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Articles

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ABSTRACT

It is axiomatic that defects in federal subject-matter jurisdiction may be raised at any time, even for the first time on appeal, and even if the parties involved in the cases do not dispute the federal courts' power to decide the matters; likewise, subject-matter jurisdiction is deemed so important that federal courts should determine their jurisdiction before proceeding to other issues. These axioms are sometimes referred to as subject-matter jurisdiction's "no-waiver rule" because they highlight the critical importance of the subject-matter jurisdiction inquiry. Recently, scholars have questioned whether the strict demarcation between jurisdictional and nonjurisdictional rules should be preserved, and whether it might make more sense to permit jurisdictional rules, at appropriate times, to take on certain nonjurisdictional attributes—such as the attribute of waiver. This Article engages with that scholarship with respect to the jurisdictional rules defining statutory subject-matter jurisdiction and the nonjurisdictional attribute of forfeiture or waiver and argues that efficiency, fairness, consistency, legitimacy, and transparency will all be enhanced if statutory subject-matter jurisdiction can, under certain circumstances, be waived. This Article further explains why such a change to the no-waiver rule will not adversely affect federalism values, as many courts and scholars opine.

Despite the current no-waiver rule governing subject-matter jurisdiction, courts have waived, excused, or otherwise deferred the resolution of the subject-matter jurisdiction question until advanced stages of the proceedings. As courts create and expand these exceptions to the no-waiver rule and pretermit the subject-matter jurisdiction inquiry in order to tackle other (and often easier) issues, the gap between the "no waiver" rhetoric and actual application of that rule grows larger. This Article explores these exceptions and demonstrates that their ad hoc

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creation undermines the legitimacy of the courts and raises fairness and efficiency concerns, while providing few countervailing benefits. The federal courts would be better served to have in place a uniform statute that accounts for classes of exceptions, rather than permitting the courts to create ad hoc, after-the-fact exceptions.

This Article advocates for the adoption of the American Law Institute's 1969 proposal for a new subject-matter jurisdiction statute that provides that defects in statutory subject-matter jurisdiction may be waived if not asserted before trial or before any ruling that is dispositive of the merits. The proposed statute adopts many of the current exceptions created by the courts and offers the added benefit of providing concrete guidance for future cases, thereby ensuring that the courts are perceived as legitimate, neutral arbiters that provide fair, uniform adjudication to all litigants.

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I. INTRODUCTION

Defects in subject-matter jurisdiction are supposed to be non-waivable. Horror stories abound of cases reversed after lengthy trials because of late-discovered defects.[1] To ameliorate the sting of such occurrences, courts have created case-specific exceptions to the non-waivability rule. By 1982, such exceptions had so proliferated that the American Law Institute ("ALI") predicted that procedural rules of the future would be "reformulated to require that objections to subject matter jurisdiction be raised before trial."[2] This Article argues that the future is here, and the time to reformulate the rules governing subject-matter jurisdiction is now. Our system currently disallows attacks on subject-matter jurisdiction after direct appeals have ended, but given the current state of affairs, that line can constitutionally, and should logically, be drawn much earlier, at least with respect to statutorily conferred subject-matter jurisdiction.

1. *See infra* Part II.B. (discussing several cases, including Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); Arena v. Graybar, 669 F.3d 214 (5th Cir. 2012); Belleri v. United States, 712 F.3d 543 (11th Cir. 2013)).

2. RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. d (1982) ("It may well be that procedural rules of the future will be reformulated to require that objections to subject matter jurisdiction be raised before trial on the merits, thus expressing a policy approaching that now applied to objections to territorial jurisdiction.").

Current rules governing subject-matter jurisdiction do not permit waiver; indeed, just the opposite. It is axiomatic that defects in federal subject-matter jurisdiction may be raised at any time, even for the first time on appeal, and even if the parties involved in the case do not dispute the court's authority to hear and decide the matter.[3] This precept is deeply ingrained in our legal tradition,[4] and in this respect, subject-matter jurisdiction is treated differently from all other matters of procedure. A judge who notices a defect in subject matter must *sua sponte* raise the issue.[5] Even a party who suffers an adverse judgment may

3. Federal subject-matter jurisdiction has received much scholarly attention in the major treatises. *See, e.g.*, 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3522 (3d ed. 2008) [hereinafter WRIGHT & MILLER]

> The parties cannot confer on a federal court jurisdiction that has not been vested in that court by the Constitution and Congress. This means that the parties cannot waive lack of subject matter jurisdiction by express consent, or by conduct, or even by estoppel. The subject matter jurisdiction of the federal courts is too fundamental a concern to be left to the whims and tactical concerns of the litigants . . . . Even if the parties remain silent, a federal court, whether trial or appellate, is obliged to notice on its own motion its lack of subject matter jurisdiction, or the lower court's lack of subject matter jurisdiction when a case is on appeal.

Id.; 2 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE § 12.30(1) (Matthew Bender 3d ed. 1997) [hereinafter MOORE] ("Lack of subject matter jurisdiction may be raised at any time. Indeed, even if the litigants do not identify a potential problem in that respect, it is the duty of the court—at any level of the proceedings—to address the issue sua sponte whenever it is perceived."); RESTATEMENT (SECOND) OF JUDGMENTS § 1 cmt. b (1982) ("The requirement of subject matter jurisdiction stands on different footing [from personal jurisdiction and notice requirements]. Broadly speaking, an objection to subject matter jurisdiction may be taken at any time during an action, even on appeal, and may be taken after the action has become final under a wider variety of circumstances than the objection to territorial jurisdiction."); RICHARD H. FALLON JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (6th ed. 2009) [hereinafter HART & WECHSLER'S]. These treatises discuss federal subject-matter jurisdiction. Similar problems may also occur in state court, but special considerations relating to state-court jurisdiction are beyond the scope of this Article.

Federal subject-matter jurisdiction has also received renewed scholarly attention in recent years. *See, e.g.*, Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 5–6 (2008) [hereinafter "*Mandatory Rules*"] (advocating a middle ground between jurisdictional rules that may be raised by any party at any time and that are not subject to principles of waiver or consent, and nonjurisdictional rules that are assumed to have the inverse attributes); Steven Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 TULSA L. REV. 587, 603–04 (2009) (arguing that the rejection of assuming subject-matter jurisdiction has affected the precedential force of earlier decisions); Frederic Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 972 (2009) (suggesting that the claim that personal jurisdiction and subject-matter jurisdiction rules are "inflexible and without exception" is not true, but that this "discrepancy" between rhetoric and practice should be maintained); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 365–67 (2010) (reconciling the liberal ethos of access and resolution on the merits with the restrictive ethos of frustration of access and noting that federal subject-matter jurisdiction rules fall on the access-restrictive side); Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439 (2011) [hereinafter *Hybridizing Jurisdiction*] (exploring nonjurisdictional attributes of jurisdictional rules); Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 50–55 (2011) [hereinafter *Jurisdictional Clarity*] (questioning whether clear and simple jurisdictional rules are necessary—or even possible); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

4. Dan B. Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C. L. REV. 49, 77 (1962) [hereinafter *Jurisdiction by Consent*] (calling the precept "legal folklore").

5. FED. R. CIV. P. 12(h)(3); RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. c (1982) ("Whether a court whose jurisdiction has been invoked has subject matter jurisdiction of the action is a legal question that may be raised by a party to the action or by the court itself.").

belatedly assert lack of subject-matter jurisdiction on appeal and request that the adverse judgment be set aside.[6] The Federal Rules of Civil Procedure codify this practice by requiring a district court to dismiss an action "[i]f the court determines at any time that it lacks subject-matter jurisdiction."[7] While other defects may be waived, subject-matter jurisdiction stands alone as the single unwaivable defect.

The law on the books makes a lot of sense; after all, federal courts are courts of limited jurisdiction, so they lack the power to hear and decide cases unless the Constitution and statutes grant them such authority.[8] Thus, federal courts must determine their jurisdiction to hear the matter before disposing of a case, and a federal court's lack of power cannot be excused merely because the defect is not timely raised.[9] The only readily admitted exception to this no-waiver rule is that subject-matter jurisdiction defects are finally waived by the time of collateral attack. But even that assumed finality may, in "limited circumstances," be subject to attack in collateral proceedings.[10]

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6. *See* Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804) (plaintiff brought a diversity action in federal court and lost on the merits after trial; plaintiff appealed and argued lack of subject-matter jurisdiction; the Supreme Court agreed and vacated the judgment against the plaintiff, determining that there was no jurisdiction, even though it was the plaintiff who had invoked jurisdiction); Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 7 (1951) (defendant who removed the case to federal court, and resisted the plaintiff's attempts to remand to state court, raised lack of subject-matter jurisdiction after a verdict for the plaintiff and prevailed on his subject-matter-jurisdiction argument); *Jurisdiction by Consent*, *supra* note 4, at 49 ("In the name of this saintly precept a plaintiff may choose his forum, lose his suit and try again in another forum on the ground that the first court had no jurisdiction.").

7. FED. R. CIV. P. 12(h)(3). As noted *infra* notes 278, 291 and accompanying text,, Federal Rule 12(h)(3) facially addresses district courts, not appellate courts. Although the language of the Rule may suggest that a district court may raise subject-matter jurisdiction during a collateral attack before that court, it seems unlikely that the Rule overrules long-standing practice disfavoring collateral attack. *Cf.* 13 WRIGHT & MILLER, *supra* note 3, § 3522 ("The doctrine regarding the limited subject matter jurisdiction of the federal courts is reflected in the Federal Rules of Civil Procedure. Some defenses are waived if the party fails to assert them early in the proceedings, but Civil Rule 12(h)(3) specifically provides that lack of subject matter jurisdiction may be raised at any time during the proceeding."). The phrase "the proceeding" seems limited to the original action, not subsequent collateral attacks.

8. 13D WRIGHT & MILLER, *supra* note 3, § 3536 (Subject-matter jurisdiction "involves the allocation of judicial authority between the federal and state governments. Accordingly, federal courts are under the obligation to ensure that they have subject matter jurisdiction over the controversy, even when a party fails to raise the issue."); RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. d (1982) ("[A] court is powerless to decide a controversy with respect to which it lacks subject matter jurisdiction."); Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.") (quotation marks and citation omitted).

9. 13 WRIGHT & MILLER, *supra* note 3, § 3522 ("A federal court's entertaining a case that is not within its subject matter jurisdiction is no mere technical violation; it is nothing less than an unconstitutional usurpation of state judicial power.").

10. *See infra* Part III.C.1 (regarding collateral attack). The no-waiver rhetoric suggests that parties should be permitted to raise the lack of subject-matter jurisdiction on collateral attack. The general rule, however, is to the contrary—that subject-matter jurisdiction may not be attacked collaterally. *See* Kontrick v. Ryan, 540 U.S. 443, 456 n.9 (2004) ("Even subject-matter jurisdiction, however, may not be attacked collaterally.") (citations omitted). Limited exceptions to that rule do permit subject-matter jurisdiction collateral attacks. *Compare* RESTATEMENT (SECOND) OF JUDGMENTS § 69 (1982) (providing for "very limited circumstances" when a

However, the claim that the rules governing subject-matter jurisdiction are unwavering is misleading. In addition to the collateral attack exception to the no-waiver rule, myriad other exceptions undermine the rigidity of the rhetoric surrounding subject-matter jurisdiction.[11] The federal courts have, on occasion, acknowledged that the importance of "just, speedy, and inexpensive" adjudications outweighs the resolution of certain subject-matter defects.[12] On these occasions, the courts have created exceptions to the no-waiver rule by pretermitting the subject-matter jurisdiction inquiry in favor of other procedural adjudications, such as forum non conveniens or personal jurisdiction.[13] Courts may also disregard a subject-matter jurisdiction defect in favor of finalizing a merits-based decision.[14] Quite simply, the law in action does not accord with the law on the books.

Ad hoc responses create more problems than they solve. One court may rely on an exception because it seems to enhance fairness or efficiency in the particular circumstances of the case; another court may not, focusing instead on the strongly worded no-waiver rule. These exceptions therefore fail to provide guidance for future cases, facially conflict with the rules governing subject-matter jurisdiction, and add uncertainty and costs to litigation. These exceptions also undermine the legitimacy of the federal courts in the eyes of the lawyers and litigants because the courts find some cases merit an ad hoc exception, while denying that exception to other cases presenting seemingly similar situations.[15]

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contested action may be subsequently attacked for lack of subject-matter jurisdiction), *with* RESTATEMENT (FIRST) OF JUDGMENTS § 11 (1942) ("A judgment which is void is subject to collateral attack both in the State in which it is rendered and in other States.").

Kalb v. Feuerstein, 308 U.S. 433 (1940), presents one of these "limited circumstances" described by the Restatement (Second) of Judgments. In *Kalb*, appellees initiated foreclosure proceedings on appellants-farmers' farms in state court. The farmers filed bankruptcy proceedings, and those petitions were pending before the bankruptcy court when the local sheriffs sold the farms in execution of the state-court judgments. *Kalb*, 308 U.S. at 435–36. The issue presented to the US Supreme Court was whether the state-court judgments—and therefore the sales—were valid, or whether the state courts had been divested of jurisdiction. The Supreme Court held, "We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court in which the farmer's petition was then pending." *Id.* at 440. The Court so held despite "the absence of direct appeal" and the fact that this was a collateral attack. *Id.* at 436. For further information, see *infra* text accompanying notes 142–145.

11. *See infra* Part III.C (discussing exceptions to the no-waiver rule, including the previously mentioned exception that subject-matter jurisdiction generally cannot be attacked on collateral review).

12. FED. R. CIV. P. 1.

13. *See* 2 MOORE, *supra* note 3, § 12.30[1] (noting that subject-matter jurisdiction defects may take a back seat to efficiency concerns, such as when courts may choose to determine personal jurisdiction or forum non conveniens issues before inquiring into their subject-matter jurisdiction); *infra* Part III.C.2.

14. *See infra* Parts III.B.1, III.C.5.

15. *Compare* Caterpillar, Inc. v. Lewis, 519 U.S. 61, 64 (1996) (permitting an exception to the no-waiver rule), *with* Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567 (2004) (declining to permit an exception to the no-waiver rule); *see infra* Part II.B.

Providing federal courts unfettered discretion to choose between applying the rules or the exceptions permits the courts either to render or to avoid merits-based decisions, and couch these decisions as being required by the law on the books or, conversely, by the law in action. For example, a court in one case may choose to ignore the subject-matter jurisdiction problem by invoking an exception in order to resolve that case on the merits. In a seemingly similar case, a different court might rely on the subject-matter jurisdiction defect (and ignore the exception), thus resting the decision on procedural grounds. Although exceptions are not necessarily invoked to reach a desired result or benefit a certain party, a litigant on the losing end may not fully appreciate the fine distinctions the court has drawn in his particular case. In this way, the exceptions also undermine fairness goals because courts grant exceptions to some parties and not to other similarly situated parties.

Even if one overlooks these numerous and irregularly applied exceptions, the no-waiver rule itself imposes significant costs on the legal system. Cases fully litigated and disposed of on the merits may be dismissed and must begin anew, thereby increasing delay for the parties involved in those particular cases, for parties in other pending cases, and for the state courts that must now decide the cases for a second time.

The problems with the no-waiver rule, both in terms of its doctrinal underpinnings and its scattered and potentially inconsistent exceptions, have enormous consequences for our civil justice system. And these consequences are not mere abstractions. Real parties involved in real cases feel the sting of the no-waiver rule.[16] When courts invoke the sanctified rhetoric of subject-matter jurisdiction, these parties must begin anew (if they are able under the applicable statutes of limitations and tolling provisions)[17] in a foreign court, state court, or other federal court having jurisdiction to hear the case,[18] even when the federal court system has already resolved the merits of the dispute.[19]

16. *See infra* Part II.B (discussing several cases, including Louisville & Nashville RR. Co. v. Mottley, 211 U.S. 149 (1908); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); Arena v. Graybar, 669 F.3d 214 (5th Cir. 2012); and Belleri v. United States, 712 F.3d 543 (11th Cir. 2013)).

17. There may be statute of limitations problems when a party refiles the suit in an appropriate court. Regarding the statute of limitations, the ALI statute proposes to toll the period for thirty days so a litigant may re-file in an appropriate court. *See* ALI, *Study of the Division of Jurisdiction Between State and Federal Courts* § 1386(b) [hereinafter ALI Study]. There may also be preclusion issues with respect to the findings in the first lawsuit. Regarding preclusion, a pure 12(b)(1) dismissal should not stop a different court from entertaining jurisdiction—although the facts underlying that jurisdictional dismissal may constrain the subsequent court despite the previous court's lack of power to adjudicate.

18. The Federal Circuit comes to mind for patent cases. *See* 28 U.S.C. §1295(a)(1) (2006).

19. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e (1982) ("[T]he underlying question is how far to go in the direction of policing the boundaries of a court's subject matter jurisdiction, when the cost of intensive policing is to enlarge the vulnerability of the proceeding to interruption through extraordinary writ or the like and to belated attack after it has gone to judgment.").

This Article explores whether the strict application of the no-waiver rule makes sense.[20] In so doing, this Article contributes to a growing body of scholarly work on subject-matter jurisdiction and contemporary US Supreme Court doctrine attempting to define the limits of subject-matter jurisdiction.[21] Recently, scholars have also questioned whether the strict demarcation between jurisdictional (typically conceived of as power or authority to hear a case) and nonjurisdictional rules (generally concerned with substance and procedure) should be retained; and some have suggested that jurisdictional rules should sometimes take on nonjurisdictional attributes, and that nonjurisdictional rules should sometimes exhibit jurisdictional attributes.[22] But little has been written specifically on the non-waivability of subject-matter jurisdiction and how best, both in terms of justice norms and in terms of federalism, to bridge the ever-widening gap between subject-matter jurisdiction rhetoric and practice. By examining the no-waiver doctrine, this Article contributes to the broader debates about how to understand jurisdictional versus nonjurisdictional rules, how to balance justice, efficiency, and costs in civil litigation, the role of federalism and the limited nature of federal courts, and the problems associated with the rhetoric-practice divide.[23]

This Article advocates that statutory subject-matter jurisdiction should exhibit the nonjurisdictional attribute of waiver and that statutory subject-matter jurisdiction should be deemed to have been waived if not raised before trial

20. Wright and Miller write, "This harsh [no-waiver] rule would be indefensible if what was involved was a simple question of procedural regulation of practice." 13 WRIGHT & MILLER, *supra* note 3, § 3522. But as with most issues in life, the task is one of balancing, prioritizing, and choosing. The strict rhetoric of the no-waiver rule does not match the realities of the doctrine, and this Article proposes that the strict rhetoric should soften to match the more realistic and nuanced application. *See generally* Bloom, *supra* note 3, at 972–73 ("Jurisdiction claims to be 'inflexible and without exception.'. . . [It] does more than misstate its own firmness. It creates a need for offsetting measures, elaborate escape valves devised to soften jurisdiction's hard rules.") (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577 (1999) (quoting Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884)).

21. Recent US Supreme Court opinions have spilled much ink trying to force issues into an appropriate box—jurisdictional or nonjurisdictional—because of the consequences of the label affixed. *See*, *e.g.*, Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817 (2013) (holding that the 180-day limitation for filing administrative appeals is not jurisdictional). In that case, the US Supreme Court noted, "Characterizing a rule as jurisdictional renders it unique in our adversarial system." *Id.* at 824.

22. Bloom, *supra* note 3, at 972. *See generally* Dodson, *Hybridizing Jurisdiction*, *supra* note 3; Dodson, *Mandatory Rules*, *supra* note 3; Muskrat v. Deer Creek Pub. Sch., 715 F.3d 775, 783 (10th Cir. 2013) ("[T]he Supreme Court recently admonished the federal courts to employ the 'jurisdictional' label carefully given the important differences between jurisdictional and nonjurisdictional requirements. We are to avoid 'drive-by jurisdictional rulings,' that fail to consider the careful balance between non-waivable subject matter jurisdiction requirements and waivable "claim processing" provisions that do not invoke our subject matter jurisdiction.") (citations omitted).

23. *See, e.g.*, Dodson, *Hybridizing Jurisdiction*, *supra* note 3; Dodson, *Mandatory Rules*, *supra* note 3; Dodson, *Jurisdictional Clarity*, *supra* note 3; Bloom, *supra* note 3; Vladeck, *supra* note 3; Spencer, *supra* note 3, at 365–67 (reconciling the liberal ethos of access and resolution on the merits with the restrictive ethos of frustration of access and noting that federal subject-matter jurisdiction rules fall on the access-restrictive side); Shapiro, *supra* note 3.

begins or any prior decision dispositive of the merits is rendered. This proposal is modest and pragmatic. It does not disrupt our current approach to constitutional subject-matter adjudication, but tackles only statutory subject-matter jurisdiction.[24] The proposal, in sum, seeks principally to close the gap between rhetoric and practice by constraining courts' discretion with a uniformly applicable statute, rather than permitting courts to continue to proliferate haphazard exceptions. The proposal also avoids federalism concerns because it effects change only with respect to statutorily granted subject-matter jurisdiction; and Congress, by statute, may tinker with the ramifications of statutory subject-matter jurisdiction.

After this Introduction, the Article continues in three parts. Part II examines how courts currently define and apply the rules governing subject-matter jurisdiction. Part II.A attempts to define the term "subject-matter jurisdiction" and contends that a narrow definition should apply for purposes of the current no-waiver rule so that even if this Article's principal argument that statutory subject-matter jurisdiction should be waivable is not accepted, fewer cases will be susceptible to a delayed attack[25] on grounds that do not implicate the federal court's core constitutional power to hear cases.[26] Part II.B then provides several

24. The Constitution provides the outer limits of federal-court power; jurisdictional statutes such as 28 U.S.C. §§ 1331 and 1332 narrow that reach. *See, e.g.*, 28 U.S.C. §§ 1331, 1332 (2006). Presumably, Congress could increase the courts' statutory authority to the full extent of the Constitution. In the case of diversity, Congress could authorize federal courts to hear all cases involving minimal diversity and could eliminate the amount in controversy requirement. With respect to federal question cases, Congress could permit federal courts to hear cases involving federal ingredients, even if the federal issue does not arise from the plaintiff's well-pleaded complaint. As long as there is a difference between the broader reach of constitutional subject-matter jurisdiction and the narrower scope of statutory subject-matter jurisdiction, Congress may tinker with the latter and expand it. And if the lone jurisdictional defect in a case is statutory, there is less of a federalism concern, given the Constitution would vest federal courts with the authority to hear that case. Unless otherwise noted, this Article focuses on statutory subject-matter jurisdiction.

25. Imposing costs and penalties provides another way to deter parties from egregiously overreaching. Such a system of sanctions could be modeled on the penalties for discovery abuses. *See, e.g.*, Fed. R. Civ. P. 37 (imposing sanctions for improper conduct related to discovery). Conversely, the label of "jurisdictional" or "nonjurisdictional" certainly matters less if the ALI's statute is passed because one of the principal attributes of a jurisdictional rule is that it is non-waivable; however, the ALI's statute changes that default and makes jurisdictional rules waivable under most circumstances. *See infra* note 27 and accompanying text.

26. *See, e.g.*, 2 MOORE, *supra* note 3, at § 12.30[1]

> When a claim is based on a federal statute, the parties and courts sometimes erroneously conflate the question of subject matter jurisdiction with the question of whether the plaintiff can prove that the federal statute actually applies to the defendant or to the defendant's conduct. . . . This distinction is important. Whether a statutory provision that establishes a threshold for relief is jurisdictional or goes to the merits determines whether a failure to comply with the provision is grounds for dismissal (at any time in the litigation) under Rule 12(b)(1), or whether a failure to meet the threshold is merely a basis for summary judgment or for dismissal for failure to state a claim under Rule 12(b)(6), matters that are subject to very different procedural rules and limits.

. In this regard, the United States Supreme Court's opinion in *Bell v. Hood*, 327 U.S. 678 (1946), has been widely criticized as conflating certain 12(b)(6) dismissals with 12(b)(1) dismissals. *See* Yazoo County Indus. Dev. Corp. v. Suthoff, 454 U.S. 1157, 1157–61 (1982) (Rehnquist, J., dissenting) (criticizing *Bell v. Hood* and the denial of certiorari). In *Bell*, the US Supreme Court authorized the dismissal of insubstantial federal claims

examples of cases that were dismissed for lack of jurisdiction after a disposition had been rendered on the merits, highlighting the problems with the current rules governing subject-matter jurisdiction. Part III explores the current gap between rhetoric and practice. In particular, it shines a light on the inconsistencies, the waste of resources, and the profound disconnect between the rhetoric governing subject-matter jurisdiction, set out in Part II, and the actual application of the rhetoric.

Part IV proposes the adoption of a federal statute that should ameliorate many of the fairness, legitimacy, and efficiency concerns created by the current subject-matter jurisdiction doctrine. In the late 1960s, the ALI advocated for the enactment of just such a statute providing that defects in statutory subject-matter jurisdiction are forfeited if not raised before the commencement of a trial or before any ruling that is dispositive of the merits for those parties.[27] Congress may change the scope of statutory subject-matter jurisdiction within constitutional bounds, and this statute represents one minor way that Congress may expand the federal judiciary's authority, yet remain within the confines of the Constitution. By situating subject-matter jurisdiction within the broader scholarship regarding jurisdictional rules, and by demonstrating the ever-widening gap between current rhetoric and practice, this Article deconstructs the rules governing subject-matter jurisdiction and provides the doctrinal underpinnings necessary for understanding and ultimately adopting the ALI's proposal.[28]

Although the notion of waiving subject-matter jurisdiction may, at first glance, seem radical, the proposed statute, in fact, accounts for many of the exceptions to subject-matter jurisdiction's rules. Furthermore, it offers the added benefits of providing guidance and predictability in future cases (because it is a

on subject-matter jurisdiction grounds rather than failure to state a claim. *Bell*, 327 U.S. at 682–83. The Court in *Bell* itself questioned the propriety of calling these dismissals jurisdictional. *Id.* Perhaps labeling those dismissals as jurisdictional is kind to plaintiffs who will not be foreclosed by claim preclusion. In any event, many have criticized *Bell v. Hood* for conflating these two forms of dismissal.

27. In the late-1960s, the ALI laid out, "in the light of modern conditions, the appropriate bases for the jurisdiction of federal and state courts." ALI Study, *supra* note 17, at ix. The ALI suggested the adoption of a statute requiring parties and district courts to raise statutory subject-matter defects before the commencement of trial or before the district court renders a decision on a merits-dispositive motion. *Id.* at § 1386. The ALI's proposed statute was never enacted and, in fact, never received widespread consideration by the academy or by Congress. The author has privately communicated with Professor David Shapiro, a reporter for the 1969 Study, regarding the reasons why the ALI's proposal regarding waiver of subject-matter jurisdiction did not flourish. Although Professor Shapiro and I reached no definitive conclusions, we surmised several possibilities: Perhaps the change was too radical; perhaps the need for change was not felt; or perhaps the ALI's great thinkers were not the best lobbyists for change.

28. At least procedurally, the Federal Rules of Civil Procedure could change the no-waiver rule by eliminating Rule 12(h)(3) and instead permitting parties under certain circumstances to forfeit objections to statutory subject-matter jurisdiction defects if not timely raised. However, this approach may run afoul of Rule 82, which provides that the Rules "do not extend or limit the jurisdiction of the district courts." FED. R. CIV. P. 82. Moreover, courts may not desire to have a Rule that constrains their discretion. Thus, a statutory solution seems the way to proceed. Clearly the ALI thought so too.

statute, not court-created ad hoc exceptions), ensuring the legitimacy of the courts (because practice will match rhetoric), providing fair application to all litigants (because litigants will be treated according to the same rules, known to all beforehand), and generally promoting confidence in the civil justice system.

II. CURRENT PRACTICE

Courts apply the rules and exceptions governing subject-matter jurisdiction in inconsistent manners.[29] Part of the problem flows from the fact that it is not entirely clear what counts as subject-matter jurisdiction.[30] Does standing count? Exhaustion? Ripeness? Mootness? What about the political question doctrine? The courts are divided.[31] Without a clear understanding of what sorts of defects qualify as subject-matter jurisdiction defects, courts cannot possibly consistently apply the subject-matter jurisdiction rules.

A. Defining Subject-Matter Jurisdiction

This Article explores the waivability of subject-matter jurisdiction;[32] therefore, it is useful to know what sorts of issues are encompassed by the term "subject-matter jurisdiction." Clearly, not every limitation on a federal court's authority to render a binding decision is a limitation on subject-matter jurisdiction. But determining with any precision what is, and what is not, subject-matter jurisdiction proves no easy task.[33]

Fortunately, whether an issue is labeled subject-matter jurisdiction or not ultimately makes little difference if this Article's proposal is adopted. For example, if an issue (such as ripeness) is labeled subject-matter jurisdiction, that issue will be waivable under the approach taken by this Article; however, if that

29. *See infra* Parts II.A, III.

30. *See infra* Part II.A.

31. *See infra* note 41 and accompanying text.

32. This Article discusses subject-matter jurisdiction for purposes of waiver, not, for example, for purposes of the legal sufficiency of the allegations in a pleading. *See, e.g.*, La Envt'l Action Network v. City of Baton Rouge, 677 F.3d 737, 745 (5th Cir. 2012) (noting that "if a provision is jurisdictional," a district court does not accept the allegations in the plaintiff's complaint as true, while if a provision is not jurisdictional, then the allegations are accepted as true and viewed in the light most favorable to the plaintiff). Dismissals for subject-matter jurisdiction defects carry different *res judicata* consequences from dismissals on the merits; moreover, as previously noted *supra* note 26 and accompanying text, the use of the dismissed claim as an anchor for other claims under 28 U.S.C. § 1367 may also differ according to the reason for the dismissal (*e.g.*, lack of subject-matter jurisdiction versus failure to state a claim). *Mandatory Rules*, *supra* note 3, at 21–22.

33. RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. a (1982) (defining jurisdiction as turning on whether the tribunal is empowered to adjudicate the type of controversy that is presented). In a series of articles, Professor Dodson argues that issues should not be strictly labeled as either "jurisdictional" or "nonjurisdictional," but instead that jurisdictional rules may have nonjurisdictional attributes. *See Hybridizing Jurisdiction*, *supra* note 3. He also argues that nonjurisdictional rules may have some jurisdictional attributes. *See Jurisdictional Clarity*, *supra* note 3.

issue (ripeness) is not labeled subject-matter jurisdiction, it will be waivable under ordinary principles of adjudication.

This Article focuses on two fountainheads of federal-court jurisdiction: (1) the Constitution's restrictions in Article III, Section 2 regarding diversity jurisdiction and Congress's additional restrictions in 28 U.S.C. § 1332; and (2) Article III, Section 2's explication of arising-under jurisdiction and Congress's additional restrictions in 28 U.S.C. § 1331.[34] This Article uses §§ 1331 and 1332 as exemplars for all of the subject-matter jurisdiction statutes.[35]

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34. Article III, Section 2, Clause 1 of the US Constitution provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2006). Section 1332 states:

> The district courts shall have original jurisdiction over all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign State who are lawfully admitted for permanent residence in the United States and are domiciled in the same State; (3) citizens of different States in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or different States.

28 U.S.C. § 1332(a) (2006).

35. *Cf.* Arbaugh v. Y&H Corp., 546 U.S. 500, 513 (2006) ("The basic statutory grants of federal-court subject-matter jurisdiction are contained in 28 U.S.C. §§ 1331 and 1332."); *see also* 5B WRIGHT & MILLER, *supra* note 3, § 1350 (noting that the paradigmatic subject-matter jurisdiction cases are federal question and diversity: "A Rule 12(b)(1) motion most typically is employed when the movant believes that the claim asserted by the plaintiff does not involve a federal question, and there is no diversity of citizenship between the parties or, in a diversity of citizenship case, the amount in controversy does not exceed the required jurisdictional amount."); Bloom, *supra* note 3, at 988 ("Most 'original' subject-matter questions follow one of two lines. The first is called 'federal-question,' and it aims to promote the predictable, uniform, and expert administration of federal law. The other is called 'diversity,' and it seeks to 'counteract prejudice on the part of state courts.'").

Even the requirements of Section 1331 seem to be shifting. The well-pleaded complaint rule now admits of an exception for complete preemption. *See* 13 WRIGHT & MILLER, *supra* note 3, § 3522; 13D WRIGHT & MILLER, *supra* note 3, § 3566. If state-law claims are "completely preempted" by federal law, the state-law claims may be considered "necessarily federal" and the case may be removed to federal court. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 22–23 (1983); Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 390 U.S. 557 (1968). As noted throughout this Article, the Constitution limits the reach of federal judicial power. *See supra* notes 24, 34 and accompanying text. For example, the matter must present a "case or controversy"—the bedrock element of federal power. U.S. CONST. art. III, § 2. Thus, federal courts do not issue advisory opinions or reach into matters that are otherwise nonjusticiable. While the content of these terms may change from time to time, the core principles underlying these constitutional restrictions remain constant. This Article does not analyze concerns regarding constitutional subject-matter jurisdiction.

1. Scholarship's Definition of Subject-Matter Jurisdiction

Scholars point out that there is something "core" about subject-matter jurisdiction.[36] Professor Wasserman explains the rubric this way:

> [The Supreme Court's approach] presumes that there is something essential, definable, and recognizable as "jurisdiction" that is, and must remain, distinct from substantive merits. Jurisdictional rules typically appear in separate provisions, speaking to courts about judicial authority and the categories of cases that courts can adjudicate. They are grounded in unique structural policies of separation of powers, federalism, and limited federal government.[37]

But even this sorting mechanism does not distinguish very well. Although there may be "something essential" about subject-matter jurisdiction in some contexts, it is difficult to see what is "essential" about a car accident between diverse parties that amounts to $75,000.01 in controversy and what is so obviously lacking in a car accident between diverse parties that results in damages of a single penny less. "Essentiality" does not always capture the core of subject-matter jurisdiction.

2. Supreme Court's Definition(s) of Subject-Matter Jurisdiction

The Supreme Court too has struggled to define the boundaries of what constitutes subject-matter jurisdiction.[38] Part of the problem is that words may mean different things in different contexts, and so what may constitute subject-matter jurisdiction for one purpose (*e.g.*, availability of a federal forum) may not constitute subject-matter jurisdiction for another (*e.g.*, waiver).[39]

36. *See infra* note 37 and accompanying text.

37. Howard M. Wasserman, *The Demise of "Drive-by Jurisdictional Rulings,"* 105 NW. U. L. REV. COLLOQUY 184, 186 (2011) [hereinafter "*The Demise*"]. *But see* Gregory Sisk, *Lifting the Blindfold from Lady Justice: Allowing Judges to See the Structure in the Judicial Code*, 62 FLA. L. REV. 457 (2010) (discussing the congressional decision prohibiting drawing any inference from the placement of a provision in a particular chapter within Title 28).

38. *See supra* note 35 and accompanying text.

39. "'Identical words may have different meanings where [among other things] the conditions are different.'" Verizon Cal., Inc. v. F.C.C., 555 F.3d 270, 276 (D.C. Cir. 2009) (citation omitted) (alteration in original); *see also* City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 184 (Ginsburg, J., dissenting) (1997) ("We would do well, however, to recall in this context a sage and grave warning: 'The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.'") (quoting Walter Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933)).

In *Kontrick v. Ryan*, the Court observed that this indeterminacy in definition has led many courts to misuse the term "subject-matter jurisdiction":

> Courts, including this Court . . . , have more than occasionally [mis]used the term "jurisdictional" to describe emphatic time prescriptions in [claim-processing] rules. . . . Classifying time prescriptions, even rigid ones, under the heading "subject matter jurisdiction" can be confounding. Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.[40]

The Supreme Court has concluded time deadlines are generally not jurisdictional, which means litigants must raise any missed deadlines early in the litigation or forfeit the objection. But the Court has not spoken so clearly regarding other potential jurisdictional issues, such as exhaustion of remedies, ripeness, or mootness.[41]

In recent years, the US Supreme Court has become more interested in articulating a precise rubric for determining whether a provision relates to subject-matter jurisdiction: A provision is jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional."[42] Conversely, "when Congress does not rank a statutory limitation

40. Kontrick v. Ryan, 540 U.S. 443, 454–55 (2004) (citations omitted) (some internal quotation marks and brackets omitted). *But see* Bowles v. Russell, 551 U.S. 205, 209–12 (2007) (characterizing a statutory thirty-day time limit for an appeal as jurisdictional); *id.* at 215–16 (Souter, J., dissenting) (excoriating the majority as at odds with the Court's recent undertaking to "avoid[] the erroneous jurisdictional conclusions that flow from [the] indiscriminate use of the ambiguous word"); RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e (1982) ("There is a strong tendency in procedural law to treat various kinds of serious procedural errors as defects in subject matter jurisdiction. This is because characterizing a court's departure in exercising authority as 'jurisdictional' permits an objection to the departure to be taken belatedly."); *see also id.* § 69 cmt. b ("The modern decisions, moreover, generally display realism if not complete candor in their manipulation of the term 'jurisdiction.'"); 2 MOORE, *supra* note 3, at § 12.30[1] ("When a claim is based on a federal statute, the parties and courts sometimes erroneously conflate the question of subject matter jurisdiction with the question of whether the plaintiff can prove that the federal statute actually applies to the defendant or to the defendant's conduct.").

41. Courts disagree over whether exhaustion of remedies is jurisdictional or not, *see, e.g.*, Muskrat v. Deer Creek Pub. Schs., 715 F.3d 775, 784–85 (10th Cir. 2013) (cataloguing the circuit split regarding whether exhaustion is jurisdictional under the Individuals with Disabilities Education Act); 5B WRIGHT & MILLER, *supra* note 3, § 1350 (noting both characterizations of exhaustion and whether ripeness ranks as jurisdictional); Stanton v. City of Philadelphia, No. CIV.A. 10-2726, 2011 WL 710481, at *2 n.2 (E.D. Pa. Mar. 1, 2011) (collecting cases from the Third Circuit reviewing ripeness dismissals under both 12(b)(6) and 12(b)(1) standards).

42. Arbaugh v. Y&H Corp., 546 U.S. 500, 515–16 (2006); Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013) ("To ward off profligate use of the term 'jurisdiction,' we have adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional. We inquire whether Congress has 'clearly state[d]' that the rule is jurisdictional; absent such a clear statement, we have

on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."[43]

This framework sounds clear and easy to apply, but may not work in practice for several reasons. First, it puts the burden on Congress to say whether a statutory limitation is jurisdictional. Second, Congress rarely says whether a portion of a statute is or is not jurisdictional when writing a statute conferring a right. Third, Congress is not particularly well-equipped (and certainly not as well-equipped as the Court) to say whether something is jurisdictional.

In its October 2009 term, the US Supreme Court attempted to provide further guidance for identifying when jurisdictional issues are present.[44] In four cases, the Court squarely addressed whether a certain requirement constituted a jurisdictional rule or a claim-processing rule (that is, a nonjurisdictional rule).[45] In each, the Supreme Court rejected characterizing the legal rule as jurisdictional, and thus narrowed the scope of subject-matter jurisdiction.[46] Most notably, Justice Scalia set forth a clearer distinction between jurisdictional rules and other inquiries in *Morrison v. National Australia Bank*.[47]

The issue in *Morrison* was whether § 10(b) of the Securities and Exchange Act[48] applied to misconduct by *foreign* defendants that harmed *foreign* plaintiffs

cautioned, 'courts should treat the restriction as nonjurisdictional in character.'") (alteration in original) (citations omitted). One wonders whether Congress will do this, and whether, even if Congress wishes to tackle the issue, Congress has the time to do so on a piecemeal basis in each statute it writes.

43. *Arbaugh*, 546 U.S. at 516; Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161–62 (2010) (citing *Arbaugh* for the proposition that Congress may make a threshold limitation "jurisdictional" by so stating in the statute).

44. *See generally Reed Elsevier Inc.*, 559 U.S. 154.

45. Morrison v. Nat'l Ausl. Bank Ltd., 561 U.S. 247 (2010); United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010); *Reed Elsevier, Inc.*, 559 U.S. 154; Union Pac. R.R. Co. v. Bd. of Locomotive Eng'rs & Trainmen, 558 U.S. 67 (2009).

46. *See generally Morrison*, 561 U.S. 247 (resolving whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges; determining that this is a merits inquiry about the scope of the law, not a jurisdictional inquiry); *Espinosa*, 559 U.S. 260 (reviewing whether a bankruptcy court order that confirms the discharge of a student loan debt without an undue hardship finding or an adversary proceeding, or both, is a void judgment under Rule 60(b)(4); noting that the undue hardship analysis and the adversary proceedings are procedural rules adopted for the orderly procession of bankruptcy cases, not jurisdictional requirements); *Reed Elsevier, Inc.*, 559 U.S. 157 (holding that the "Copyright Act's registration requirement [in § 411(a)] is a precondition to filing a . . . claim," but not a restriction on a federal court's subject-matter jurisdiction); *Bd. of Locomotive Eng'rs & Trainmen*, 558 U.S. at 71–72 (determining that the requirement that parties in minor disputes before the National Railroad Adjustment Board must attempt settlement in conference is not a limit on the Board's jurisdiction).

47. *See generally Morrison*, 561 U.S. 247. In *Morrison*, Justice Scalia's dissenting position in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), became a majority position. In *Hartford Fire Ins. Co.*, Justice Scalia articulated a difference between a district court's subject-matter jurisdiction and Congress's legislative jurisdiction. *Id.* at 812–21 (Scalia, J., dissenting). In *Morrison*, Justice Scalia pointed out that the district court's power to hear the case came from 15 U.S.C. § 78aa (2006), but that was an entirely separate question from whether Congress had intended that section of the statute to apply to conduct outside the United States. *Morrison*, 561 U.S. at 251.

48. 15 U.S.C. § 78a (2006).

in transactions on *foreign* exchanges.[49] The Supreme Court determined that the extraterritorial application of § 10(b) was a merits question, not a jurisdictional one. Justice Scalia wrote, "[T]o ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question."[50] In other words, whether the statute covers the particular set of circumstances is a merits issue.[51] Perhaps *Morrison* will provide adequate guidance to enable the federal courts to place legal questions in the appropriate construct (jurisdictional or merits) and to determine the appropriate attributes of the construct—such as whether the defect is waivable or non-waivable.[52]

For all the ink spilled attempting to define subject-matter jurisdiction, there is remarkably little to show for the effort. At least for purposes of waivability, a narrow conception of subject-matter jurisdiction has much to commend itself because the no-waiver rule has distinctly harsh consequences for parties and the court system.[53] An issue of exhaustion or of timely filing, raised for the first time

49. *Morrison*, 561 U.S. at 250.

50. *Id.* at 251. One may properly wonder what this determination means in different contexts. For example, would an Australian court in a subsequent suit care whether the US dismissal was based on "jurisdictional" or "merits" grounds? In other words, would the Australian court accord comity to the American merits decision and dismiss subsequent Australian claims? As another example, suppose in the American lawsuit there were supplemental claims under the law of Australia. Would Justice Scalia allow these claims to proceed under the supplemental jurisdiction statute, 28 U.S.C. § 1367(c) (2006)? Or, for determining the supplemental jurisdiction question, would the dismissal be labeled differently—that is, as a jurisdictional question? *Cf.* Arena v. Graybar, 669 F.3d 214 (5th Cir. 2012), discussed *infra* Part II.B.2.

51. *See also Arbaugh*, 546 U.S. at 516 ("[W]hen Congress does not rank a statutory limitation on coverage as 'jurisdictional,' courts should treat the restriction as nonjurisdictional in character."); Kontrick v. Ryan, 540 U.S. 443, 455 (2004) ("Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.").

52. Two years before *Morrison*, Professor Dodson wrote that the Supreme "Court has yet to develop a principled framework for resolving the issue" of whether a particular "rule is jurisdictional or not." *Mandatory Rules*, *supra* note 3, at 2. Perhaps *Morrison* and the other cases from the 2009 term help provide that framework. *See supra* notes 45–46 and accompanying text.

53. *See The Demise*, *supra* note 37, at 197 ("If jurisdiction and procedure align in terms of timing and fact-finder, the question becomes, 'Why is it worth separating the jurisdictional from the merely procedural?' . . . . [One] answer centers on the consequence of the characterization. Adjudicative jurisdictional rules are, by definition, non-waivable. The parties cannot consent to subject matter jurisdiction in federal court or waive an objection to it. Judges at every level have an independent obligation to raise subject matter jurisdiction sua sponte, and the court or a party can raise jurisdiction at any time throughout the litigation process. And, as a general (although sharply contested) proposition, adjudicative jurisdictional rules are rigid and inflexible, not allowing for equitable exception or leniency."); Eammon O'Hagan, *Stop Changing the Subject! Recent Supreme Court Jurisprudence on Whether Statutory Requirements Are Subject Matter Jurisdictional or Claims Processing Rules*, 20 J. BANKR. L. & PRAC. 1 ART. 2 (2011) ("In recent years, the U.S. Supreme Court has attempted to formulate a coherent framework for determining when a moving party's failure to satisfy a statutory requirement deprives a court of subject matter jurisdiction as opposed to simply depriving the movant of a basis for relief. . . . [T]his distinction is critical because unlike most defenses, a lack of subject matter jurisdiction can be raised at any time prior to final judgment—even on appeal.").

There are other consequences of the separation of the jurisdictional from the merely procedural. Professor Wasserman discussed some of the more important consequences of labeling an issue as jurisdictional. *See supra*

before the court of appeals, should not result in a dismissal for failure to comply with subject-matter jurisdiction. If, however, the central thesis of this Article is accepted (namely, that subject-matter jurisdiction should be waivable), courts and scholars may not have to spend as much time attempting to draw a line between what is and what is not subject-matter jurisdiction because both would be waivable.[54]

B. Non-Waivability in the Caselaw

1. Early Approaches to Non-Waiver

Louisville & Nashville Railroad Co. v. Mottley[55] and *Owen Equipment & Erection Co. v. Kroger*[56] highlight the inefficiency and harshness of the no-waiver rule. In each case, there was a plausible argument for federal subject-matter jurisdiction. And in each case, the parties failed to raise the issue before trial, the trial court rendered a decision on the merits, and an appellate court dismissed the action for lack of jurisdiction, thereby invalidating the merits decision.

Perhaps the best-known case of dismissal for lack of subject-matter jurisdiction is *Louisville & Nashville Railroad Co. v. Mottley*. The Mottleys sued the railroad company for breach of contract after the company ceased to honor the Mottleys' free train passes,[57] citing as authority a federal statute arguably

note 37 and accompanying text. Some others include whether the defect can be attacked on collateral review; the res judicata consequences of the judgment (*see supra* note 26); treatment of supplemental claims (if the original claim is dismissed for lack of subject-matter jurisdiction the supplemental claims must be dismissed, and the result is otherwise if the federal claim is dismissed for failure to state a claim, *see infra Arena*, 669 F.3d 214 in Part II.B.2); tolling of the statute of limitations; and the ability of an administrative agency to expand a statutory time frame for appeal. This last issue was raised in *Sebelius v. Auburn Regional Medical Center* and there, the Court held that the 180-day limit was nonjurisdictional, permitting the agency to expand the time frame to three years. 133 S. Ct. 817, 821–22 (2013). Of course, outside of jurisdictional inquiries, courts often defer to agency interpretations of the statutes within their purview. *See generally* Ryan Abbott, *Big Data and Pharmacovigilance: Using Healthcare Information Exchanges to Revolutionize Drug Safety*, 99 IOWA L. REV. 225 (2013) (discussing agency deference).

The nonjurisdictional nature of a defect may render it susceptible to a 12(b)(6) motion, which can be raised at any time through trial. The district courts have flexibility in entertaining these motions; for example, the courts may deploy estoppel rules to preclude parties from belatedly raising these defects. Estoppel may be precipitated by answers to complaints, answers to interrogatories, deposition testimony, admissions, and pre-trial orders. These same "admissions" currently do not preclude a belated subject-matter jurisdiction attack. Although this flexibility in the 12(b)(6) arena does add a level of unpredictability, this consequence is more desirable than the current alternative, which is to label this defect "jurisdictional" and permit attack even for the first time on appeal.

54. However, the time frame for that waiver may differ; so, there is still some utility in exploring this issue.

55. 211 U.S. 149 (1908).

56. 437 U.S. 365 (1978).

57. The Mottleys had been injured in a train accident, and in compensation for their injuries, the Railroad Company promised them free train passes for life. *Mottley*, 211 U.S. at 150.

banning the provision of free passes.[58] Although nominally a breach of contract case, the salient and contested issues all involved federal law: the application, interpretation, and constitutionality of the federal statute.[59] The lower federal courts reached the merits of the Mottleys' claim, interpreted the federal statute, and held that the railroad had to honor the Mottleys' passes.[60] The US Supreme Court, however, determined that "the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this Court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by statute, is not exceeded."[61] Because the Mottleys' complaint did not arise under federal law for purposes of statutory subject-matter jurisdiction, but was instead a state-law breach of contract action, the Supreme Court reversed with instructions to dismiss the case for lack of federal jurisdiction.[62] The anticipation of federal issues—even though substantial and predominant—was not sufficient to confer jurisdiction under the federal question statute.

The Mottleys began anew in state court.[63] The Kentucky state court reasoned that the federal statute did not apply to their free passes, so the Railroad Company had indeed breached its agreement with the Mottleys.[64] Three years after the US Supreme Court first heard the Mottleys' case, the US Supreme Court heard their case again.[65] The Court found against the Mottleys once more. But

58. *Id.* at 151.

59. *Id.* at 151–52.

60. *Id.* at 151.

61. *Id.* at 152.

62. *Id.* at 154. Though the Court did not address the constitutional issue, the phrase "arising under" in Article III has been interpreted more broadly than the analogous phrase in the United States Code, 28 U.S.C. § 1331 (2006). *See supra* notes 24, 34–35 and accompanying text. *But see* F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 907 (2009) ("The deliberate repetition of the language from Article III in the federal question statute strongly suggests that Congress meant to confer on the federal district courts the full 'arising under' jurisdiction permitted by the Constitution, so long as the subject of dispute exceeded five hundred dollars."). A similar result has occurred in the diversity jurisdiction area—although both the United States Code and the Constitution speak in terms of "diversity," the US Supreme Court has determined that diversity for statutory purposes requires complete diversity, while diversity for constitutional purposes requires only minimal diversity. *See* Strawbridge v. Curtiss, 7 U.S. 267 (1806); U.S. CONST. art. III; 28 U.S.C. § 1332 (2006).

63. Louisville & N.R. Co. v. Mottley, 118 S.W. 982 (Ky. 1909), *rev'd*, 219 U.S. 467 (1911).

64. *Id.* at 984–85.

65. *See generally Mottley*, 219 U.S. 467. The US Supreme Court had the power to hear the appeal because the arising-under clause of Article III of the Constitution requires only an important federal element to the case, not that the plaintiff's claim for relief arise out of federal law itself. *See* Osborn v. Bank of the United States, 22 U.S. 738, 824 (1824) (articulating the "federal ingredient" test); 28 U.S.C. § 1257 (2006) (providing appellate jurisdiction over cases from state courts "by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States"). The Supreme Court, however, would not have had the authority to review any independent state-law issues such as the existence or meaning of the contract. *See* Murdock v. City of Memphis, 87 U.S. 590 (1874).

this time, it found against the Mottleys on the merits of their claim.[66] As Professor Yeazell queries, "Is this any way to run either a railroad or a judicial system?"[67] Certainly not, especially when weighty issues of federal law are dismissed from federal courts after a decision has been rendered, leaving those issues to be determined by a state court in the first instance.

A famous 1970s example of the no-waiver rule comes from *Owen Equipment & Erection Co. v. Kroger*. In that action, after some initial party-shifting and procedural wrangling, Geraldine Kroger sued Owen Equipment and Erection Company ("Owen") for the electrocution death of her husband.[68] Mrs. Kroger invoked diversity jurisdiction on the ground that Owen was a Nebraska corporation with its principal place of business in Nebraska, while she was a domiciliary of Iowa.[69] Owen's answer admitted it was a Nebraska corporation and denied everything else.[70]

Three days into trial, Owen disclosed that its principal place of business was not Nebraska, but Iowa.[71] It moved to dismiss the case for lack of subject-matter jurisdiction.[72] The district court denied the motion, and the circuit court of appeals affirmed that denial.[73] But the Supreme Court reversed, reaffirming that "[i]t is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."[74] Thus, Owen, the party in the best position to determine its corporate citizenship, was rewarded for filing an incomplete and perhaps purposely misleading answer,[75] waiting to see how the

66. *Mottley*, 219 U.S. 467.

67. STEPHEN YEAZELL, CIVIL PROCEDURE 199 (Aspen 8th ed. 2012). Contrast this case with *Caterpillar, Inc. v. Lewis*, discussed *infra* Part III.B.1, in which the Supreme Court held that a defect in statutory diversity removal jurisdiction, which was cured before entry of judgment, did not deprive the district court of the power to hear and resolve the case. 519 U.S. 61 (1996); *see also* Bloom, *supra* note 3, at 987–88 ("This jurisdictional limit [subject-matter jurisdiction] can seem an 'expensive habit.' Parties may not waive, disguise, or stumble through subject-matter jurisdiction defects. Nor may federal courts avoid, elide, or ignore them—no matter when they emerge.").

68. Owen Equipment. & Erection Co. v. Kroger, 437 U.S. 365, 367–68 (1978).

69. *Id.* at 368–69.

70. *Id.* at 365.

71. *Id.* at 369. According to the Court, "The problem apparently was one of geography. Although the Missouri River generally marks the boundary between Iowa and Nebraska, Carter Lake, Iowa, where the accident occurred and where Owen had its main office, lies west of the river, adjacent to Omaha, Neb. Apparently the river once avulsed at one of its bends, cutting Carter Lake off from the rest of Iowa." *Id.* at 369 n.5.

72. *Id.* at 369.

73. *Id.*

74. *Id.* at 374.

75. *See* Igor Potym, *FEDERAL JURISDICTION—Ancillary Jurisdiction—Independent Grounds of Jurisdiction Required for Plaintiff's Claim Against Third-Party Defendant* Owen Equipment and Erection Co. v. Kroger, 98 S. Ct. 2396 (1978), 62 MARQ. L. REV. 89, 99 (1978) ("Owen concealed its true citizenship until after the Iowa statute of limitations had expired.").

case was proceeding, and then belatedly raising the subject-matter defect three days into trial.[76]

Because of the rhetoric that defects in subject-matter jurisdiction are not waivable, these cases were dismissed after parties, witnesses, lawyers, judges, and juries had invested substantial time, money, and energy. It is also arguable that in *Kroger*, Owen knew it had a jurisdiction trump card and waited to play it when the case began to go badly for it, thereby supporting gamesmanship as a litigation strategy. Moreover, finding no-waiver in some contexts, as in *Mottley*, may pose problems from a federalism perspective. In that case, the key issue involved the interpretation and constitutionality of a federal statute; yet, the federal courts' interpretation of that statute was wiped out in favor of a future state-court adjudication of the federal issue.[77]

2. The Non-Waiver Trap Continues: Recent Examples

More recent cases show that parties continue to fall into the trap created by the no-waiver rule. Two fairly typical examples are *Belleri v. United States*[78] and *Arena v. Graybar*.[79] In both, the federal courts arguably had jurisdiction; the parties failed to raise the subject-matter jurisdiction defects before the district courts rendered final dispositions; and the appellate courts found defects in subject-matter jurisdiction. The waste of resources is obvious.

In *Belleri v. United States*, a former detainee sued the United States and federal officials for damages arising out of his eight-month detention.[80] Although

76. *See also* Am. Fire & Casualty Ins. Co. v. Finn, 341 U.S. 6 (1951). In *Finn*, the defendant insurance company, hoping to find a more hospitable fact-finder, removed the plaintiff's case from state to federal court. After the plaintiff won the case, the defendant successfully argued lack of subject-matter jurisdiction on appeal, even though the *defendant* had been the party to invoke federal court jurisdiction in the first place. *Id.* at 18. Scholars have noted that result hardly seems fair. *See, e.g.*, Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 492 (1967) [hereinafter "*Beyond Bootstrap*"]

> This means that a defendant—or a plaintiff in a removed case—may say nothing about the absence of jurisdiction until he sees the verdict. If it is favorable, he will maintain a truly golden silence. If it is unfavorable, he will object to the court's jurisdiction and demand that the verdict be set aside and the case dismissed. In old-fashioned terminology, this is morally wrong. It is unfair to the winning party. After all, he has won on the merits, and a jurisdictional defect seldom affects the fairness of the trial. . . . Further, it is bad administration of justice; it is inefficient as well as unfair, and it quite properly raises grave public doubts about the judicial system.

(citations omitted). In situations like the one Professor Dobbs describes, perhaps the jurisdictional rule should take on the nonjurisdictional attribute of estoppel. *See infra* Part IV (noting, among other things, that the ALI's proposed statute accounts for this estoppel attribute).

77. Louisville & N.R. Co. v. Mottley, 219 U.S. 467 (1911). The Supreme Court's limited docket means that only a small fraction of state-court cases will find their way to the US Supreme Court, even if those cases involve interpretation of a federal statute.

78. Belleri v. United States, 712 F.3d 543 (11th Cir. 2013).

79. Arena v. Graybar, 669 F.3d 214 (5th Cir. 2012).

80. *Belleri*, 712 F.3d at 544.

a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 stripped federal courts of jurisdiction to hear claims brought by "aliens," the parties agreed that the plaintiff was a citizen and, therefore, the case did not fall within this jurisdiction-stripping provision.[81] On appeal, however, the defendants disputed the plaintiff's citizenship, alleging that he was an alien after all.[82] The Eleventh Circuit remanded the case to the district court to determine whether the federal courts had subject-matter jurisdiction over the case.[83] The issue of jurisdiction had not been waived.

In 2012, after seven years of litigation, the Fifth Circuit found federal question jurisdiction lacking in *Arena v. Graybar*. In 2005, Arena sued the defendants, alleging violations of the federal Miller Act[84] and supplemental jurisdiction over some related state-law breach of contract claims.[85] The defendants had not secured a bond—which is required for a Miller Act claim because the plaintiff is bringing an action on the bond[86]—so the district court dismissed the federal claim at the beginning of the bench trial.[87] The district court, however, exercised supplemental jurisdiction over the breach of contract claims, ultimately entering judgment for Arena.[88] Only then did the defendants move to dismiss for lack of subject-matter jurisdiction, suggesting for the first time that no federal claim anchored the supplemental state-law claims, and that, therefore, supplemental jurisdiction was improperly exercised.[89] The district court disagreed, finding that it had jurisdiction.[90] The Fifth Circuit held that supplemental jurisdiction could not save the case because the defendants had never satisfied the bond requirement, rendering the Miller Act claim "fatally defective" on its face.[91] Arena had the misfortune of spending nearly seven years

81. *Id.*

82. *Id.* at 548.

83. *Id.* at 549.

84. 40 U.S.C. §§ 3131–34 (2006).

85. *Arena*, 669 F.3d at 218.

86. *See* 40 U.S.C. § 3133(b).

87. *Arena*, 669 F.3d at 218. A subcontractor may sue under the Miller Act only if the contractor has secured a bond. *Id.* at 220; 40 U.S.C. § 3133(b)(1) ("Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131 of this title and that has not been paid in full within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due.").

88. *Arena*, 669 F.3d at 218.

89. *Id.*

90. *Id.*

91. *Id.* at 221. Section 1367(c) grants the district court discretion to retain supplemental jurisdiction over state claims if the federal claim is dismissed for failure to state a claim; it does not purport to give that same discretion to keep jurisdiction where the federal claim lacked subject-matter jurisdiction. *See* 28 U.S.C. § 1367(c) (2006). However, if the failure to secure a bond were a failure to state a claim rather than a lack of subject-matter jurisdiction, it may seem less problematic to keep the supplemental claims. Once again, whether a defect is labeled jurisdictional or not dictates the outcome because of the "untoward consequences" of calling

in litigation, only to have the favorable judgment wiped out by a belated challenge to subject-matter jurisdiction.

During its 2012 term, the Supreme Court also had occasion to discuss the waivability subject-matter jurisdiction in *Gunn v. Minton*.[92] There, a plaintiff brought a malpractice claim against his former lawyer in state court and received an adverse ruling. On appeal, the plaintiff argued that he had chosen the wrong forum—that because his malpractice claim was premised on a legal mistake in handling a patent matter, the state court where he had chosen to bring his suit lacked subject-matter jurisdiction.[93] The US Supreme Court rejected his argument, but only because the Court disagreed that the plaintiff's malpractice claim arose under federal law. Had the Court agreed with the plaintiff's premise, presumably the Court would have vacated the judgment, citing the no-waiver rule.[94]

III. PROBLEMS WITH THE CURRENT PRACTICE

A. Waste of Scarce Resources

Bloated dockets, long delays, and substantial costs tarnish our civil justice system.[95] On the federal side, the Federal Rules of Civil Procedure increasingly emphasize efficiency and disposition of cases at the pre-trial stage.[96] Even so, delay is perceived as a major impediment to justice.[97]

Dismissal of cases like *Mottley*, *Kroger*, and *Arena* on subject-matter jurisdiction grounds after a final disposition on the merits further entrenches delay in our civil justice system.[98] The parties obviously suffered from the delay and its attendant costs. They not only waited years for their cases to wind through

a defect jurisdictional. *See* Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013).

92. Gunn v. Minton, 133 S. Ct. 1059 (2013).

93. *Id.* at 1063. Of course, plaintiffs, as well as defendants, are permitted to invoke subject-matter jurisdiction defects in order to wipe out unfavorable judgments. *See supra* note 6 and accompanying text (discussing Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804)).

94. *Gunn*, 133 S. Ct. at 1068–69.

95. *E.g.*, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U.L. REV. 982, 985–95 (2003) (describing critiques of cost, delay, and backlog in the federal system); ABA Task Force on Preservation of the Justice System, *Report to the House of Delegates by the American Bar Association Task Force on Preservation of the Justice System—Crisis in the Courts: Defining the Problem—Proposals and Options*, 83 PA. B.A. Q. 29, 33 (2012) (discussing costs associated with delay in the state systems).

96. FED. R. CIV. P. 1; *see also* Miller, *supra* note 95, at 984.

97. *See* Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 FORDHAM L. REV. 833, 863–68 (1994) (citing a 1986 study reporting that fifty-seven percent of respondents, adult Americans, disagreed with the proposition that "[t]he civil justice system provides timely resolutions of disputes without significant delays" and a 1988 study in which civil litigators cited delay as their most serious criticism) (alterations omitted).

98. *See supra* Part II.B.

motion practice to trial, but also filed briefs and had appellate arguments, only to have their judgments wiped out on appeal because of late-discovered subject-matter jurisdiction defects.[99]

Cases like *Mottley*, *Kroger*, and *Arena* also exacerbate delays for other cases by clogging the system and wasting judicial and other resources. When these cases—which have already been judicially resolved—face do-overs in state courts, the state-court dockets become burdened with repetitive litigation. Judges who could be spending their time on other cases instead must rehear previously made arguments, re-read previously read motions and briefs, re-hold previously held trials and evidentiary hearings, and re-decide previously decided issues. Delayed subject-matter jurisdiction attacks are inimical to the civil justice system's emphasis on efficiency, early dispute resolution, and finality.

B. Lack of Coherent Application

The federal courts, including the US Supreme Court, have long struggled with how to apply the rules governing subject-matter jurisdiction and, in particular, whether to permit dismissals of cases because of late-discovered subject-matter jurisdiction defects. Two cases, decided by the Court just eight years apart, show the seemingly inconsistent application of the no-waiver rule. Perhaps because the consequences of the rule can appear so harsh, even our highest Court has strived to ameliorate the effects. In *Caterpillar, Inc. v. Lewis*,[100] the Court determined that the lack of subject-matter jurisdiction was not fatal to the suit. However, in *Grupo Dataflux v. Atlas Global Group*, the Court refused to extend the flexible approach of *Caterpillar* and found the lack of subject-matter jurisdiction to indeed be fatal.[101]

99. *Id.*

100. Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996).

101. Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567 (2004). As discussed below, there are doctrinal reasons for the difference in treatment. First, in *Caterpillar*, the parties were individuals, while in *Grupo Dataflux*, the key party was a business association. Therefore, when the individuals dropped out of the case in *Caterpillar*, the lineup in the case changed; in contrast, when partners in the association dropped out, the lineup in the case remained the same. *See infra* note 123 and accompanying text. Second, *Caterpillar* involved a case originally filed in state court and removed to federal court, while the plaintiff originally filed *Grupo Dataflux* in federal court. These formalistic distinctions, however, mask the remarkable similarities between the cases and undermine an even-handed application of subject-matter jurisdiction's rules. *See infra* notes 126-127 and accompanying text.

Other scholars have critiqued *Caterpillar* and *Grupo Dataflux*, singly and in combination. *See, e.g.*, Taylor Simpson-Wood, *Has the Seductive Siren of Judicial Frugality Ceased to Sing?:* Dataflux *and Its Family Tree*, 53 DRAKE L. REV. 281, 349 (2005) (calling the decision in *Grupo Dataflux* "almost incomprehensible"); *Leading Cases: Federal Jurisdiction and Procedure*, 118 HARV. L. REV. 386 (2004) (critiquing both cases); Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1948 n.267 (2008) (noting that the rationale of *Caterpillar* could have controlled the outcome in *Grupo Dataflux*).

1. Caterpillar, Inc. v. Lewis[102]

In *Caterpillar v. Lewis*, the Supreme Court announced that a lack of subject-matter jurisdiction may not end a suit if the defect is cured by the time judgment is entered.[103] A unanimous Supreme Court held that the judgment would stand. The Court did so despite the fact that the defendant removed the case to federal court when complete diversity was lacking, with only one day to spare before the time to remove would have expired and the plaintiff properly objected to removal.[104] The Court held that "[o]nce a diversity case has been tried in federal court," and as long as there is subject-matter jurisdiction at the time of judgment, "considerations of finality, efficiency, and economy become overwhelming."[105]

This seems a particularly egregious case in which to permit a defect in subject-matter jurisdiction to be "cured." The plaintiff preferred that the case proceed in state court, but the defendant removed the case despite the lack of complete diversity.[106] The defendant could not wait for complete diversity to present itself because the one-year limit for removal of diversity actions was fast approaching.[107] The plaintiff moved the district court to remand the action for lack of complete diversity, but the district court botched the motion.[108] In sum, the plaintiff did all that was necessary to raise and preserve the issue.[109] But a

102. 519 U.S. 61.

103. *Id.* at 73 (noting the jurisdictional defect was cured before trial); *see also id.* at 64 ("The question presented is whether the absence of complete diversity at the time of removal is fatal to federal-court adjudication. We hold that a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered."). Although this has been characterized as a court committing "harmless error by failing to remand the case upon a proper motion to remand," the error is hardly harmless to the plaintiff in this case. Chad Mills, Note, Caterpillar Inc. v. Lewis: *Harmless Error Applied to Removal Jurisdiction*, 35 HOUS. L. REV. 601, 614 (1998)

The plaintiff brought the case in state court and preferred to have it remain there; had the defendant waited until complete diversity existed, the defendant could not have removed the case because of the one-year time limit for removing. *Caterpillar*, 519 U.S. at 75. It was quite harmful for this plaintiff—who chose state court—to be dragged into federal court even though subject-matter jurisdiction was lacking. For example, the plaintiff argued that a state court would have had a more sympathetic jury. Br. For Resp., *available at* 1996 WL 428359, at *21–22. The plaintiff also argued that the state court's evidentiary standard for subsequent remedial measures would have benefitted his case. *Id.* at *22 (noting that in Kentucky State court, he would have been permitted to show that the bulldozer had been redesigned after his accident).

104. *Caterpillar*, 519 U.S. at 65; *see also id.* at 74 ("Lewis, by timely moving for remand, did all that was required to preserve his objection to removal."); *id.* at 75 ("Had Caterpillar waited until the case was ripe for removal, *i.e.*, until Whayne Supply was dismissed as a defendant, the one-year limitation would have barred the way, and plaintiff's choice of forum would have been preserved.").

105. *Id.* at 75; *see also id.* at 77 ("To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.").

106. *See supra* note 103 and accompanying text.

107. *See* 28 U.S.C. § 1446(h) (2006).

108. *Caterpillar*, 519 U.S. at 64–66. The nondiverse party remained in the case another three years. *Id.* at 66.

109. The plaintiff was not required to take an interlocutory appeal. *Id.* at 74.

unanimous Supreme Court nonetheless held that the defect in subject-matter jurisdiction was curable.[110] The Court said that the "fair" administration of justice required affirming the judgment.[111]

Somehow subject-matter jurisdiction, which is so often characterized by the Court as of paramount importance, was treated as less important than other considerations that have been raised below and preserved. The Court apparently concluded that the end justified the means; therefore, as long as jurisdiction existed at the end of the case, intermediate problems with jurisdiction could be overlooked.[112] In the words of Professor Bloom, concerns of finality, efficiency, and economy "counseled a late, permissive, and unexpected twist on jurisdiction's hard rules. So the Court let judgment stand in *Caterpillar*. Subject-matter jurisdiction belatedly, and *unpredictably*, did bend."[113]

2. Grupo Dataflux v. Atlas Global Group, L.P.[114]

The result in *Caterpillar* was unpredictable indeed. The Court ignored the no-waiver rhetoric and permitted the case to remain in federal court. Perhaps realizing that the practice pendulum had swung too far from the rhetoric of the rule, less than a decade later, the Court declined to follow its earlier flexible approach. In a 5–4 decision, the Court held that, in a diversity case, a partnership's post-filing change in membership (effecting a change in its citizenship) could not cure a lack of complete diversity that existed at the time of filing.[115]

110. *Id.* at 77.

111. *Id.* ("fair and unprotracted administration of justice").

112. The Supreme Court in *Caterpillar* assumed that its decision sprung from the removal statute, but its reasoning seemingly applies to the statutory complete diversity requirement as well:

> Applying the Court's reasoning to the complete diversity requirement, an appellate court could not consider a lack of complete diversity to be a jurisdictional bar once the litigants have had a full and fair trial on the merits, as any error would be harmless. It is difficult to see the logic separating a case where complete diversity does not exist from a case that is improperly removed. Neither case presents a direct constitutional bar to jurisdiction; rather, both involve matters of statutory interpretation only. . . . In fact, one could argue that the restrictions Congress placed on removal jurisdiction should be adhered to more strictly than those placed on diversity jurisdiction. The statute implementing diversity jurisdiction makes no explicit mention of a requirement for complete diversity. . . . In stark contrast, the restrictions Congress placed on removal jurisdiction are spelled out explicitly in the statutes.

Mills, *supra* note 103, at 616–17.

113. Bloom, *supra* note 3, at 1004 (emphasis added). In his Article, Professor Bloom offers support for these sorts of departures from the inflexible rhetoric of subject-matter jurisdiction. This Article takes a different approach, arguing that the departures reflect the better view, and that the inflexible rhetoric should be changed to account for the departures.

114. Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567 (2004).

115. *Id.* at 567.

In *Grupo Dataflux*, a limited partnership sued a Mexican corporation in federal court.[116] The limited partnership, however, also contained some partners who were citizens of Mexico.[117] Therefore, at the time of filing, complete diversity was lacking.[118] But the Mexican partners left the partnership a month before the trial began, so by the time the trial started, both minimal and complete diversity existed.[119] The jury rendered a verdict in favor of the plaintiff. This prompted the defendant, prior to the entry of judgment, to file a motion to dismiss for lack of subject-matter jurisdiction.[120] The Supreme Court could have applied the *Caterpillar* exception, but chose not to do so.[121]

The Court's majority held that there was no federal-court jurisdiction, meaning that the parties would have to retry the case in state court.[122] The majority distinguished *Caterpillar* on two grounds. First, *Caterpillar* involved the dismissal of the party that had destroyed diversity rather than a post-filing change in citizenship of a single party for purposes of cementing jurisdiction.[123] Second, *Caterpillar* "related not to cure of the *jurisdictional* defect, but to cure of a *statutory* defect, namely, failure to comply with the requirement of the removal statute, 28 U.S.C. § 1441(a), that there be complete diversity at the time of removal."[124]

Both distinctions are questionable, and they are certainly not inexorable. As to the first distinction, a change in partnership—where some partners left the partnership—could easily be re-conceptualized as a change in the party lineup, just as in *Caterpillar*. For purposes of subject-matter jurisdiction, each of the partners in Atlas Global Group functions like a separate plaintiff in that he lends his citizenship to the plaintiff's side of the case. When one or more of those partners leaves the partnership, those partners also quit supplying their

116. *Id.* at 568.

117. *Id.* at 569.

118. *Id.* ("Because Atlas had two partners who were Mexican citizens at the time of filing, the partnership was a Mexican citizen."). The partnership was also a citizen of Delaware and Texas based on the citizenship of its other partners. *Id.* Because the defendant, Dataflux, was a Mexican corporation, the requisite statutory diversity was therefore absent. *See* Carden v. Arkoma Assocs., 494 U.S. 185, 189, 192–97 (1990) (holding that, for diversity purposes, all partners, limited and general, must be diverse from the parties on the opposing side of the case).

119. *Grupo Dataflux,* 541 U.S. at 569.

120. *Id.*

121. *See* Simpson-Wood, *supra* note 101, at 351 ("Applying the logic of *Newman-Green* and its extension in *Caterpillar* to the facts of *Dataflux* should have led to only one viable conclusion: because the jurisdictional flaw was remedied prior to trial and judgment, the district court had proper jurisdiction over the matter.").

122. *Grupo Dataflux,* 541 U.S. at 579–80.

123. *Id.* at 572 ("*Caterpillar* broke no new ground, because the jurisdictional defect it addressed had been cured by the dismissal of the party that had destroyed diversity. That method of curing a jurisdictional defect had long been an exception to the time-of-filing rule."). In contrast, historically a partnership includes the domiciles of all of its members at the time of filing; no post-filing change of partners would cure that defect.

124. *Id.* at 574.

citizenship to the party. Therefore, the citizenship lineup did change. The dissent in *Grupo Dataflux* explained this reasoning: "The postcommencement party lineup changes in *Caterpillar* . . . simply trimmed the litigation down to an ever-present core that met the statutory requirement. The same holds true for Atlas. No partner moved. Instead, those that spoiled statutory diversity dropped out of the case as did the nondiverse part[y] in *Caterpillar*."[125]

As to the second reason proffered by the majority—that *Caterpillar* involved a statutory defect with respect to the removal of the case—*Grupo Dataflux* also presented a *statutory* defect, namely a failure to satisfy the complete diversity requirement of 28 U.S.C. § 1332.[126] Minimal diversity existed between the parties because some of the partners were domiciliaries of states other than the state of the opposing party. Other than history, there is little reason to treat a lack of diversity in a removal case differently from lack of diversity in a case originally filed in federal court.[127]

The majority in *Grupo Dataflux* also thought that refusing to allow the judgment to stand would, over time, be the most efficient outcome, even if the ruling resulted in extra litigation in this case. The majority chided the dissent for "arousing hopes of further new exceptions in the future . . . from such an expandable concept as the 'efficiency' rationale."[128]

Why did that same concern not animate the Court in *Caterpillar*? After all, it was *Caterpillar* that aroused the hope for the plaintiff in *Grupo Dataflux*. It is problematic when courts decide one way in one case and a different way in another case. But more importantly, the majority's critique overlooks the possibility of an exception that is itself the result of a uniform rule, not one that is created out of whole cloth based on the "expandable concept" of efficiency. This Article posits the need for that more definitive rule—through the adoption of the ALI's proposed statute.

125. *Id.* at 591 (Ginsburg, J., dissenting).

126. *Id.* at 592 (Ginsburg, J., dissenting) ("The 'considerations of finality, efficiency, and economy' central to the *Caterpillar* Court's treatment of a failure to satisfy 'the [complete-diversity] requirement of the removal statute, 28 U.S.C. § 1441(a),' have equal force in appraising the '*statutory* defect' here, *i.e.*, Atlas' failure initially to satisfy the complete-diversity requirement of § 1332(a).") (brackets in original) (citation to majority opinion omitted).

127. *See* HART & WECHSLER'S, *supra* note 3, at 1414.

128. *Grupo Dataflux*, 541 U.S. at 580–81 ("The dissent would have it that the time-of-filing rule applies to establish that a court has jurisdiction (and to protect that jurisdiction from later destruction), but does *not* apply to establish that a court lacks jurisdiction (and to prevent postfiling changes that perfect jurisdiction). But whether destruction or perfection of jurisdiction is at issue, the policy goal of minimizing litigation over jurisdiction is thwarted whenever a new exception to the time-of-filing rule is announced, arousing hopes of further new exceptions in the future. That litigation-fostering effect would be particularly strong for a new exception derived from such an expandable concept as the 'efficiency' rationale relied upon by the dissent.") (emphasis in original) (citations omitted).

C. Disconnect Between Rhetoric and Practice

History, judicial precedents, scholarly works, and sound policy all militate against the continued rhetoric of the no-waiver rule. Indeed, courts, recognizing the rigid rule must bend, have created exceptions to the primacy of subject-matter jurisdiction.[129] In one case that has been cited as a departure from the norm,[130] the Third Circuit held that a defendant could not raise a belated motion to dismiss for lack of subject-matter jurisdiction once the defendant had admitted the existence of diversity and participated in trial preparations.[131] This exception to the no-waiver norm shows that, at least in limited circumstances, courts elevate fairness and efficiency over strict adherence to the rule governing subject-matter jurisdiction and its non-waivability.[132]

This Section of the Article explores some of these judicially created carve-outs to the position that subject-matter jurisdiction is so important it cannot be waived and that a case cannot proceed when subject-matter jurisdiction is in doubt.[133] These exceptions have created a gap between the inflexible rhetoric of subject-matter jurisdiction and actual practice, and their existence provides support for the proposition that the rigid rhetoric governing subject-matter jurisdiction should be abandoned, as it is not followed anyway.[134] Closing the rhetoric-practice gap to permit waiver—in most circumstances—after trial begins will enhance fairness and transparency, and will help reduce costs.

129. Bloom, *supra* note 3, at 993 (noting "gaps between what courts often say about jurisdiction and what they sometimes do"); *see also id.* at 1005 ("Modern jurisdictional tests sometimes prove more pliable than jurisdictional rhetoric suggests."); *id.* at 1006 ("Jurisdiction's firm and inflexible rules are in some cases neither, even as courts repeat them vigorously.").

130. Di Frischia v. N.Y. Cent. R.R. Co., 279 F.2d 141, 141–42 (3d Cir. 1960), *abrogated by* Mennen Co. v. Atl. Mut. Ins. Co., 147 F.3d 287, 294 n.9 (3d Cir. 1998); *see also* 13 WRIGHT & MILLER, *supra* note 3, § 3522 n.25; 2A MOORE, *supra* note 3, ¶ 12.23 (discussing *Di Frischia* as an outlier).

131. *See Di Frischia*, 279 F.2d at 144. Professor Dan B. Dobbs suggests that, if the Third Circuit truly desired to ensure that the "defendant [would] not play fast and loose with the judicial machinery and deceive the courts," the court could have dismissed the case but prevented the defendant from pleading any statute of limitations that had run by virtue of his delay in making the jurisdictional motion. *Beyond Bootstrap*, *supra* note 76, at 506.

In a different context, several scholars have discussed whether *state* courts should consider on their own state constitutional issues that have not been raised by the parties in certain criminal cases. *See, e.g.*, Michael A. Berch, *Reflections on the Role of State Courts in the Vindication of State Constitutional Rights: A Plea for State Appellate Courts to Consider Unraised Issues of State Constitutional Law in Criminal Cases*, 59 U. KAN. L. REV. 833–34 (2011). The author does not address these very serious issues in the adjudication of criminal cases, for fear of angering her father.

132. *See generally Di Frischia*, 279 F.2d 141.

133. *See supra* Part III.B.

134. *Id.*

1. Subject-Matter Jurisdiction Is Not Generally Reviewable on Collateral Attack

Even the modern no-waiver rule admits of at least one "black letter" exception: subject-matter jurisdiction is not reviewable on collateral attack.[135] If parties raise the subject-matter jurisdiction issue during the original proceeding and direct review, and the courts determine that they do have jurisdiction, the losing party may not raise the issue in a collateral attack. This is true even if the original court clearly lacked subject-matter jurisdiction over the action.[136] Parties who fail to raise subject-matter jurisdiction in the direct review process are similarly barred from collaterally attacking the prior judgment as void.[137] Even in the case of a default judgment, because the court (and the present party) should have been policing jurisdiction, the common wisdom is that subject-matter

135. 18 MOORE, *supra* note 3, at § 132.03[5][e]. Although the Restatement (First) of Judgments set forth situations in which collateral attack should be permitted (namely, lack of personal jurisdiction, subject-matter jurisdiction, notice and opportunity to be heard, competency of the court, or other failure to comply with the prerequisites for adjudicatory power), the Restatement (Second) expressed a preference for finality and so, in most circumstances, disallows collateral attacks. *Compare* RESTATEMENT (FIRST) OF JUDGMENTS § 11 cmt. b (1942) (noting that a prior judgment is void if "the State in which the judgment was rendered had no jurisdiction to subject the parties or the subject matter to its control"), *with* RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. d (1982) ("Even if the issue of subject matter jurisdiction has not been raised and determined, the judgment after becoming final should ordinarily be treated as wholly valid if the controversy has been litigated in any other respect."), *and* §§ 5–8 (the prerequisites for proper authority); *see also* 13D WRIGHT & MILLER, *supra* note 3, § 3536.

136. HART & WECHSLER'S, *supra* note 3, at 1415 ("The policy underlying the modern-day principle has not generally been held to permit a federal court's judgment to be collaterally attacked on the ground that the rendering court lacked subject matter jurisdiction."); RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. c (1982) ("When the question of the tribunal's jurisdiction is raised in the original action, in a modern procedural regime there is no reason why the determination of the issue should not thereafter be conclusive under the usual rules of issue preclusion."); *see also* 13 WRIGHT & MILLER, *supra* note 3, § 3522 ("In light of the protective wall built around federal subject matter jurisdiction, the rules as to collateral attack for lack of subject matter jurisdiction may appear anomalous. . . . [I]t has long been accepted doctrine that a federal court judgment or decree is not vulnerable to collateral attack either because the prior record failed to show that there was subject matter jurisdiction or because it affirmatively showed that there was no jurisdiction."); Durfee v. Duke, 375 U.S. 106, 116 (1963) (holding that the state court's determination of its jurisdiction could not be attacked collaterally); Des Moines Navigation & RR. Co. v. Iowa Homestead Co., 123 U.S. 552, 559 (1887) (holding the first judgment was entitled to preclusive effect even though the record showed that there was no basis for federal subject-matter jurisdiction); McCormick v. Sullivant, 23 U.S. 192, 199–200 (1825) (holding a general decree of dismissal barred collateral attack and noting that the proper method was to raise the issue by appeal).

137. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. d (1982); Chicot Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940); *see also* Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 313 (2011) ("[A] judgment resting on assumed subject-matter jurisdiction can nonetheless stand safe from challenge. Notwithstanding all the slogans about subject-matter jurisdiction's fundamental importance, the offense to the systemic interests at stake is not great enough always to warrant relief from judgment."); Victor J. Haydel, Jr., Comment, *Collateral Attack for Lack of Subject Matter Jurisdiction*, 52 CALIF. L. REV. 623, 626 (1964) ("Moreover, where the question of subject matter jurisdiction was not fully litigated, the general rule appears to be that the original decision will be res judicata in a subsequent action if the issue could have been litigated.").

jurisdiction may not be collaterally attacked.[138] Wright and Miller explain why courts do not permit collateral attacks on subject-matter jurisdiction, even if the issue was not explicitly raised and adjudicated in the original proceeding:

> A lack of subject-matter jurisdiction does not of itself depreciate any of the central values of judicial finality. Whether the question is one of enforcing the judgment, applying claim preclusion, or forestalling belated defenses, the mere fact that the court wandered outside its proper orbit suggests less reason to distrust the judgment than application of wrong substantive rules or poor procedure, matters commonly swallowed up in res judicata. If the question of jurisdiction was actually litigated in the first action, ordinary principles of issue preclusion would suggest that it be put to rest; if it was not actually litigated, ordinary principles of defense preclusion would suggest that it be lost just as defenses on the merits are lost. Exceptional cases could easily be accommodated in the welter of principles that bring flexibility into the basic rules of res judicata.[139]

But within this exception to the no-waiver rule looms an exception-to-the-exception of indeterminate size; that is, within the exception to no-waiver generally disallowing collateral attack, there is an exception allowing parties, in limited circumstances, to raise subject-matter jurisdiction defects through collateral proceedings.[140] In the same term in which the US Supreme Court held that subject-matter jurisdiction generally may not be collaterally attacked by a party who failed to raise the issue in the original proceedings,[141] the Court decided *Kalb v. Feuerstein*.[142] In *Kalb*, the Court held that a state court's

138. 13D WRIGHT & MILLER, *supra* note 3, § 3536 ("Thus, it seems appropriate to assume that the court entering the default judgment did make a determination that it had subject matter jurisdiction. After all, it had no business entering a judgment unless it had already determined that the case was properly before it."). *But see* RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. f (1982) (noting "very few modern decisions involving default judgments attacked for lack of subject matter jurisdiction" and that some cases sustain the attack while others reject it); *id.* § 65 (permitting collateral attack of a default judgment for lack of subject-matter jurisdiction).

It is noteworthy that personal jurisdiction and notice defects may be raised on collateral attack after a default judgment. Unlike subject-matter jurisdiction, these defects are personal to the defendant and the courts are ill-equipped to police them because they are not knowledgeable of the facts and circumstances governing these defenses.

139. 18A WRIGHT & MILLER, *supra* note 3, at § 4428. Although normally issue preclusion does not attach to issues not actually litigated and determined, default judgments are not subject to collateral attack regarding subject-matter jurisdiction because the court itself determined its subject-matter jurisdiction when it rendered its decision; in other words, the issue was actually determined.

140. *See* Kalb v. Feuerstein, 308 U.S. 433, 440 (1940).

141. Chicot Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940).

142. *Kalb*, 308 U.S. 433 (foreclosure sale by a state court held void because a bankruptcy petition had been pending); *see also* United States v. U.S. Fidelity & Guar. Co., 309 U.S. 506, 513–14 (1940) (holding that immunity was not waived by failure to assert it). In *U.S. Fidelity & Guaranty Co.*, the Supreme Court held that

foreclosure proceeding against a farmer while bankruptcy proceedings were pending did not bind the federal court in a collateral attack inasmuch as the state court's jurisdiction had been divested by the automatic stay provision of federal bankruptcy law.[143] The Court posited that the statute would require that result even if the issue of state-court jurisdiction had been affirmatively raised and litigated in the state court.[144] By vesting sole authority in the bankruptcy courts, Congress was ensuring uniformity.[145]

Putting aside that (presumably small) exception-to-the-exception where Congress clearly requires such a result, collateral attack stands as a current outer limit to the no-waiver rule.[146] Litigation must come to an end, so after all direct appeals are exhausted or time to notice them has expired, parties may not collaterally attack a judgment on the basis that the rendering court lacked subject-matter jurisdiction.[147] Our system thus tolerates subject-matter-jurisdiction-lacking cases after direct appeal, when we deem the cases "final."

But if the system can tolerate that line, why not an earlier one? It cannot be that the Constitution requires all of these cases with jurisdictional defects to be dismissed; after all, many of our limitations on subject-matter jurisdiction, such as complete diversity, the well-pleaded complaint rule, or the monetary limits on diversity, are not constitutionally mandated.[148] The answer seems to be that there

immunity from suit by the United States and Indian Tribes cannot be waived and, therefore, judgment against them may be attacked collaterally. 309 U.S. at 513–14. Because their immunity was not waived, the previous judgment against them was void. *U.S. Fidelity & Guar. Co.*, 309 U.S. at 514; *see also supra* note 10 and accompanying text.

143. *Kalb*, 308 U.S. at 440 ("We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did, deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court in which the farmer's petition was then pending.").

144. *Id.* at 444.

145. *Id.* at 442.

146. *Id.*

147. *See, e.g.*, FED. R. CIV. P. 60(c). At some point, obviously, litigation and uncertainty must end. *E.g.*, Haydel, *supra* note 137, at 633 ("[T]here should come a time when litigants can rely on a decision of their case."). That is why Rule 60 provides a one-year time frame for motions based on 60(b)(1) (mistake), (b)(2) (newly discovered evidence), and (b)(3) (fraud). FED. R. CIV. P. 60(c)(1). An attack that the judgment was void under Rule 60(b)(4) requires only that the motion be made within "reasonable time." *Id.* The same "reasonable time" limit applies to 60(b)(5) (satisfaction or equity) and 60(b)(6) (other justifications). *Id.*

But why not at least limit the *stare decisis* effect of the decision—even if the case is *res judicata* between the parties? Could a subsequent court refuse to follow the prior decision because it lacked subject-matter jurisdiction? Probably not. *But see* Vladeck, *supra* note 3, at 591 (questioning the precedential force of the pre-*Steel Co.* hypothetical jurisdiction cases); *infra* note 150 and accompanying text (explaining hypothetical jurisdiction). Given the general unavailability of collateral attack, no subsequent court has the authority to make that determination. Thus, despite the fact that the underlying opinion should be void between the parties and nonprecedential for other parties, the case that makes it all the way through its direct appeals will be, for the most part, untouchable. *Cf.* Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940) (holding that a judgment rendered by a district court that lacked jurisdiction was *res judicata* on collateral attack by one of the parties); Stoll v. Gottlieb, 305 U.S. 165, 172 (explaining that the need for finality in litigation prevents parties from mounting collateral attacks on a court's subject-matter jurisdiction).

148. U.S. CONST. art. III; *see, e.g.*, 28 U.S.C. § 1332(a) (2006) (requiring complete diversity and

is simply a point in time—when direct appeals end—after which our system will tolerate lack of subject-matter jurisdiction. This Article posits that the line can constitutionally, and should logically, be drawn much earlier, at least with respect to statutory subject-matter jurisdiction.[149]

2. *Courts Rule on Other Procedural Issues Before They Conclude They Have Subject-Matter Jurisdiction*

"The requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception."[150] Or is it? Because "[j]urisdiction is [the] power to declare the law," and "[w]ithout jurisdiction the court cannot proceed at all in any cause," the US Supreme Court has generally required subject-matter jurisdiction to be established before a court may proceed with the case.[151] But this does not always happen.[152]

a. Ruling on Personal Jurisdiction Before Subject-Matter Jurisdiction

In 1999, a unanimous US Supreme Court held in *Ruhrgas AG v. Marathon Oil Co.* that, customarily, a court should resolve a challenge to its subject-matter

providing monetary limits). Oddly, *Kalb* permitted collateral attack because of *statutory* subject-matter jurisdiction concerns, not constitutional ones. 308 U.S. at 440.

149. Haydel*, supra* note 137, at 633.

150. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998) (internal quotation marks and citation omitted) (requiring courts to determine subject-matter jurisdiction before proceeding to merits inquiries).

Before *Steel Co.*, several Circuit Courts of Appeals had endorsed the doctrine of "hypothetical jurisdiction," that is, assuming jurisdiction for the purpose of deciding an easy merits issue. *See, e.g.*, United States v. Troescher, 99 F.3d 933, 934 (9th Cir. 1996); Smith v. Avino, 91 F.3d 105, 108 (11th Cir. 1996); Cross-Sound Ferry Servs., Inc. v. Interstate Commerce Comm'n, 934 F.2d 327, 333 (D.C. Cir. 1991); United States v. Parcel of Land, 928 F.2d 1, 4 (1st Cir. 1991); Browning-Ferris Indus. v. Muszynski, 899 F.2d 151, 159 (2d Cir. 1990). The US Supreme Court put an end to hypothetical jurisdiction. Here is the Supreme Court's reasoning:

> Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

Steel Co., 523 U.S. at 101–02 (internal citations omitted).

151. *Steel Co.*, 523 U.S. at 94; *see also* Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

152. An obvious example is that a court has "'jurisdiction to determine jurisdiction', thus show[ing] that jurisdictionality is more malleable than it presupposes." *Hybridizing Jurisdiction*, *supra* note 3, at 1454; 13D WRIGHT & MILLER, *supra* note 3, § 3536 n.1 (discussing jurisdiction to determine jurisdiction and collecting authorities).

jurisdiction before proceeding to inquire into personal jurisdiction.[153] But if "a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction."[154]

Lower courts have relied on *Ruhrgas* to expand their ability to review personal jurisdiction motions before examining subject-matter jurisdiction.[155] Thus, in *Alpine View Co. v. Atlas Copco AB*, the Fifth Circuit agreed with the district court that the lower court had the discretion to determine a personal jurisdiction issue before the subject-matter jurisdiction issue, even though the latter was not particularly "thorny."[156] The Fifth Circuit affirmed for efficiency reasons.[157]

Why may a court pretermit or delay a decision on whether it has subject-matter jurisdiction in favor of rendering a binding decision on another issue? Deciding a case in this fashion seems backward because a court without subject-matter jurisdiction lacks the power to declare the law and so should lack the power to render a binding decision on personal jurisdiction or any other issue.[158] Yet, the US Supreme Court acknowledged not only that a court lacking subject-matter jurisdiction may declare the law regarding personal jurisdiction, but also that the law declared regarding personal jurisdiction may bind the state court.[159] Under current theoretical underpinnings for subject-matter jurisdiction, this seems to get it wrong twice. First, it seems wrong because a court may dismiss a case for a reason other than subject-matter jurisdiction without determining

153. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578–88 (1999).

154. *Id.* at 588; *see also Steel Co.*, 523 U.S. at 111 (Breyer, J., concurring in part and concurring in the judgment) ("[F]ederal courts often, and typically should, decide standing questions at the outset of a case. The Constitution, in my view, does not require us to replace those words with the word 'always.' The Constitution does not impose a rigid judicial 'order of operations,' when doing so would cause serious practical problems."); 2 MOORE, *supra* note 3, at § 12.30[1] ("The district court must determine questions of subject matter jurisdiction first, before determining the merits of the case. However, the court is not always required to determine subject matter jurisdiction in advance of other jurisdictional issues. If a personal jurisdiction issue presents no complex questions, and if an alleged defect in subject matter jurisdiction raises a difficult and novel question, it is appropriate for the court to consider personal jurisdiction first.").

155. *See, e.g.*, Alpine View Co. v. Atlas Copco, 205 F.3d 208, 213–14 (5th Cir. 2000).

156. *Id.* ("The magistrate judge did not state that these motions raised particularly thorny questions, and instead cited judicial economy as the primary reason for considering motions for dismissal due to a lack of personal jurisdiction before the subject-matter jurisdiction motions. *Ruhrgas AG* suggests this does not, under the circumstances, constitute an abuse of discretion.").

157. *Id.*

158. *Steel Co.*, 523 U.S. at 94.

159. *Ruhrgas*, 526 U.S. at 585–87 ("If a federal court dismisses a removed case for want of personal jurisdiction, that determination may preclude the parties from relitigating the very same personal jurisdiction issue in state court.") (citation omitted). Does the verb "may preclude" actually mean "must preclude"? If not, it seems the only way for the state court to disavow the federal court's findings is to determine the federal court lacked subject-matter jurisdiction—the very inquiry the federal court sidestepped by adjudicating the personal jurisdiction issue first. *Id.*

whether the court really had the power to make that case-dispositive determination.[160] Second, it seems doubly wrong because that decision, rendered by a court potentially lacking subject-matter jurisdiction, may bind a state court.[161] Yet, ordinary rules governing issue preclusion require that the court issuing the original judgment have the power to hear the case.[162] In *Ruhrgas*, the Court largely ignored these thorny issues and appealed to efficiency and docket control to permit a federal court to handle the easier jurisdictional question first.[163] There is nothing wrong with a nod to efficiency and docket control, unless those concerns trump the Constitution's limits on federal court subject-matter jurisdiction or otherwise undermine uniformity of adjudication.[164]

The Court noted something else of importance in *Ruhrgas*—the difference between constitutional and statutory requirements of subject-matter jurisdiction.[165] The Court also contrasted the *statutory* requirements of subject-matter jurisdiction (that may be lacking in *Ruhrgas* itself) with the *constitutional* underpinnings of personal jurisdiction (that may also be lacking in *Ruhrgas*).[166] Ultimately, however, the Court did not pin its resolution of the case on that point; so in the future, a straightforward statutory personal jurisdiction question may be decided before a complicated, constitutional subject-matter jurisdiction question.[167] The US Supreme Court's decision would have been more appealing if

160. *Id.* at 588.

161. Query whether the state court might refuse to follow the personal jurisdiction ruling by determining that the federal court lacked subject-matter jurisdiction. *See supra* note 159 and accompanying text.

162. 18A WRIGHT & MILLER, *supra* note 3, § 4428.

163. *Ruhrgas*, 526 U.S. at 587–88 (noting that a district court should not have to turn to an "arduous" subject-matter inquiry if there is a "straightforward personal jurisdiction issue"); *see also id.* at 588 (explaining that the primary reason for permitting personal jurisdiction inquiries to take place before subject-matter ones is "judicial efficiency"); *see generally* Marathon Oil Co. v. Ruhrgas, 145 F.3d 211, 219 (5th Cir. 1998) (en banc), *rev'd sub nom* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) (holding that "judicial efficiency" does not override the constitutional issue of subject-matter jurisdiction).

164. U.S. CONST. art. III.

165. 526 U.S. at 584 ("In this case, indeed, the impediment to subject-matter jurisdiction on which Marathon relies—lack of complete diversity—rests on statutory interpretation, not constitutional command. Marathon joined an alien plaintiff (Norge) as well as an alien defendant (Ruhrgas). If the joinder of Norge is legitimate, the complete diversity required by 28 U.S.C. § 1332, but not by Article III, is absent.") (internal citations omitted).

166. *Id.* (contrasting the statutory impediment of complete diversity with "the constitutional safeguard of due process to stop the court from proceeding to the merits of the case") (citation omitted).

167. The dissenting opinion in the Fifth Circuit's en banc decision not only recognized (as did the Supreme Court) the statutory-versus-constitutional issue, but also recognized (as the Supreme Court apparently did not) the importance of this distinction:

> Thus, when federal courts examine our subject matter jurisdiction, we are ordinarily construing the jurisdiction-authorizing statutes present in Title 28 of the U.S. Code, not Article III or any power flowing directly from it. Indeed, one of the attacks upon jurisdiction pointed to here as a defect in subject matter jurisdiction—a lack of complete diversity—is not itself a requirement of Article III, but rather suffers from want of a jurisdictional grant by Congress. In the literal sense then, personal jurisdiction rests more immediately upon a constitutional command than does a want of complete diversity. Contrary to the majority's suggestion, there is no subordinate role for personal jurisdiction

it developed further the distinction between statutory and constitutional defects: perhaps a court must determine if it has constitutional subject-matter jurisdiction before turning to other jurisdictional quandaries, such as personal jurisdiction, but a court is free(r) to re-order its inquiries if statutory subject-matter jurisdiction is at stake.

b. Ruling on Other Justiciability Inquiries Before Subject-Matter Jurisdiction

The US Supreme Court has since expanded on its decision in *Ruhrgas* and given federal courts the freedom to conduct other preliminary inquiries before determining the existence (or nonexistence) of subject-matter jurisdiction.[168] In the context of forum non conveniens, the Supreme Court has held that federal courts may dismiss in favor of a foreign tribunal without having first examined subject-matter jurisdiction.[169] In a unanimous opinion in *Sinochem International Co. v. Malaysia International Shipping Corp.*,[170] the Court concluded that issues of subject-matter jurisdiction or personal jurisdiction need not be resolved before determining whether a foreign tribunal is plainly more suitable as the arbiter of the merits of the case.[171]

Just as lower courts seized on *Ruhrgas* to expand their powers to dismiss for reasons other than subject-matter jurisdiction, post-*Sinochem* cases engaged in similar broadening.[172] Thus, in *In re LimitNone*, the Seventh Circuit ruled that the district court could make a venue determination before adjudicating subject-matter jurisdiction.[173] And the US Supreme Court has continued to broaden the

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in these fundamentals of our federalism.

Marathon Oil Co., 145 F.3d at 229 (Higginbotham, P., dissenting); *cf. Steel Co.*, 523 U.S. at 97 (noting the difference between statutory standing and Article III standing with these words: "The latter question is an issue of *statutory* standing. It has nothing to do with whether there is case or controversy under Article III.").

Determining whether to tackle personal jurisdiction or subject-matter jurisdiction first might be further complicated if the subject-matter jurisdiction question is very difficult, but the personal jurisdiction question will turn entirely on interpretation of the State's long-arm statute. *See Ruhrgas*, 526 U.S. at 586. What if interpretation of that statute is not entirely straightforward? May the federal court nonetheless choose to tackle that state issue first?

168. *See* Jack H. Friedenthal, *The Crack in the* Steel *Case*, 68 GEO. WASH. L. REV. 258, 269 (2000) (noting there is "strong reason to approve" the result in *Ruhrgas* and to extend it in the interests of efficiency).

169. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 435 (2007).

170. *Id.*

171. *Id.* at 425; *see also, e.g.*, 2 MOORE, *supra* note 3, at § 12.30[1] ("A district court has discretion to consider a defendant's forum non conveniens plea before resolving whether it has subject-matter jurisdiction."); Clermont, *supra* note 137, at 326 ("Thus, 'when considerations of convenience, fairness, and judicial economy so warrant,' a court can decide 'a threshold, nonmerits issue' like forum non conveniens before subject-matter jurisdiction.") (citing *Sinochem*, 439 U.S. at 432, 433). Professor Clermont suggests that issues involving justiciability, abstention, exhaustion, and venue might also be decided before subject-matter jurisdiction. *Id.* at 329–30.

172. *See* In re LimitNone LLC, 551 F.3d 572 (7th Cir. 2008).

173. *Id.* at 576–78.

exceptions by finding it appropriate to resolve class certification issues before subject-matter jurisdiction issues.[174] This Article suggests that this "pragmatic approach"[175] to subject-matter jurisdiction should be extended—but not in the piecemeal way it is currently being done through court decisions, and not without reframing subject-matter jurisdiction's rhetoric; the pragmatic approach should be extended by adopting the ALI's proposed statute.

3. Courts Issue Non-Dispositive Orders Without Subject-Matter Jurisdiction

Federal courts have the power to render interim decisions that bind parties and affect the disposition of the case. Those previously rendered decisions are not undone by a later determination that a court lacked the power to issue the previous orders: "Federal courts have jurisdiction to conduct discovery, to issue sanctions, to hold a trial, and to assess costs, even though they may lack subject-matter jurisdiction."[176]

174. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815, 831 (1999). The issue in *Amchem Products* was whether a settlement class was appropriate in asbestos litigation. *Amchem*, 521 U.S. at 597. The Supreme Court, recognizing an "array of jurisdictional barriers"—namely standing and ripeness given that exposure-only claimants had suffered no injury yet—nonetheless determined that the class certification issues were "dispositive" and "logically antecedent to the existence of any Article III issues." *Amchem*, 521 U.S. at 612. *Ortiz* too involved a settlement class in asbestos litigation, and there again the Supreme Court announced that "class certification issues are 'logically antecedent' to Article III concerns." *Ortiz*, 521 U.S. at 831.

175. HART & WECHSLER'S, *supra* note 3, at 1414–15 (calling Court's analysis in *Ruhrgas*, *Amchem*, *Ortiz*, and *Sinochem* a "pragmatic approach").

176. Marathon Oil Co. v. Ruhrgas, 145 F.3d 211, 221 (5th Cir. 1998), *vacated by* Marathon Oil Co. v. Ruhrgas, 145 F.3d 211 (5th Cir. 1998) (en banc), *rev'd sub nom* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999); *see also* 13 WRIGHT & MILLER, *supra* note 3, § 3522 ("Despite the lack of subject matter jurisdiction, a federal court may be justified in ordering payment of just costs upon dismissal, as assessing attorney's fees or costs for improperly removed cases, imposing sanctions under Civil Rule 11 if it finds an abuse of the judicial process, imposing sanctions for improper conduct related to discovery under Civil Rule 37, or ordering other appropriate relief concerning inappropriate behavior."); 2 MOORE, *supra* note 3, at § 11.23[4] ("The absence of subject matter jurisdiction over the merits of a case does not prevent a district court from adjudicating the collateral issue of sanctions under Rule 11."); 28 U.S.C. § 1919 (2006) (authorizing "payment of just costs" in a case dismissed for lack of jurisdiction); 28 U.S.C. § 1447(c) (2006) (authorizing attorney's fees and costs for wrongful removal); Willy v. Coastal Corp., 503 U.S. 131, 135–136 (1992) (upholding Rule 11 sanctions even though the district court ultimately determined that it lacked subject-matter jurisdiction). In *Willy*, the Supreme Court explained that "[a] final determination of lack of subject-matter jurisdiction of a case in federal court, of course, precludes further adjudication of it. But such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction." *Willy*, 503 U.S. at 137.

Mansfield v. Swan presents an interesting discussion about awarding costs. 111 U.S. 379 (1884). After the Court concluded that the defendants had inappropriately removed the case to federal court where subject-matter jurisdiction was lacking, the Justices turned to the question of costs. *Mansfield*, 111 U.S. at 386–89. The Justices determined that the defendants (although they succeeded in obtaining a reversal of the judgment against them) were not the prevailing party because they had invoked federal jurisdiction when there was none. *Mansfield*, 111 U.S. at 388. The Court then awarded costs against the defendants.

United States v. United Mine Workers exemplifies such a case.[177] There, a district court issued a restraining order against an upcoming strike.[178] The union ignored the order, believing that the district court lacked jurisdiction to hear the case.[179] The US Supreme Court upheld contempt citations issued against the union, reasoning that, even if the district court had lacked jurisdiction to issue the restraining order, the lower court was empowered to preserve the status quo.[180]

Courts have suggested that they have these powers because these rulings are not case-dispositive.[181] But some of these rulings turn out to have case-dispositive effects. Even routine matters, such as discovery orders, may make or break a party's case. Certainly, they may lead a party to settle the case.[182] If, for example, a plaintiff is not permitted certain discovery, the case may not be worth pursuing, or the plaintiff may settle for a vastly lower sum.[183] Conversely, a defendant may be required to disgorge discovery in a case that should not be before a federal court; in this situation, the defendant may settle for an amount higher than previously thought justified. If the court simply dismissed for lack of subject-matter jurisdiction, the defendant might not have settled for the inflated amount. Even if the cases do not settle, can it really be said that these discovery orders were not influential, and perhaps even ultimately dispositive in terms of case strategy?[184]

177. 330 U.S. 258 (1947).

178. *Id.* at 266–67.

179. *Id.* at 267.

180. *Id.* at 293.

181. Marathon Oil Co. v. Ruhrgas, 145 F.3d 211, 221 (5th Cir. 1998) (en banc), *rev'd sub nom.* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999); *see also Willy*, 503 U.S. at 137 ("The District Court order which the petitioner seeks to upset is one that is collateral to the merits."). These courts reason that they are not adjudicating the merits of a "case or controversy" over which they lack jurisdiction. *Willy*, 503 U.S. at 138.

182. Clermont, *supra* note 137, at 305–06.

183. *See id.* at 304 ("The order in which the court confronts nondispositive issues also matters. The sequence of these issues affects the course of a case's progress. Parties should care because an early victory on a certain issue, or even the threatened intrusiveness of early attention to a certain issue, can shift parties' settlement leverage dramatically.").

184. Others have noted that some of these so-called "interim orders" are, in reality, case-dispositive orders. *United Mine Workers* itself is an example of a case-dispositive "interim" order. *See* Comment, *Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical Jurisdiction*, 127 U. PA. L. REV. 712, 721 (1979)

> *United Mine Workers* thus stands for the proposition that, when confronted with novel and substantial jurisdictional questions, a federal court has the power to issue temporary relief to preserve the status quo while inquiring into its own jurisdiction. The labor context of the case, however, suggests a broader reading. It has long been recognized that ex parte restraining orders against strikes, although "temporary" in name, in fact *permanently dispose of the merits* by awarding the complaining party the desired relief and mooting the dispute. This phenomenon was a prominent factor in the passage of the Norris-LaGuardia Act, which deprived federal courts of jurisdiction to issue labor injunctions. Given this history, it is somewhat coy to view *United Mine Workers* as limiting bootstrap jurisdiction to orders maintaining the status quo. In effect, *the district court resolved the merits of the dispute without first having established its jurisdiction, and this procedure was validated by the Supreme Court.* If this reading of the case is correct, then bootstrap jurisdiction

Thus, many issues may be raised and disposed of before subject-matter jurisdiction is determined, even constitutional subject-matter jurisdiction. In fact, the famous case of *Marbury v. Madison* sanctioned the Court's authority to opine on an issue in the absence of jurisdiction.[185] Chief Justice Marshall declared that Marbury had the right to his commission, and then held that the Court lacked constitutional authority to hear the case.[186] The Court thus endorsed its own power of judicial review in a case in which the Court itself recognized it lacked constitutional authority to render a decision.[187]

It may be necessary for courts to issue interim determinations such as these; however, the very existence of these interim rulings suggests that the "inflexible" rule requiring subject-matter jurisdiction to be determined at the beginning of litigation really is more myth than reality. This lends support to this Article's thesis that we should recognize the inflexible rule for the legal fiction that it is and substitute in its place a statute that recognizes the more malleable reality of subject-matter jurisdiction.

4. Courts Have the Discretion to Retain Jurisdiction over Supplemental Claims and Parties

The supplemental jurisdiction statute, 28 U.S.C. § 1367, and the common-law doctrines of pendent and ancillary jurisdiction in place before Section 1367's enactment, also show that courts treat subject-matter jurisdiction more flexibly than the mandatory rhetoric suggests.[188] In *United Mine Workers v. Gibbs*, the US Supreme Court explained the power of a federal court to hear claims over which the court would not have original jurisdiction:

> The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

arguably allows a court not merely to preserve the status quo, but effectively to issue substantive rulings as well.

(emphases added).

185. *See* Marbury v. Madison, 5 U.S. 137, 170 (1803).

186. *Id.* at 167–68, 176.

187. *Id.* at 177–78.

188. *See* 28 U.S.C. § 1367 (2006).

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.[189]

Today, Section 1367(c)(3) provides that "district courts *may* decline to exercise supplemental jurisdiction over a [state-law] claim . . . [once] the district court has dismissed all claims over which it has original jurisdiction."[190] But that implies that a court may also choose to continue to exercise jurisdiction.[191] A plain reading of the statute suggests that a federal court may hear a purely state-based claim, even if the parties are not diverse, as long as, at one time, the court had jurisdiction over at least one claim.[192] The US Supreme Court agrees that this is the plain import of the statute,[193] and occasionally district courts do exercise their discretion to hear purely state-based, non-diversity claims.[194] The reasons underlying this discretion come from *Gibbs*: "considerations of judicial economy, convenience and fairness to litigants."[195] All in all, courts, in creating the common-law doctrines, and Congress, through Section 1367, exhibit rather flexible attitudes in their approaches to subject-matter jurisdiction.

5. Parties May "Cure Defects" in Subject-Matter Jurisdiction

As mentioned in Part III.B.1, a subject-matter jurisdiction defect may not compel a court to dismiss a case, even if the federal court does not have jurisdiction at the outset of the action.[196] In an action removed to federal court, the

189. United Mine Workers v. Gibbs, 383 U.S. 715, 725–26 (1966) (internal citation omitted).

190. 28 U.S.C. § 1367(c)(3) (emphasis added).

191. The dismissal of state claims after all federal claims have been dismissed is not "a mandatory rule to be applied inflexibly in all cases. The statement simply recognizes that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988).

192. Of course, a federal court probably does not want to maintain jurisdiction over these sorts of claims; so, in all reality, the court would likely dismiss the case and, if a removal case, would remand to state court. Nonetheless, the possibility that a federal court *could* retain jurisdiction over a purely state-law claim between non-diverse parties (or based on an insufficient amount of money) suggests that, contrary to the allegedly inflexible principles governing subject-matter jurisdiction, there is indeed some wiggle room. 28 U.S.C. § 1367(c)(3).

193. *See* Osborn v. Haley, 549 U.S. 225, 245 (2007) ("Even if only state-law claims remained after resolution of the federal question, the District Court would have discretion, consistent with Article III, to retain jurisdiction."); *Cohill*, 484 U.S. at 350; Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006) ("[W]hen a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over pendent state-law claims."); Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 639 (2009).

194. *See, e.g.*, Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996); Raucci v. Town of Rotterdam, 902 F.2d 1050, 1055 (2d Cir. 1990).

195. United Mine Workers v. Gibbs, 383 U.S. at 715, 726. (1966).

196. HART & WECHSLER'S, *supra* note 3, at 1412–13.

defect in subject-matter jurisdiction may be cured, and thereafter the court may enter judgment.[197] That is why, even though diversity jurisdiction is established at the time of removal, in *Caterpillar v. Lewis* the US Supreme Court permitted a post-filing change in party lineup to vest the district court with subject-matter jurisdiction.[198]

Similarly, in *American Fire & Casualty Co. v. Finn*, the plaintiff filed suit in state court and the defendant improperly removed the case to federal court.[199] After trial, judgment was entered for the plaintiff.[200] When the case reached the US Supreme Court, it found complete diversity lacking.[201] On remand, the court of appeals ordered a renewed entry of judgment in the plaintiff's favor after the party whose presence destroyed diversity had been dismissed.[202] Thus, the original judgment stood, despite the fact that at the time of entry of the original judgment, complete diversity was lacking.[203]

Although courts have confined their willingness to permit parties to cure defects to removal cases, perhaps other subject-matter defects should be curable as well. In Hart and Wechsler's text, *The Federal Courts and the Federal System*, the authors point out that "[t]he rule that subject-matter jurisdiction is ordinarily determined at filing is one devised by the courts and not mandated by Congress" or the Constitution, and they query whether it makes more sense, "in order best to achieve the goals of efficiency and fairness in adjudication," to permit parties to cure subject-matter jurisdiction defects after the time of filing.[204]

Courts are taking the cue and are ameliorating the harsh effects of the no-waiver rule.[205] For example, courts currently allow parties to cure subject-matter jurisdiction defects in removed cases.[206] This shows a preference for efficiency

197. *Id.*

198. *See supra* Part III.B.1; 13E WRIGHT & MILLER, *supra* note 3, § 3608 ("In the removal context, federal courts are split as to what is the critical point for determining the existence of diversity jurisdiction. The majority of decisions typically require complete diversity to exist at the time the removal petition is filed. However, in Caterpillar, Incorporated v. Lewis, the Supreme Court held that the absence of complete diversity at the time of removal does not necessarily vitiate diversity jurisdiction.").

199. 341 U.S. 6, 18 (1951).

200. *Id.* at 8.

201. *Id.* at 17.

202. Finn v. Am. Fire & Cas. Ins. Co., 207 F.2d 113, 116 (5th Cir. 1953) ("When the suit was voluntarily dismissed, however, as to all of the defendants except the appellee, against whom a verdict had been rendered, the amendment of the pleadings related to the date of filing of the original suit and cured the defect in the district court's jurisdiction of the controversy between the remaining parties.") (citing FED. R. CIV. P. 15(c), 21); *see also* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 837 (1989) (permitting correction on appeal).

203. *See generally Finn*, 341 U.S. 6.

204. HART & WECHSLER'S, *supra* note 3, at 1413–14.

205. *Id.* at 1414.

206. 13E WRIGHT & MILLER, *supra* note 3, §3608.

rather than strict application of the no-waiver rule.[207] This preference should be expanded to other areas, not merely removal cases.

6. Conclusion

The rigid rhetoric of subject-matter jurisdiction does not match the reality of the doctrine. Federal courts have tremendous leeway in which issues to address and in which order.[208] Moreover, the courts have crafted various exceptions to subject-matter jurisdiction's rigid rules. These exceptions further widen the gap between rhetoric and practice, and their very existence undermines the values of efficiency, fairness, and transparency.

IV. SOLUTION: RHETORIC TO MATCH PRACTICE

The more exceptions courts fashion to the "nonwaivability" of subject-matter jurisdiction, the more one wonders whether it is time to simply scuttle the rule and craft a new one. The rhetoric-reality gap looms large. Academics, practitioners, and judges alike assume we have a coherent theory of subject-matter jurisdiction.[209] We have rendered it untouchable and chant the mantra that subject-matter jurisdiction cannot be waived because it is a core limitation springing from the Constitution.[210]

Although we say that this exalted position of subject-matter jurisdiction is required because of its constitutional pedigree,[211] much of what we fret about in cases involving belated attacks on subject-matter jurisdiction does not belong to the core constitutional aspects of subject-matter jurisdiction, but instead to defects that stem from imperfect compliance with statutes that help define subject-matter jurisdiction.[212] Additionally, even if the subject-matter jurisdiction problems identified were of constitutional dimension, it is not entirely clear why subject-matter jurisdiction (derived from Article III, Section 2) may not be waived, while personal jurisdiction (derived from the due process clause and the territorial limitations of the state courts)[213] is not only waivable, but waivable by

207. HART & WECHSLER'S, *supra* note 3, at 1414.

208. *Id.*

209. 4 WRIGHT & MILLER, *supra* note 3, § 1063.1.

210. This is why in cases like Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978), the fact that Owen Equipment answered Ms. Kroger's complaint by admitting it was a Nebraska Corporation and generally "den[ying] every other allegation of the complaint" did not result in a waiver of subject-matter jurisdiction by the defendant and did not estop the Secretary of Owen Equipment from testifying that Owen's principal place of business was Iowa (which happened to be the plaintiff's domicile as well). *Id.* at 368–69, 377.

211. 4 WRIGHT & MILLER, *supra* note 3, § 1063.1.

212. *See supra* Part II.B. *But see* Hessick, *supra* note 62, at 907 (suggesting that statutory subject-matter jurisdiction should have the same reach as constitutional subject-matter jurisdiction).

213. The Court's personal jurisdiction jurisprudence is not the model of clarity. Originally, *Pennoyer* envisioned personal jurisdiction as a limit on a State's territorial power. *See* Pennoyer v. Neff, 95 U.S. 714, 720

the slightest misstep in the earliest stages of litigation.[214] Courts, perhaps recognizing this disconnect between rhetoric and reality, have crafted numerous exceptions to subject-matter jurisdiction's harsh rules.[215] In practice, the primacy of subject-matter jurisdiction and its non-waivability fall short of the strong rhetoric.[216]

All of these exceptions to a supposedly ironclad rule raise real concerns for our federal court system's legitimacy, fairness, efficiency, and transparency.[217] These exceptions undermine the legitimacy of the legal system because the federal courts appear to be crafting exceptions for particular situations out of whole cloth, or to achieve a particular result in a case. And the exceptions do not seem entirely consistent with one another and are not applied consistently to like cases.[218] These ad hoc exceptions are unfair to those against whom they are applied; and conversely, when courts decline to apply an exception to a case, the lack of the exception feels unfair to the litigant who thought his or her case merited the exception.[219] Moreover, parties and lawyers cannot predict beforehand how their cases will be analyzed because of the ever-present possibility of a newly crafted exception and the unpredictability of the application of previously crafted exceptions.[220] Exceptions are thought to be more

(1877). At least as late as 1980, the Supreme Court described the constitutional dimensions of personal jurisdiction analysis "as an instrument of interstate federalism." *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980); Hanson v. Denckla, 357 U.S. 235, 251 (1958) (discussing personal jurisdiction as a territorial limitation on state power). In 1982, in *Ireland*, the Court determined that personal jurisdiction was a matter of the defendant's liberty. *See* Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."). In a footnote, the Court purported to move away from the territorial limitation model. *Ireland*, 357 U.S. at 702 n.10 ("It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other States. . . . The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."). Today, personal jurisdiction doctrine pulls from both its territorial and due process roots. *See, e.g.*, James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 210 (2004) (noting the territorial and due process traditions).

214. *See, e.g.*, FED. R. CIV. P. 12(h)(1).

215. HART & WECHSLER'S, *supra* note 3, at 1414; *see also supra* Part III.C.

216. *See supra* Part III.C.

217. "Waiver, consent, and forfeiture . . . promote finality . . . [a]nd, they reduce the unfairness of allowing the noncomplying party to raise her own default as a basis for overturning an adverse result." *Mandatory Rules*, *supra* note 3, at 10.

218. As Justice Scalia has noted, "When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989); *Mandatory Rules*, *supra* note 3, at 10; *Jurisdictional Clarity*, *supra* note 3, at 9 ("Jurisdictional clarity also can enhance judicial legitimacy. The transparent judicial enforcement of a clear statutory rule of jurisdiction negates the democratically problematic perception of unauthorized judicial lawmaking."). Thus, a statute that accounts for these different dispositions will accord the judiciary more legitimacy and respect.

219. *See supra* note 218 and accompanying text.

220. *Id.*

efficient because they tend not to require parties to engage in a "do-over"; however, permitting parties to test the waters and raise subject-matter jurisdiction "late in the case, after a merits determination, [thereby] flip[ping] the natural order of the proceedings and . . . caus[ing] an unraveling of the entire case" often does more harm than good.[221] Finally, these exceptions undermine transparency and confidence in the judicial system because the application does not match the rhetoric.[222]

Even if each individually crafted exception to the no-waiver rule appears to contribute to a well-functioning civil justice system, having a statute that accounts for these classes of exceptions would offer greater fairness, efficiency, transparency, predictability, and legitimacy. Thus, it would be better to discard the rhetoric of the allegedly sacrosanct stature of subject-matter jurisdiction and instead embrace a more practical approach to the topic that permits many of the exceptions that courts have already created, while simultaneously ensuring a more "just, speedy, and inexpensive" course of federal-court litigation.[223]

Procedural rules generally require parties to raise issues in pleadings, in pre-trial motions, or, at the latest, during trial.[224] Early disposition of procedural matters promotes efficiency and flexibility, providing trial courts and parties opportunities to cure deficiencies where practicable.[225] Similar considerations are in play for subject-matter jurisdiction, at least when jurisdictional statutes are involved (rather than the Constitution); therefore, similar rules[226] should govern

221. *Mandatory Rules*, *supra* note 3, at 24. Requiring issues to be raised in a timely fashion allows the issues to be litigated promptly, avoiding wasteful litigation. It also prevents parties from delaying raising the issues until they see some tactical advantage. *Id.* at 29.

222. HART & WECHSLER'S, *supra* note 3, at 1414.

223. FED. R. CIV. P. 1.

224. RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b (1982); FED. R. CIV. P. 12(h).

225. 2 MOORE, *supra* note 3, at § 12.30[1] (discussing *Sinochem*, which permitted district courts to determine a defendant's forum non conveniens motion before determining their subject-matter jurisdiction and *Ruhrgas*, which permitted district courts to dismiss a case for lack of personal jurisdiction before determining their subject-matter jurisdiction and noting that, in both cases, "the Court concluded that, despite the general jurisdiction-first rule, efficiency could and should be served when the lower courts could avoid a difficult jurisdictional issue by first deciding some other, non-merits threshold issue"). A similar reasoning favoring efficiency endorses the waivability of subject-matter jurisdiction defects in those circumstances where it is not timely raised.

226. Similar, but not necessarily identical. The other Rule 12(b) defenses receive varied treatments. The 12(b)(2)–(5) defenses (lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process) must be raised by pre-answer motion or in a responsive pleading if no pre-answer motion is made; these defenses are therefore easily, and often inadvertently, waived. FED. R. CIV. P. 12(h)(1). Rules 12(b)(6) (failure to state a claim) and 12(b)(7) (failure to join a person required by Rule 19) may be raised even during trial. FED. R. CIV. P. 12(h)(2). Certainly, a case may be made against applying to subject-matter jurisdiction the deadline applied to the 12(b)(2)–(5) defenses; after all, such an early deadline would permit parties to waive a structural, rather than individual, defect by the slightest misstep in the very beginning of the case. But what about the trial deadline for the 12(b)(6)–(7) defenses? The author would be willing to push back the subject-matter jurisdiction deadline to include during trial, and may be inclined to advocate such a rule; however, the ALI chose to set the deadline before trial, and the ALI's choice has merit. ALI Study, *supra* note 17, § 1386. The ALI's deadline grants sufficient time to raise the issue, yet does not allow parties to "test the

subject-matter jurisdiction.[227] Otherwise, these ad hoc jurisdictional rules may impose "needless expense and inefficiency," and implicate judicial overreaching and legitimacy concerns.[228] In this way, subject-matter jurisdiction should function like state sovereign immunity: "Despite its potentially jurisdictional status, state sovereign immunity can be waived."[229]

A. Revisiting the ALI's Proposal

In March of 1969, after nearly a decade of research, debate, writing, and re-writing, the ALI published its *Study of the Division of Jurisdiction Between State and Federal Courts*.[230] The purpose of the volume was to "study and publish a report defining, in the light of modern conditions, the appropriate bases for the jurisdiction of federal and state courts."[231] As part of the volume, the ALI proposed a new statute, 28 U.S.C. § 1386, regarding waiver of subject-matter jurisdiction.[232] Of importance to this Article is subsection (a):[233]

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waters" during trial before deciding whether to invoke subject-matter jurisdiction barriers. The ALI's earlier deadline for 12(b)(1) complaints may make sense given the different consequences of a 12(b)(1) and a 12(b)(6) dismissal; namely, a 12(b)(6) ruling may have preclusive effect on a state court, which is not true of a 12(b)(1) dismissal. In light of this, the author defers to the ALI's timeframe and agrees that parties should, under most circumstances, be obligated to raise subject-matter defects before trial begins.

227. Professor Dodson advocated that certain jurisdictional rules should have some nonjurisdictional attributes. *Mandatory Rules*, *supra* note 3, at 9–11. This Article advocates that subject-matter jurisdiction should have the nonjurisdictional attribute of waiver.

228. Bloom, *supra* note 3, at 1007 ("There are costs to jurisdictional flexibility. It threatens needless expense and inefficiency—judicial resources wasted and great effort rendered 'meaningless' at the last possible step. It risks judicial overreaching too—careless judges 'beguiled' into reaching 'indefensible results.'") (alteration accepted). Professor Bloom, however, suggests that "we [should] favor" this sort of "pliability" by permitting ad hoc exceptions. *Id.* This Article suggests we should favor this sort of pliability by a single comprehensive statute. Professor Bloom considered that option, but ultimately rejected it:

> So what should we make of jurisdiction's false inflexible front? One answer is direct and clear-cut: Jurisdiction's false front is an edifice that should be taken down. Courts should stop making misleading claims about jurisdiction's inflexibility—claims that misstate jurisdictional reality, distort jurisdictional doctrine, and compromise judicial integrity, all while fooling very few. Judges should concentrate their efforts instead on reaching smart jurisdictional ends by less troubling jurisdictional means—precisely drafted rules, immaculately crafted exceptions, perfectly weighted presumptions, and a more transparent (if restricted) flexibility.

Id. at 1018.

229. *Hybridizing Jurisdiction*, *supra* note 3, at 1473 ("Perhaps sovereign immunity could be jurisdictional despite having nonjurisdictional features, such as waivability."). *But see* United States v. U.S. Fidelity & Guar. Co., 309 U.S. 506, 514 (1940) (holding that immunity was not waived by failure to assert it), *supra* note 142. Professor Dodson describes at length sovereign immunity's jurisdictional status, along with its nonjurisdictional attributes. *Hybridizing Jurisdiction*, *supra* note 3, at 1473–74. He notes that sovereign immunity may appropriately have this dualistic taxonomy. *Id.* at 1473.

230. ALI Study, *supra* note 17, at x.

231. *Id.* at ix.

232. *Id.* § 1386.

233. Subsection (b) provides that any claim that is timely when filed in federal court, but subsequently dismissed after the statute of limitations has run, may be brought in the proper court within thirty days after the dismissal has become final. *Id.* § 1386(b). Subsection (c) provides the same, but in reverse, such that a claim

After the commencement of trial on the merits in the district court, or following any prior decision of a district court that is dispositive of the merits,[234] no court of the United States shall consider, either on its own motion or at the instance of any party, a question of jurisdiction over the subject matter of the case,[235] unless:

(1) The court is acting pursuant to a prior judicial determination deferring the resolution of such question of jurisdiction;[236] or

(2) The question is raised by a party on the basis of facts of which he[237] had no knowledge, and that he could not be expected to have discovered in the exercise of reasonable diligence, at an earlier stage in the proceedings, or on the basis of change in the applicable law;[238] or

(3) The question was not raised at an earlier stage[239] in the proceedings as a result of an attempt, by collusion or connivance (including conscious concealment of a known jurisdictional defect by two or more opposing parties, whether or not accompanied by an agreement between or among such parties), to confer jurisdiction on the court;[240] or

(4) The question arises on appeal or other review[241] or reconsideration on the record already made, of a decision with respect to such question

timely filed in state court, but over which the federal courts have exclusive jurisdiction, may be refiled in federal court within thirty days after dismissal even if the statute of limitations has since expired. *Id.* § 1386(c).

234. *See supra* note 226 and accompanying text, for at least one reason it may make sense to have a longer timeframe in which to raise a 12(b)(6) objection than in which to raise a 12(b)(1) objection; namely, preclusion consequences.

235. *See* FED. R. CIV. P. 16 (permitting courts to set deadlines for raising certain issues). Pursuant to its Rule 16 powers, a court may also require the parties to raise subject-matter defects earlier than this statute requires; however, a court could not invoke its Rule 16 power to extend the time-limits for raising subject-matter jurisdiction defects in contravention of the proposed statute.

236. Since *Steel Co.*, a federal court cannot assume subject-matter jurisdiction exists in order to tackle easy merits questions. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998). The ALI proposal would seem to allow a court to defer ruling on statutory subject-matter jurisdiction issues.

237. If such a statute is formally proposed, Congress should cast it in gender-neutral terms.

238. The change in applicable law would have to occur in the trial phase or on direct appeal; changes in the law that occur after the judgment has become final should not be taken into account. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989) (discussing retroactivity).

239. Presumably the phrase "at an earlier stage" means the stage required by this statute; that is, before trial or any prior decision disposing of the merits.

240. This subsection ameliorates the problem raised by *Kroger*, *see supra* Part II.B.1, where the party that could have timely raised the subject-matter defect chose instead to delay until trial was underway. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 369 (1978).

241. If the phrase "or other review" means collateral attack, the author believes it should be omitted. The Restatement (Second) appropriately accords substantial weight to the need for finality. RESTATEMENT

> not rendered contrary to the provisions of this section, and is raised by a party who has previously challenged the jurisdiction; or
>
> (5) Consideration of a jurisdictional defect at the stage of the proceedings is required by the Constitution.[242]

This proposed statute would be a marked improvement over the current state of the law. It permits the waiver of statutory subject-matter jurisdiction defects if the defect is not timely raised before the commencement of trial (or before any decision dispositive of the merits if there is pretrial motion practice).[243] The ALI also recognized the special place for constitutional subject-matter jurisdiction and said, "[T]here are situations in which subsection (a) cannot be constitutionally applied."[244] The ALI wisely elected to leave constitutional subject-matter jurisdiction requirements to the side, at least in this first step of reconceptualizing

(SECOND) OF JUDGMENTS § 12 cmt. a (1982). Therefore, a judgment in a case in which the court lacked statutory subject-matter jurisdiction is not void for purposes of relief under Rule 60(b)(4). FED. R. CIV. P. 60(b)(4). Of course, Congress remains free to enact other statutes that permit collateral attack in certain circumstances. The more specific statute Congress enacts will trump the more general one proposed here. *See* 82 C.J.S. STATUTE § 482 (2013) ("Where a matter is addressed by two statutes, one specific and the other general, the specific statute governs over the general statute.") (internal citation omitted).

242. *See* ALI Study, *supra* note 17, at 64–65. This Article proposes allowing waiver of *statutory* subject-matter defects. Authorities seem to concur that constitutional defects may be raised at any time on direct review, and perhaps even on collateral attack. This author does not necessarily concur, but will leave that challenge to the future. Just as it is thorny to determine which issues are jurisdictional and which are nonjurisdictional, *see supra* Part II.A, it is also thorny to determine which jurisdictional issues are constitutional and which are subconstitutional. For example, the diversity statute defines domicile for a corporation as its place of incorporation and its principal place of business. 28 U.S.C. § 1332(c)(1) (2006). If an individual plaintiff from state A sues a corporation incorporated in state B with its principal place of business in state C, with the amount in controversy met, we have an easy case for federal jurisdiction. But if it turns out that the corporation's principal place of business is actually state A, is that a constitutional defect or a statutory one for purposes of waiver?

243. *See* ALI Study, *supra* note 17, at 64.

244. ALI Study, *supra* note 17, at 373. Fair enough, but perhaps not entirely free from doubt. Because subject-matter jurisdiction is not open to collateral attack, it is possible that a court lacking subject-matter jurisdiction will render a decision that will remain in effect simply because the question of subject-matter jurisdiction never arises during the trial court proceedings or direct appeals.

The Wright & Miller text also recognizes the difference between statutory and constitutional subject-matter jurisdiction requirements in the following passage:

> Arguably, Congress may ameliorate, if not abolish altogether, the doctrine that a jurisdictional defect may be noticed at any time and the action dismissed. Clearly this is so if the defect is that the case is not within the statutory grant of jurisdiction, for example, when the amount-in-controversy requirement in diversity cases is not satisfied. After all, Congress, having created that limitation, may determine at what stage of the case it can be asserted. The matter is more difficult if the defect is that the case does not fall within the constitutional grant of judicial power. Even in this context, however, a tenable argument may be made that the "necessary and proper" clause of the Constitution gives Congress power to avoid wasteful burdens on the courts by setting a time limit for raising jurisdictional questions.

13 WRIGHT & MILLER, *supra* note 3, § 3522.

the rhetoric and practice governing subject-matter jurisdiction.[245] Congress may tinker with statutory subject-matter jurisdiction, and this statute represents one minor way in which Congress can expand the federal judiciary's authority within the confines of the Constitution.[246] In sum, and as described more fully below, the ALI proposal presents a practical and achievable solution to the current rhetoric-practice gap regarding subject-matter jurisdiction and its alleged non-waivability.

B. Benefits of the ALI's Proposal

1. Promotes Uniformity and Predictability, While Avoiding Unnecessary Waste

The proposed statute does not end belated attacks based on *constitutional* subject-matter jurisdiction defects; however, permitting late attacks because of constitutional defects should not be particularly troublesome for federal courts in terms of efficiency. After all, the easy-to-meet requirements set forth in the Constitution rarely lead parties into trouble—federal question cases must have a federal ingredient and diversity cases require only minimal diversity.[247] Rather, the stricter requirements of 28 U.S.C. §§ 1331 and 1332 create the trouble and, therefore, these stricter non-constitutional requirements should be waivable.

In *Kroger*, for example, the problem that led the Court to dismiss the case was the absence of complete diversity, not the absence of any diversity; in *Mottley*, it was the absence of a federal question in the well-pleaded complaint, not the complete absence of a federal ingredient anywhere in the case, that led

245. Cases too recognize the difference in magnitude between constitutional concerns and statutory concerns relating to subject-matter jurisdiction. *See* In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 497 (2d Cir. 2002) ("We have read the *Steel Co*. decision as 'barring the assumption of 'hypothetical jurisdiction' only where the potential lack of jurisdiction is a constitutional question.'") (alteration accepted) (quoting Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 816 n.11 (2d Cir. 2000)); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) (noting that there are circumstances where the alleged subject-matter defect is statutory, while the alleged personal jurisdiction defect turns "on the constitutional safeguard of due process"); *see also* Friedenthal, *supra* note 168, at 264–65 ("It is possible to read [*Steel Co.*] as concerning only those jurisdictional limitations regarding the need for a case or controversy and not concerning constitutional limits on jurisdictions, such as the need for at least minimal diversity of citizenship.").

However, in at least one case, the US Supreme Court bypassed the Article III standing concern to reach the prudential standing limitations. *See* Kowalski v. Tesmer, 543 U.S. 125, 127–28 (2004). If it does not offend the Constitution for the US Supreme Court to operate under the assumption that constitutional standing is satisfied in order to reach judicially imposed standing principles, then perhaps the Constitution is even more flexible than this Article has previously suggested. *Cf.* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (noting that the constitutional question should be put aside in order to decide the case on non-constitutional grounds).

246. Moreover, a proposed statute that purported to waive constitutional defects would likely be of no effect.

247. U.S. CONST. art. III, § 2 (allowing federal courts to hear diversity cases and cases "arising under this Constitution, [and] the Laws of the United States").

the Court to dismiss.[248] Since these cases satisfied the minimal requirements of the Constitution, and since both were fully adjudicated, these statutory subject-matter jurisdiction defects should, in future cases, be deemed waived.[249] The ALI reporters put it this way:

> The reporters do not believe that a system that imposes reasonable limitations on the opportunity to raise issues of subject-matter jurisdiction, even issues going to the court's power under Article III, is unconstitutional, so long as a question of collusion or connivance between adverse parties may be considered at any time. It is necessary and proper to the exercise of Article III power that procedures be devised to require issues of jurisdiction to be timely raised, and to prevent their use to take unfair advantage of opposing parties or to impede the administration of justice.[250]

The proposed statute sets clear parameters for dismissals and reinforces the notion that like cases should be treated alike.[251] This uniformity between the rules governing dismissals and the practice would decrease the proliferation of ad hoc remedies, enhance predictability, and instill confidence in the judicial system.

Moreover, the ALI's statute accomplishes what many of the current exceptions seek to accomplish.[252] Under the ALI's statute, subject-matter jurisdiction defects could not be collaterally attacked (even if no party raised the defect in the original action) because a party, or the court, must raise subject-matter jurisdiction defects by the commencement of trial or other case-dispositive inquiry.[253] The ALI statute also permits federal courts to determine other non-merits issues before reaching subject-matter jurisdiction and, if the court or parties believed a subject-matter jurisdiction defect existed, that issue would need to be raised pre-trial.[254] Because the lack of statutory subject-matter jurisdiction would not be fatal once a case reached trial, it would not be unusual that a federal

248. Owen Equip. & Erection Co. v Kroger, 437 U.S. 365 (1978); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908); *see supra* Part II.B.1.

249. If these defects cannot be waived, a *statutory* requirement for subject-matter jurisdiction has been vaulted above a *constitutional* requirement for personal jurisdiction. That should make us all a little suspicious of the state of affairs although, of course, the current model is not without some support. For example, the due process model of personal jurisdiction protects individuals (who should therefore have the power to waive their rights), while federal subject-matter jurisdiction directly regulates the court system and implicates federalism and separation of powers concerns.

250. ALI Study, *supra* note 17, at 368. Despite the fact that the Reporters believed that even a constitutional subject-matter defect could be waived, their proposal nonetheless exempted constitutional defects.

251. *Id.* § 1386.

252. *See supra* Part III.C.

253. Of course, Congress has the power to create an exception, as it did with respect to bankruptcy proceedings as determined by the *Kalb* case. *See supra* notes 142–145 and accompanying text.

254. ALI Study, *supra* note 17, § 1386.

court might choose to exercise its discretion to retain jurisdiction over supplemental state-law claims even after the federal claims have been dismissed, as the supplemental jurisdiction statute, Section 1367(c), allows. Finally, because the lack of statutory subject-matter jurisdiction would not be fatal, it would not be jarring that parties could "cure" subject-matter defects before the entry of judgment.[255] Thus, the ALI's proposal does much of what the current exceptions to the no-waiver rule attempt to do, but provides a uniform framework rather than a patchwork of exceptions. Moreover, a federal statute, like the ALI's proposal, must be followed. With cases creating the patchwork of rules, courts tend to pick and choose, distinguishing the cases that lead to results that seem unfair, or perhaps reaching out to rely on a case that provides an easy conclusion to a difficult case. Closing the gap between rules and reality would promote uniformity, evenhandedness, and transparency.[256]

2. Enhances Legitimacy of Federal Courts

Judges should be explicit about what they are doing and why and should not obscure their decision-making process. The gap between rhetoric and practice poses problems because it enables judges to veil their reasoning and gives cover for courts to make merits-based decisions wrapped in the guise of procedural ones.[257] Because of the uncertain lines between jurisdictional issues and nonjurisdictional issues,[258] judges may choose to dispose of cases under either label, depending on the consequences the judges are seeking to achieve or avoid.[259]

The gap also poses problems because some judges may apply the rules, while other judges may apply the exceptions.[260] When the rule says one thing, and practice dictates another, a judge can follow either option.[261] This leads to a perception of unfairness and illegitimacy.

The ALI's statute will lead to more transparency in federal-court decision-making. Because there is no gap (or a greatly diminished one), the rules by which the federal courts are making decisions will be clear to parties and court

255. *See supra* Part III.C.5 (discussing curative practice in removal cases).

256. For example, if the statute governed cases like *Caterpillar* and *Grupo Dataflux*, their divergent resolutions would not be "incomprehensible." Simpson-Wood, *supra* note 101, at 349. If the plaintiff in *Caterpillar* had not raised the subject-matter jurisdiction defect, then the entry of judgment (indeed, the beginning of the trial) would bar consideration of the issue; since the plaintiff had raised the defect, however, subsection (4) of the ALI's statute would allow the appellate courts to consider the issue. In *Grupo Dataflux*, the objection to subject-matter jurisdiction would have been deemed waived.

257. *See generally* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613 (2003) (discussing the dubious line between procedure and merits and the judges' ability to label attributes either way).

258. *Id.* at 1625.

259. *See generally id.*

260. *Id.*

261. *Id.*

observers. The system will appear more legitimate when the courts apply uniform rules and reach uniform outcomes.

3. More Closely Parallels Approach to Other Procedural Issues

Parties should raise subject-matter jurisdiction defects early in the litigation, as they do other procedural issues. Several defenses must be raised in the responsive pleading; others must be raised by the time of or during trial.[262] If a party does not timely raise such defenses, it risks losing them.[263] This is true even if the defense, like personal jurisdiction, is grounded in the Constitution.[264] If other defenses must be timely raised, it stands to reason that subject-matter jurisdiction must also be.[265] Professor Dobbs writes, "There is no reason why ordinary procedural rules cannot apply to issues of jurisdiction so that objections not timely raised are deemed waived."[266] Nothing in the Constitution says Article III's subject-matter restrictions (as further restricted by Congressional statutes) are so important that they cannot be waived, while other constitutional restrictions, such as personal jurisdiction limitations embodied in the due process clause, can be readily waived.[267] Nothing in the Constitution requires a particular time or manner for raising subject-matter jurisdiction problems. Parties, of course, must have an opportunity to raise these issues, but nothing—other than stubbornness—requires the current no-waiver rule.[268] As Professor Dobbs put it: "The short of it is that no one should suspect a constitutional issue lurking in the background; the issue is purely an issue of civilized and efficient administration of justice."[269] We should think critically about the reasons for our rigid rule, and we should not simply accept that there is something so innately different about subject-matter jurisdiction that it—and it alone—cannot be waived.[270]

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262. FED. R. CIV. P. 12.

263. *Id.* 12(h).

264. *Id.* 12(b)(2), 12(h)(1).

265. *Beyond Bootstrap*, *supra* note 76, at 491 ("Good judicial administration requires that all issues preliminary to the merits of a dispute be raised and disposed of at an early stage of litigation.").

266. *Id.* at 507.

267. And yet, this is exactly what our current jurisprudence (unthinkingly) says. RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. d (1982) ("In this respect the question of subject matter jurisdiction is very different from the question of territorial jurisdiction or one of regularity of notice. This difference has been explained by the fact that an objection to subject matter jurisdiction is in some sense more fundamental than objections to territorial jurisdiction or notice, in that a court is powerless to decide a controversy with respect to which it lacks subject matter jurisdiction."). Of course, many important constitutional rights can be inadvertently waived, such as the privilege against self-incrimination. *See e.g.*, U.S. CONST. amend. V.

268. *Jurisdiction by Consent*, *supra* note 4, at 79 ("Furthermore, it is apparent today that the problem of our judicial system is the problem of overburden rather than under-work, the problem of finality rather than the problem of injustice. When the no consent rule was developing, res judicata was not the significant legal tool that it is today, and the policies of res judicata were not weighed in the balance.").

269. *Beyond Bootstrap*, *supra* note 76, at 521.

270. *Id.*

Federal courts should be able to accept jurisdiction in some limited circumstances, just as they may decline jurisdiction in some circumstances. Federal courts have long enjoyed the power to decline to exercise jurisdiction for a variety of discretionary reasons, such as forum non conveniens, abstention, prudential standing, supplemental jurisdiction, ripeness, mootness, or exhaustion. Professor David Shapiro has argued against an "unflagging obligation"[271] to exercise subject-matter jurisdiction and in favor of greater leeway in declining to accept jurisdiction.[272] Similarly, it makes sense to permit federal courts to exercise jurisdiction for prudential reasons, at least when not forbidden to do so by the Constitution and when the federal system has invested considerable time in the case. The mismatch between the rhetoric of an obligation to exercise jurisdiction and the reality of the numerous times when federal courts have declined jurisdiction mirrors the mismatch between the rhetoric of no-waiver and the practice of waiver. Professor Shapiro advocated that the most honest way out of the conundrum on the declining jurisdiction side is to recognize the discretion inherent in the practice.[273] This Article proposes that the most honest way out of the conundrum on the retaining jurisdiction side is also to recognize the discretion inherent in the practice and no longer cling to the rhetoric of the no-waiver rule.

4. More Closely Matches Historical Practice

Throughout our history, the US Supreme Court has taken different approaches to waiver of subject-matter jurisdiction defects.[274] Early on, the Court announced that pleadings controlled a federal court's power to hear a case; a party "could waive an objection to properly pled jurisdiction if the objection was not made by a pre-answer plea."[275] Thus, a federal court could hear a case—even

271. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 15 (1983).

272. *See generally* Shapiro, *supra* note 3.

273. *Id.*

274. *See, e.g.*, Carter v. Bennett, 56 U.S. (15 How.) 354, 357 (1853); Smith v. Kernochen, 48 U.S. (7 How.) 198, 216 (1849); Evans v. Gee, 36 U.S. (11 Pet.) 80, 83 (1837); D'Wolf v. Rabaud, 26 U.S. (1 Pet.) 476, 498 (1828)).

275. Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1832, 1838–39, n. 23 (2007) (citing cases listed *supra* note 274); *see also* HART & WECHSLER'S, *supra* note 3 at 1411–12 ("Professor Collins, in an important study, contends that the Mansfield decision was part of a transition from an earlier approach in which the federal courts placed heavy reliance on the pleadings, even when subject matter jurisdiction might have been lacking in fact, and in which a party could waive an objection to properly pled jurisdiction if the objection was not made by a pre-answer plea."); *Hybridizing Jurisdiction*, *supra* note 3, at 1442–43 ("In [the early 1800s], a defendant waived any objections to subject-matter jurisdiction by filing an answer instead of a plea in abatement. Parties could concoct federal jurisdiction by pleading and not objecting to the jurisdictional requirements, even if the parties' allegations contradicted factual reality. Parties could admit jurisdictional facts."); *Jurisdiction by Consent*, *supra* note 4, at 51 ("We have come to think of the no consent rule [that parties cannot consent to jurisdiction] as the inevitable product of either logic or the rational demands of policy. It is not. The rule has not always existed, even in England.").

if jurisdiction was lacking—if the defendant failed to raise the subject-matter jurisdiction issue.[276] In essence, parties, through their pleadings, could confer jurisdiction on the courts.

By the late 1800s, however, the US Supreme Court envisioned for itself, and for all federal courts, a more active role in ensuring that federal courts had appropriate subject-matter jurisdiction.[277] Professor Collins posits that the Judiciary Act of 1875 effected the change in attitude regarding jurisdiction.[278] Less than ten years later, the Court decided *Mansfield*,[279] signaling the beginning of a new era of federal jurisdictional rules.

In *Mansfield*, the plaintiffs sued the defendants in state court for breaching a contract for the construction of a railroad.[280] The defendants petitioned for removal, alleging that the plaintiffs were of diverse citizenship from the defendants.[281] The plaintiffs moved to remand for lack of jurisdiction, but the court denied the motion.[282] After trial, a verdict was rendered in the plaintiffs' favor.[283] At that point, the defendants raised lack of subject-matter jurisdiction, despite the fact that their petition for removal had alleged the requisite diversity requirements.[284]

The US Supreme Court held that subject-matter jurisdiction is "inflexible and without exception,"[285] and it noted with approval the requirement that the record must affirmatively show jurisdiction in the courts below.[286] In *Mansfield*, the pleadings showed a lack of jurisdiction—and so it was the Court's duty to

276. Remarkably, the US Supreme Court's early approach of permitting waiver of subject-matter jurisdiction is similar to the position taken by the ALI and by this Article. A primary difference is that the Supreme Court's approach permitted waiver to occur even earlier than the ALI's proposed statute does—at the pleading stage rather than the dispositive motion or trial stage advocated here. *See supra* note 226 and accompanying text (regarding different timetables for waiver, including the possibility of waiver at the pleading stage).

277. *See generally* Mansfield v. Swan, 111 U.S. 379 (1884); 18 Stat. 470, § 5 (1875).

278. Collins, *supra* note 275, at 1861–62. Professor Dobbs notes, however, that even the Judiciary Act of 1875 was quite clear in permitting only trial courts, but not appellate courts, to dismiss actions for lack of jurisdiction. *Beyond Bootstrap*, *supra* note 76, at 512; *see also id.* at 513 (The statute did not "contain the remotest suggestion that the parties have standing to make a belated jurisdictional attack. Nor does it impose upon the judge a duty to hear or initiate such an attack.").

The Judiciary Act provided that if it appeared to the district court "at any time [that the lawsuit] does not really and substantially involve a dispute or controversy properly within the jurisdiction of the said [district] court, or that the parties have been improperly or collusively joined . . . the said [district] court shall proceed no further therein, but shall dismiss the suit or remand it to the court from where it was removed. 18 Stat. 472 (1875).

279. *See generally* Mansfield, 111 U.S. 379.

280. *Id.* at 379–80.

281. *Id.* at 380.

282. *Id.* at 381.

283. *Id.*

284. *Id.*

285. *Id.* at 382.

286. *Id.* at 383.

reverse the lower court's judgment in the plaintiff's favor.[287] At least by the time of the *Mansfield* decision in 1884, the Supreme Court believed that federal courts had an independent duty to determine jurisdiction—a duty that could not be forfeited by the parties' inattention, by the passage of time, or by the entry of judgment.[288]

In the early 1900s, subject-matter jurisdiction took on its strict no-waiver mantra.[289] In 1936, the US Supreme Court made it clear that litigants could not create subject-matter jurisdiction by merely pleading its existence.[290] Two years later, in 1938, the Federal Rules of Civil Procedure were fresh off the press, and they contained Rule 12(h), which required district courts to police subject-matter jurisdiction on their own and to dismiss cases "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter."[291] This understanding of subject-matter jurisdiction, with its origins in the *Mansfield* case, has persisted to the present day.[292]

Hart and Wechsler have summed up the history of the no-waiver rule to the modern era.[293] Regarding the state of the current rule, they write:

> Whatever the precise origins of the modern-day principle, federal courts today insist that the first duty of counsel is to make clear to the court the

287. *Id.* ("[I]n the present case, the failure of the jurisdiction of the circuit court arises[] not merely because the record omits the averments necessary to its existence, but because it recites facts which contradict it.").

288. 13 WRIGHT & MILLER, *supra* note 3, § 3522 ("Though two lower court opinions in the mid-twentieth century raised the possibility of asserting estoppel against a party who had sought to invoke federal jurisdiction, they had no influence, and have been left in the wake of the realization that if a federal court entertains a dispute which does not invoke federal subject matter jurisdiction, it usurps power lodged by the Constitution in the state courts.") (citing Di Frischia v. N.Y. Ctr. R.R. Co, 279 F.2d 141 (3d. Cir. 1960); Klee v. Pittsburgh & W.V. Ry. Co., 22 F.R.D. 252 (W.D. Pa. 1958)).

289. *See, e.g.*, HART & WECHSLER'S, *supra* note 3, at 1412 (citing McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936)).

290. HART & WECHSLER'S, *supra* note 3, at 1412 (citing *McNutt*, 298 U.S. at 189). In *McNutt*, the plaintiff had alleged that the amount-in-controversy exceeded the then-required $3,000. *McNutt*, 298 U.S. at 179–180. The answer denied that jurisdictional allegation. *Id.* Because there was no evidence supporting the amount-in-controversy, the Supreme Court held that there was a showing that the district court lacked subject-matter jurisdiction and the case should be dismissed. *Id.* at 190.

291. See *Beyond Bootstrap*, *supra* note 76, at 513; FED. R. CIV. P. 12(h)(3). Because Rule 12(h)(3) tracks Section 5 of the Judiciary Act of 1875 regarding waiver of subject-matter jurisdiction, perhaps only a trial court may dismiss the action, and the trial court may dismiss the action only if the defect is evident from the record itself or if the parties have acted collusively. *See supra* note 278 and accompanying text.

292. Cases from the early 1900s to today tend to follow the *Mansfield* conception of subject-matter jurisdiction. *See, e.g.*, Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 ("We do not deem it necessary, however, to consider [the merits questions] because, in our opinion, the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the circuit court, which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion.") (citing, among other cases, Mansfield v. Swan, 111 U.S. 379, 382 (1884)); *cf.* Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 546 (1986) (raising the issue of standing, citing *Mansfield*, and determining that the appellant had no standing to appeal).

293. *See generally* HART & WECHSLER'S, *supra* note 3, at 1411–12.

> basis of its jurisdiction. And the first duty of the court is to make sure that jurisdiction exists. If the record fails to disclose the basis for federal jurisdiction, the court must suspend determination of the merits of the controversy unless the failure can be cured. This is true whether the case is at the trial or at the appellate stage, and whether or not any party calls the defect to the court's attention.[294]

Historically, subject-matter jurisdiction was not cloaked with the strong rules that surround it today. The historical understanding of subject-matter jurisdiction permitted parties to "consent" to jurisdiction by so pleading (and failing to contest); it also permitted courts to "consent" to jurisdiction by failing to provide appellate courts with an independent power to dismiss *sua sponte* for lack of subject-matter jurisdiction.[295] Accordingly, there is nothing wrong from a historical perspective with permitting a broader right to waiver; indeed, such a rule comports with these venerable roots.[296]

C. Responding to Criticism

1. The ALI's Proposal Is Modest and Clear

But alas, nearly a half-century after the ALI's proposal, and we are no closer to enacting proposed Section 1386 than we were in 1969.[297] There is little information explaining why.[298]One might surmise that the proposed statute lies dormant because it seemed to suggest a radical change in civil procedure, and

294. *Id.* at 1412.

295. *Id.* at 1411–15.

296. *See* De Sobry v. Nicholson, 70 U.S. (1 Wall.) 420, 423 (1866) ("The objection to jurisdiction upon the ground of citizenship, in actions at law, can only be made by a plea in abatement. After the general issue, it is too late. It cannot be raised at the trial upon the merits.") (citations omitted).

297. Portions of the ALI's proposal were enacted into law. For example, twenty years after the ALI's proposal came out, Congress, in enacting the supplemental jurisdiction statute, 28 U.S.C. § 1367, added subsection (d), which allows a 30-day period of tolling of a statute of limitations for any supplemental claim that is dismissed. *See* 28 U.S.C. § 1367(d) (2006). This savings-clause has its genesis in the ALI's proposed § 1386(b), which provides, "If any claim in an action timely commenced in federal court is dismissed for lack of jurisdiction over the subject matter of the claim, a new action on the same claim brought in another court shall not be barred by a statute of limitations that would not have barred the original action had it been commenced in that court, if such new action is brought in a proper court, federal or State, within thirty days after dismissal of the original claim has become final or within such longer period as may be available under State law." ALI Study, *supra* note 17, § 1386(b); *see also* Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 216, n.28 (1991); Alfred R. Light, *New Federalism, Old Due Process, and Retroactive Revival: Constitutional Problems with CERCLA's Amendment of State Law*, 40 U. KAN. L. REV. 365, 387 (1992) ("The provision implements in the specific context of pendent or supplemental jurisdiction a recommendation of the American Law Institute (ALI) made some twenty years earlier.").

298. *See supra* note 27 (regarding discussions with ALI Reporter Professor David Shapiro).

such fundamental change can be difficult.[299] Or perhaps there are so many scholarly writings available (some of which describe other potential statutory responses to perceived problems), and so many other pressing issues for Congress to tackle, that the ALI's proposal was simply lost in the shuffle.

Another reason that the ALI's proposal has gathered dust may lie in two critiques of it that home in on opposing issues, and thus practically cancel each other out. One critique asserts that the proposal goes too far in allowing a case that has made it to trial to proceed even if, at that point, it becomes "clear" that there is no subject-matter jurisdiction.[300] This critique questions why federal courts should be allowed to retain jurisdiction over cases that they have no statutory authority to hear.[301] The other critique posits that the proposal does not go far enough because it allows parties to test the waters all the way up until trial (or a dispositive motion) before raising the potential flaw in subject-matter jurisdiction.[302] The authors of these critiques apparently desire an even earlier cutoff time for raising jurisdictional defects. One noted scholar found the ALI's proposal too ambitious and too modest at the same time:

> The Institute's draft seems, therefore, both too broad and too narrow. Once trial has commenced the proposed section leaves no place for a belated consideration of jurisdictional objections that may be truly important; on the other hand, it makes possible the most unjust sort of tardy attacks on jurisdiction, so long as they are made before trial is commenced.[303]

That fact that a proposal does not go far enough does not seem a valid reason to reject it. Incremental steps are often preferable to no steps at all. And given that the ALI proposal has lain dormant for more than four decades, one suspects that the primary concern is not that the proposal sweeps too narrowly, but rather

299. Or perhaps not. The US Supreme Court upended settled expectations of Rule 8 pleading standards in *Twombly* and *Iqbal* without a particularly thorough examination of the deficiencies of the then-current pleading practices. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

300. *See Assuming Jurisdiction Arguendo*, *supra* note 184, at 718 ("The ALI proposal, although aimed at sound judicial administration, takes inadequate account of the weeding function currently performed by the subject matter fetish.").

301. *Id.*

302. *Id.* at 719 ("To one dogged critic of traditionally sanctimonious jurisdictional thinking, the ALI proposal errs by being too conservative, in allowing jurisdictional defects to be raised at any time before a case comes to trial.") (citing *Beyond Bootstrap*, *supra* note 76, at 525–28). This problem could be addressed by a sanction for such gamesmanship. *See, e.g.*, FED. R. CIV. P. 11.

303. *Beyond Bootstrap*, *supra* note 76, at 527. Despite these concerns, Professor Dobbs thought that the ALI proposal should be adopted "as quickly as possible." *Id.* at 529. Moreover, contrary to Professor Dobbs' worry, the ALI proposal does leave a place for important, albeit belated, objections—namely constitutional ones.

that it goes too far.[304] However, that critique also misses the mark. Proposed Section 1386 tracks what courts are currently doing and replaces the current practice of unbounded discretion and ad hoc application with a consistent framework.

The reason the ALI's proposal is still a proposal rather than the law seems to be nothing more than blind adherence to rhetoric and to the current framework for analyzing subject-matter jurisdiction. But the current framework is not inexorable. In fact, as outlined in this Article, the no-waiver rule was historically much narrower than it is today.[305] The current framework is riddled with exceptions, and courts continually craft new ones (while they also refuse to apply the old ones).[306] Once we acknowledge the ever-widening rhetoric-practice divide, it becomes easier to accept the ALI's proposal. In fact, the ALI's proposal is doctrinally close to how lawyers and judges treat subject-matter jurisdiction in practice.

2. The ALI's Proposal Is Federalism-Enhancing

Another potential counterargument to rethinking the rhetoric of subject-matter jurisdiction is that its limitations are uniquely important to preserve federalism, as a matter of both states' rights and limited national authority.[307] We need to have an orderly division of labor between state and federal courts, and we do not want the federal judiciary to intrude unduly upon the state courts' prerogative.[308]

304. 13 WRIGHT & MILLER, *supra* note 3, § 3522 ("A federal court's entertaining a case that is not within its subject matter jurisdiction is no mere technical violation; it is nothing less than an unconstitutional usurpation of state judicial power.").

305. *See supra* Part IV.B.4.

306. *See supra* Part III.C.

307. That is why the Fifth Circuit panel in *Ruhrgas* thought that the district court had to determine the subject-matter jurisdiction question before the personal jurisdiction issue. The panel wrote, "Such a course respects the proper balance of federalism." Marathon Oil Co. v. Ruhrgas, 115 F.3d 315, 318 (5th Cir. 1997). The en banc court agreed that subject-matter jurisdiction had to be determined first, at least in removed cases, because "the discretionary rule [of determining personal jurisdiction before subject-matter jurisdiction in certain circumstances] threatens the Article III principles of separation of powers and federalism." Marathon Oil Co. v. Ruhrgas, 145 F.3d 211, 219 (1998) (en banc). The US Supreme Court obviously disagreed, permitting an initial determination of personal jurisdiction. Ruhrgas v. Marathon Oil Co., 526 U.S. 574 (1999).

The reverse federalism concern may also arise. A state court decides a patent infringement case. The parties do not raise the subject-matter jurisdiction problem, and the court does not see it. On appeal, may a state appellate court consider the subject-matter jurisdiction defect? Or, if the ALI's statute governs in the federal system, may the state courts analogize that the defect has been forfeited? The Article does not reach this question, although analogous concerns seem to be at play for both systems.

308. *Assuming Jurisdiction Arguendo*, *supra* note 184, at 716 ("[E]ven if the case is within article III bounds, exercising jurisdiction in excess of specific congressional grants may violate principles of federalism by encroaching on state court powers."); *Leading Cases*, *supra* note 101 (highlighting federalism and separation of powers concerns).

Putting aside all the inroads into State sovereignty previously discussed in Part III, this federalism counter-argument still fails to explain why, as long as constitutional subject-matter requirements are met, allowing a case with deficient statutory subject-matter jurisdiction to proceed in federal court intrudes on *state* authority. The parties and the courts remain free, under the proposal, to raise statutory subject-matter defects at any time up to trial, and any defect in *statutory* subject-matter jurisdiction only affects Congress's explication of federal-court jurisdiction.[309] If anything, it is the current state of affairs that promotes ad hoc and unpredictable exercises of subject-matter jurisdiction that are inconsistent with federalism values. Moreover, the proposed statute leaves intact constitutional challenges.[310] In that way, the proposal provides ample opportunity for those involved in the case to assess whether statutory subject-matter jurisdiction exists (up until trial or pretrial disposition of the merits) and permits parties and the courts through appeals to raise constitutional defects. Although undoubtedly some cases lacking statutory subject-matter jurisdiction will proceed to judgment, "[u]nintentional mistakes of jurisdiction do not threaten any enduring values."[311]

The Constitution provides the outer boundaries of the federal courts' power.[312] If a court exceeds its *constitutional* subject-matter jurisdiction powers, the federal court clearly acts outside even the outmost limits of its powers. But if a court acts outside its *statutory* subject-matter jurisdiction grant, the court may well be within the constitutional boundaries. This latter scenario—a case within constitutional bounds but exceeding statutory bounds—presents no strong federalism argument because constitutional boundaries have remained intact; only statutory ones have been transgressed.

Moreover, the very rationale of *Ruhrgas* is that "federal and state courts are complementary systems for administering justice in our Nation: Cooperation and comity, not competition and conflict, are essential to the federal design."[313] Although "a State's dignitary interest bears consideration," a federal court does not act in a competitive way with the state court every time it adjudicates a case.[314] Imperfect boundaries exist, and as long as federal courts actively police the boundary, there is nothing untoward about a federal court deciding a case that *appears* to be within its statutory purview and is actually within its constitutional purview.[315]

309. ALI Study, *supra* note 17, at 65.

310. *Id.* § 1386(a)(5).

311. 18A WRIGHT & MILLER, *supra* note 3, § 4428.

312. *See* U.S. CONST. art. III, § 2.

313. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 586 (1999).

314. *Id.* at 576.

315. *Cf.* Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 43 (2010) ("Federalism does not require giving the states all possible autonomy. Rather, it entails striking a proper balance between state autonomy and federal oversight.").

Finally, the ALI's proposal may in fact be federalism-enhancing. Federal courts are natural forums for deciding issues of federal law. Thus, it makes sense for cases like *Mottley* to be heard in federal court if nobody notices the jurisdictional defect; after all, a federal court is in a better position to interpret a federal statute than a state court.[316]

V. CONCLUSION

Nothing unique about or inhering in statutory subject-matter jurisdiction brands it as deserving the special protection of the no-waiver rule.[317] Historically, the no-waiver rule was much more limited in scope: Federal trial courts could dismiss cases at any time, but only if the jurisdictional defect was clear from the record or the parties were fraudulently attempting to confer subject-matter jurisdiction on the court. Moreover, federal courts have not consistently adhered to the strong form of subject-matter jurisdiction—that it must be determined first and cannot be waived. An objection to subject-matter jurisdiction cannot be raised on collateral attack; courts may decide other jurisdictional issues (such as personal jurisdiction) before determining whether they have subject-matter jurisdiction; courts may issue, and need not unwind, non-dispositive orders even if the courts ultimately determine that they lack subject-matter jurisdiction; and courts have the discretion to consider claims over which they have no subject-matter jurisdiction, even if they have dismissed all the claims over which they did have subject-matter jurisdiction. So the allegedly strong statement of the sanctity of subject-matter jurisdiction and its non-waivability turns out to be rather flimsy indeed, creating a large gap between the rhetoric of the rule and the actual practice in the courts.

There may be no way to simultaneously and perfectly account for the competing concerns of finality, validity, fairness, predictability, transparency, and legitimacy.[318] But our current system is doing a poorer job accommodating these concerns than it could and should. After all, as Professor Miller hopes, the procedural system should "represent[] a reasonable balance among the competing

316. *See supra* Part II.B.1 (discussing *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908)).

317. Daniel J. Melzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 303 (1990) ("But subject matter jurisdiction is not a self-defining term, and the tradition that defects cannot be waived is not an unshakable axiom but a purposive doctrine."); 13 WRIGHT & MILLER, *supra* note 3, § 3522 ("Arguably, Congress may ameliorate, if not to abolish altogether, the doctrine that a jurisdictional defect may be noticed at any time and the action dismissed. Clearly this is so if the defect is that the case is not within the statutory grant of jurisdiction, for example, when the amount-in-controversy requirement in diversity cases is not satisfied. After all, Congress, having created that limitation, may determine at what stage of the case it can be asserted.").

318. For example, the Restatement (Second) of Judgments notes that if an issue of subject-matter jurisdiction is decided incorrectly, and allowed to stand, then the validity principle has been compromised, while if a judgment remains open to attack indefinitely for a defect in subject-matter jurisdiction, then the finality principle is compromised. RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. a (1982).

viewpoints and reflect[] the core values of society."[319] The most intellectually honest way to tackle the conundrum in which we currently find ourselves is to adopt the ALI's 1969 proposal to permit waiver of statutory subject-matter jurisdiction if the issue is not timely raised by the time of trial or before a ruling that is dispositive of the merits. We should wave goodbye to non-waiver and usher in a more equitable and predictable framework for the disposition of cases.

319. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 309 (2013).