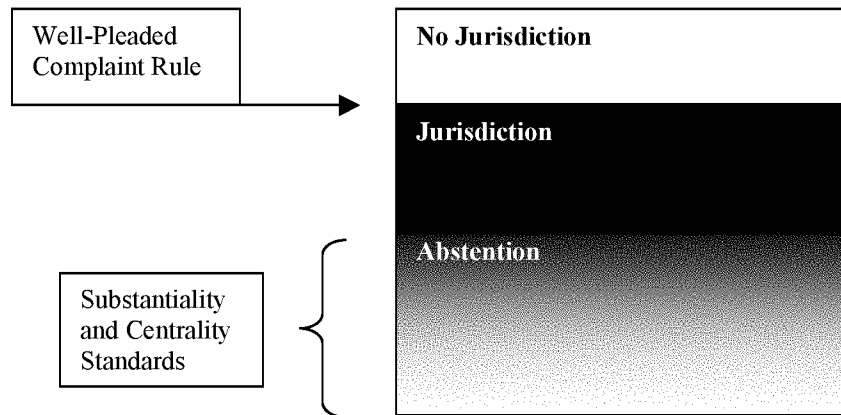
59. *Grable*, 545 U.S. at 314.

60. *Id.* at 319–20 (emphasis added).

61. Bradt, *supra* note 46, at 1194–1207.

62. Nash, *supra* note 1, at 544 fig.4.

determination based on the well-pleaded complaint rule and abstention based on the substantiality and centrality standards. Under Nash's description of a "rule-based jurisdictional boundary," the determinate rule "has effect along the clear demarcation" between black and white zones because a rule and "no abstention" defines the boundary.⁶³ Similarly, his proposal for revising jurisdiction places the well-pleaded complaint rule at the "rule-based jurisdictional boundary" and therefore should represent that boundary with juxtaposed black and white zones.⁶⁴ Further, the discretionary abstention Nash proposes is depicted more aptly as reverse shading at the bottom, because he proposes to "migrate these standards *away* from the jurisdictional boundary to discretionary abstentions, leaving a reconstructed rule-based boundary."⁶⁵ Thus, Nash's regime maintains a black-and-white, predictable threshold rule for jurisdiction and introduces graying standards in an abstention phase that does not alter or muddy the threshold determination.⁶⁶



Nash's proposal to reclassify discretionary standards as abstentions thus descriptively fits existing jurisdictional analyses by tracking their rules-then-standards progression and provides a more transparent way to depict the district courts' discretion in applying substantiality, centrality, and federalism standards. Viewing Nash's proposal as one that simply gives transparency to the existing uses of

63. *Id.* at 540 & fig. 1A.

64. *See id.* at 545–46 (characterizing the well-pleaded complaint rule as a bright-line rule).

65. *Id.* at 550 (emphasis added).

66. *See id.* at 542–43 & fig. 3 (depicting *Pullman* abstention as reverse shading at the bottom of the figure because its test is "the opposite" of the substantiality standard).

discretion to determine jurisdiction could potentially be less destabilizing than altering the jurisdictional determinations themselves.⁶⁷ Perhaps most laudably, the added transparency that comes from labeling standards as a discretionary exercise may contribute to federal-court legitimacy.⁶⁸ That is, candidly acknowledging the role of discretion in jurisdictional determinations may advance doctrinal development and enhance the legitimacy of those courts developing it.

CONCLUSION

Although the problems we have outlined here undermine Nash's laudable attempt to achieve efficiency, predictability, accuracy, legitimacy, and harmony, Nash's proposal makes significant advances in how we think about and discuss rules and standards in the context of federal question jurisdiction. In particular, his proposal for rule-based boundaries and discretionary abstentions encourages a meaningful coexistence of rules and standards, with form following function. Additionally, his proposal encourages conscious choice and thoughtful design by those crafting statutes, abstentions, and interpretations of federal-question-jurisdiction doctrine.⁶⁹

On the whole, the transparency about the nature of jurisdictional inquiries inherent in Nash's proposed taxonomy of jurisdictional rules and standards may offer the most reliable improvement to the jurisdictional regime. It may enhance the legitimacy of district-court decisions and clarify jurisdictional doctrine. Nash's proposed "efficient deployment" thus brings needed nuance and compromise to the rules-versus-standards debate.

67. Cf. Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378, 1399 (1985) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)) (arguing that, "at least in the context of abstention, an increase in judicial restraint . . . would probably result in a significant increase in the size of federal dockets").

68. Regarding legitimacy, however, it is both difficult to determine whether litigants really care about jurisdictional decisions and difficult to assess whether Nash's proposal would enhance any such perceptions of legitimacy.

69. See Nash, *supra* note 1, at 525–26.