

Washington Law Review

Volume 89 | Number 3

10-1-2014

Solving Jurisdiction's Social Cost

Dustin E. Buehler

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Jurisdiction Commons](#)

Recommended Citation

Dustin E. Buehler, *Solving Jurisdiction's Social Cost*, 89 Wash. L. Rev. 653 (2014).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol89/iss3/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

SOLVING JURISDICTION’S SOCIAL COST

Dustin E. Buehler*

Abstract: Federal court subject-matter jurisdiction rules incur a significant social cost—when jurisdiction is found lacking, courts must dismiss, no matter how many years and resources the parties have spent on the case. Indeed, hundreds of belated jurisdictional dismissals occur each year after parties have already engaged in discovery, dispositive motions, or even trial.

Federal judges tolerate this waste largely because they view nonwaivable jurisdictional rules as a function of structural values rooted in the Constitution, rather than efficiency concerns. In contrast, scholars tend to focus primarily on efficiency arguments while discussing jurisdictional nonwaivability, de-emphasizing important structural interests. Both theories are overly monistic and fail to consider the full range of jurisdictional values.

This Article advances two claims. First, jurisdictional values are pluralistic and multipolar, implicating structural and efficiency interests that are fundamentally incommensurable. We should not simply attempt to maximize a single set of jurisdictional values. And because there is no single unit of measurement for weighing structural values such as “separation of powers” against efficiency interests such as “litigation waste,” we should resist forcing these interests through a cost-benefit analysis. Instead, courts and rule makers should seek equilibrium among all relevant values when fashioning jurisdictional rules.

Second, using this equilibration approach, the Article proposes a solution to jurisdiction’s social cost: Courts should resolve all subject-matter jurisdiction questions at the outset of litigation. Federal district courts should affirmatively certify the existence of jurisdiction in every case; after that point, objections to statutory federal jurisdiction would be waived. Moreover, to accommodate both structural and efficiency interests, appellate courts should have discretion to immediately review jurisdictional orders when the benefits of doing so outweigh the costs. Lastly, federal courts should use the threat of sanctions to deter private-party abuse of jurisdictional rules.

INTRODUCTION	654
I. A PLURALISTIC THEORY OF JURISDICTION	658
A. Structural Values	659
B. Efficiency Values	661
C. Problems Presented by the Structural-Efficiency Dichotomy	663
1. Value Monism	663

* Associate Professor of Law, University of Arkansas, dbuehler@uark.edu. The author thanks Steve Calandrillo, Aziz Huq, Daniel Klerman, Max Minzner, Lumen Mulligan, Elizabeth Porter, David Rubenstein, Laurent Sacharoff, Stephen Sheppard, Gregory Sisk, and Kathryn Watts for their thoughts and comments. Special thanks also to Washington University in St. Louis for the opportunity to present a prior version of this paper at its junior faculty workshop.

2. Incommensurability	665
D. The Search for Equilibrium Among Competing Values	668
II. DECONSTRUCTING JURISDICTIONAL VALUES.....	672
A. Delineating Structural Values.....	672
1. Separation of Powers: Legislative and Judicial Prerogatives	673
2. Federalism: State and Federal Prerogatives.....	675
3. Working with Structural Values	677
B. Unpacking Efficiency Values.....	678
1. The Goal: Socially Optimal Jurisdictional Rules.....	679
2. The Problem: Perverse Private-Party Incentives	680
a. Incentives to File Jurisdictionally Suspect Lawsuits	681
b. Incentives for Defendants to Wait and See	683
c. Incentives for Plaintiffs to Belatedly Challenge Jurisdiction	687
3. Inadequate Incentives for Early Adjudication of Jurisdictional Issues by Federal Courts.....	688
III. A NEW APPROACH FOR SOLVING JURISDICTION'S SOCIAL COST	689
A. Critique of Existing Proposals.....	690
B. A New Approach: Achieving Jurisdictional Equilibrium ..	694
1. Early Jurisdictional Rulings.....	694
a. Mandatory Jurisdictional Certification	694
b. Facilitating Certification: Jurisdictional Pleading and Discovery	697
2. Foreclosing Jurisdictional Challenges	700
a. Cutting off Objections to Statutory Jurisdiction	700
b. Using Article III as a Jurisdictional Backstop.....	702
3. Interlocutory Appeal of Jurisdictional Rulings.....	703
4. Using Sanctions to Deter Abuse by Litigants	705
CONCLUSION	707

INTRODUCTION

In recent years, the Supreme Court has reminded us that federal court subject-matter jurisdiction is both inflexible and unforgiving.¹ It has stressed that the parties cannot consent to or waive jurisdictional requirements,² and that federal courts have an obligation to raise

1. True to form, the procedurally active Roberts Court issued sixteen opinions on jurisdictional issues during the October 2012 Term—about twenty percent of the Court's docket.

2. See *Standard Fire Ins. Co. v. Knowles*, ___ U.S. ___, 133 S. Ct. 1345, 1350–51 (2013) (holding that a nonbinding stipulation regarding the amount in controversy does not negate federal

jurisdictional defects, on their own initiative if necessary.³ The Court also has emphasized that litigants can raise jurisdictional defects at any time, even for the first time on appeal.⁴ And once again, we have witnessed the harsh effect of latent jurisdictional defects: The court *must* dismiss the suit, forcing the parties to start over, no matter how many years and resources they have spent on litigation up to that point.⁵

The social waste generated by jurisdictional nonwaivability⁶ is real and alarming. Federal courts conduct a belated jurisdictional inquiry in approximately five hundred cases each year,⁷ analyzing subject-matter jurisdiction for the first time months or years after the close of the pleadings,⁸ and sometimes only after the case is on appeal.⁹ Courts dismiss about forty percent of these cases, wasting resources the parties have already spent on discovery, dispositive motions, and sometimes even on trial.¹⁰ Given the exorbitant cost of modern litigation—it is not

jurisdiction under the Class Action Fairness Act).

3. *See* *Hollingsworth v. Perry*, __ U.S. __, 133 S. Ct. 2652, 2659 (2013) (describing jurisdiction as “an essential limit on our power”); *Gonzalez v. Thaler*, __ U.S. __, 132 S. Ct. 641, 648 (2012) (noting that courts must consider jurisdiction *sua sponte*).

4. *Sebelius v. Auburn Reg'l Med. Ctr.*, __ U.S. __, 133 S. Ct. 817, 824 (2013).

5. *E.g.*, *Lozman v. City of Rivera Beach*, __ U.S. __, 133 S. Ct. 735, 739–40, 746 (2013) (holding jurisdiction did not exist, despite years of litigation and a trial on the merits); *see also Sebelius*, 133 S. Ct. at 824 (noting that “[t]ardy jurisdictional objections . . . can therefore result in a waste of adjudicatory resources”).

6. This Article uses the phrase “jurisdictional nonwaivability” to refer to the characteristics that make federal court subject-matter jurisdiction exceptional: the inability of parties to consent to or waive it, the obligation of courts to raise jurisdictional issues *sua sponte*, and the ability of litigants or courts to invoke jurisdictional defects at any stage of litigation.

7. A comprehensive review of all federal district court opinions on Westlaw issued during June 2013 and containing the phrase “subject matter jurisdiction” yielded forty-six opinions with belated jurisdictional analysis. Assuming June 2013 is a representative sample month, this suggests that federal district courts belatedly analyze jurisdiction in more than 500 cases each year.

8. *E.g.*, *Chambers v. Kan. City Kan. Cmty. Coll.*, No. 11-CV-2646-CM-DJW, 2013 WL 3322315, at *2–3 (D. Kan. June 28, 2013) (dismissing claims for lack of subject-matter jurisdiction nearly two years after suit was filed), *vacated on other grounds*, 2014 WL 326021 (D. Kan. Jan. 29, 2014); *In re Motor Fuel Temperature Sales Practices Litig.*, MDL No. 1840, 2013 WL 3283859, at *1–3 (D. Kan. June 28, 2013) (analyzing jurisdiction six years after plaintiffs filed their class action, while deciding summary judgment motions).

9. *E.g.*, *Builders Mut. Ins. Co. v. Dragas Mgmt.*, 497 F. App'x 313, 315–18 (4th Cir. 2012) (deciding jurisdictional issue raised for the first time on appeal).

10. District courts dismissed eighteen of the forty-six belated jurisdictional analysis cases decided in June 2013, suggesting a dismissal rate of about 200 cases per year. *See, e.g.*, *Chambers*, 2013 WL 3322315, at *2–3 (dismissing claims for lack of jurisdiction nearly two years after suit was filed, while adjudicating a motion for summary judgment); *Grill v. Quinn*, No. 2:10-cv-0757 GEB GGH PS, 2013 WL 3146803, at *1 (E.D. Cal. June 18, 2013) (dismissing for lack of jurisdiction despite “long and complex” proceedings because “recent events” disclosed plaintiff did not have standing for his claims).

unusual for litigants to spend hundreds of thousands of dollars on discovery and merits litigation¹¹—the social cost of belated jurisdictional dismissals is intolerable.

Federal courts tolerate this waste, however, largely because they view jurisdictional nonwaivability as a function of immutable structural values rooted in the Constitution. When judges dismiss cases on jurisdictional grounds, they reference federalism and separation-of-powers interests,¹² casting themselves as impartial enforcers of jurisdictional boundaries drawn by Congress.¹³ In doing so, they de-emphasize non-structural considerations, such as efficiency and economic waste. Indeed, some courts have stated that these non-structural considerations are entirely irrelevant to jurisdictional analysis.¹⁴

Several scholars have criticized this overreliance on structural interests, basing their arguments primarily on efficiency values.¹⁵ They point to the significant social waste resulting from belated jurisdictional dismissals,¹⁶ as well as the tendency for litigants to strategically contest jurisdiction in ways that exacerbate this waste (i.e., when a party raises a jurisdictional defect for the first time after losing on the merits, in order to void the adverse judgment).¹⁷ While bringing much-needed attention

11. See Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in the Digital Age*, 58 DUKE L.J. 889, 894 (2009) (noting the cost of electronic discovery can amount to “tens or hundreds of thousands of dollars” in typical cases); Michael Orey, *Fear of Firing: How the Threat of Litigation Is Making Companies Skittish About Axing Problem Workers*, BUSINESSWEEK (Apr. 23, 2007), <http://www.businessweek.com/stories/2007-04-22/fear-of-firing> (noting that it costs \$300,000 to defend a single employment discrimination case through trial).

12. *E.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585–87 (1999); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998); *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993).

13. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973) (“When it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth, and the Congress taketh away.”).

14. *E.g.*, *Dow Jones & Co. v. Ablaise Ltd.*, 606 F.3d 1338, 1348 (Fed. Cir. 2010); *Laughlin v. Kmart Corp.*, 50 F.3d 871, 874 (10th Cir. 1995); *Prof'l Managers' Ass'n v. United States*, 761 F.2d 740, 745 (D.C. Cir. 1985).

15. *E.g.*, Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 491–92 (1966); Qian A. Gao, Note, “Salvage Operations Are Ordinarily Preferable to the Wrecking Ball”: Barring Challenges to Subject Matter Jurisdiction, 105 COLUM. L. REV. 2369, 2381 (2005).

16. See, e.g., Bruce A. Wagman, Note, *Second Bites at the Jurisdictional Apple: A Proposal for Preventing False Assertions of Diversity of Citizenship*, 41 HASTINGS L.J. 1417, 1430–32 (1990); Eric Kades, *The Law and Economics of Jurisdiction* (William & Mary Law Sch. Research Paper No. 09-11, 2009), available at <http://ssrn.com/abstract=1431959>.

17. Dobbs, *supra* note 15, at 492; Gao, *supra* note 15, at 2371.

to jurisdiction's social cost, many of these scholars unfortunately have been either indifferent or overtly hostile to the important structural interests underlying nonwaivable jurisdictional rules.¹⁸

In this respect, courts and commentators are talking past one another when it comes to federal jurisdiction. Remarkably, they increasingly resort to discordant, monistic theories of jurisdictional value, which fail to consider the full range of interests implicated by jurisdictional rules.¹⁹ This is further complicated by the fact that the two sides are talking about values that are fundamentally incommensurable—there is no single unit of measurement that we can use to weigh structural values such as “separation of powers” against efficiency interests such as “litigation waste.”²⁰ Indeed, perhaps the most surprising aspect of the debate on jurisdictional nonwaivability is that it is not a debate at all.

I aim to provoke a real debate on jurisdictional nonwaivability by advancing two primary claims. First, I argue that jurisdictional values are inherently pluralistic and multipolar, and that courts and rule makers should seek equilibrium among values when making jurisdictional rules. In practice, nonwaivable jurisdictional rules are pluralistic because they implicate *both* structural *and* efficiency values—interests that are fundamentally incommensurable. Courts and rule makers should not simply attempt to maximize a single set of jurisdictional values, nor should they force incommensurable structural and efficiency interests through a cost-benefit analysis. Instead, they should take a full inventory of relevant interests, and formulate jurisdictional rules that achieve equilibrium among those values.

Second, using an equilibration approach, I advance a proposal to solve jurisdiction's social cost that accommodates structural and efficiency values: Federal courts should adjudicate and resolve all subject-matter jurisdiction questions at the outset of litigation. The rules should require district courts to affirmatively certify the existence of jurisdiction in every case; after that point, objections to statutory federal

18. See AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 366 (1969) [hereinafter ALI STUDY] (labeling jurisdictional nonwaivability a “fetish”); Dobbs, *supra* note 15, at 525 (arguing that jurisdictional nonwaivability is “justifiable only on a radical view of ‘states’ rights”).

19. Monistic theories consider only one value or, more broadly construed, one homogeneous set of values. See Steven J. Burton, *Normative Legal Theories: The Case for Pluralism and Balancing*, 98 IOWA L. REV. 535, 537 (2013).

20. See, e.g., Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994) (“Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.”).

jurisdiction would be waived. To further accommodate structural and efficiency interests, appellate courts should have discretion to immediately review jurisdictional orders when the benefits of doing so outweigh the costs. Lastly, federal courts should use the threat of sanctions to deter private-party abuse of jurisdictional rules.

This Article proceeds in three parts. Part I outlines a pluralistic theory of jurisdiction. It examines the dueling monistic theories of jurisdictional value advanced by courts and commentators. Courts focus on structural interests; commentators emphasize efficiency concerns. Neither theory considers a full range of relevant values, and both mask the reality that jurisdictional values are inherently multipolar and incommensurable. I conclude that courts and rule makers should adopt an equilibration approach, adopting rules that achieve equilibrium among all relevant jurisdictional values.

As part of an equilibration approach, Part II deconstructs the various structural and efficiency values underlying nonwaivable jurisdictional rules. Looking first at structural values, I emphasize that separation of powers and federalism are not as monolithic as they first appear; instead, federal courts can and must play a key role in asserting federal and judicial prerogatives in jurisdictional disputes. As for efficiency values, I attribute jurisdiction's social cost to several perverse private-party incentives from nonwaivable jurisdictional rules—those rules induce plaintiffs to file jurisdictionally suspect lawsuits, motivate defendants to adopt a wait-and-see approach to jurisdictional litigation, and can even encourage plaintiffs to belatedly challenge jurisdiction. Worse yet, there are inadequate incentives for federal courts to ferret out jurisdictional defects early on in the litigation process.

Finally, Part III outlines my proposal for solving jurisdiction's social cost by achieving equilibrium among jurisdictional values. It first offers a critique of existing proposals to alter nonwaivable jurisdictional rules. It then outlines a series of changes that would accommodate both structural and efficiency values, including early jurisdictional rulings, a cut-off point for jurisdictional objections, interlocutory appeal of jurisdictional orders, and sanctions to deter abuse by litigants.

I. A PLURALISTIC THEORY OF JURISDICTION

This Part introduces the core values underlying jurisdictional nonwaivability, situating my argument within the existing case law and literature on federal court subject-matter jurisdiction. It shows that

defenders and critics of nonwaivable jurisdictional rules are largely talking past one another. Judges tend to frame jurisdiction as a structural right;²¹ many commentators focus primarily on the inefficiency of nonwaivable jurisdictional rules.²² I contend that this divergence reflects overly monistic theories of jurisdictional value, which ignore the pluralistic and incommensurable nature of jurisdictional interests.²³ I conclude that courts and rule makers should aim for equilibrium among these pluralistic interests, rather than focusing on a single value set.²⁴

A. *Structural Values*

Federal courts frame jurisdiction in terms of structural values. When adjudicating jurisdictional issues, they frequently reference federalism,²⁵ and “the avoidance of needless conflict between state and federal courts.”²⁶ Courts also emphasize separation-of-powers concerns—specifically, Congress’s constitutional power to define jurisdictional boundaries.²⁷

Judges invoke these structural values as primary justifications for jurisdictional nonwaivability.²⁸ They cast their obligation to raise jurisdictional defects at any time as essential to “the nature and limits of the judicial power”²⁹ and “the characterization of the federal sovereign.”³⁰ And they insist that inflexible adherence to jurisdictional restrictions is necessary because jurisdiction is “an essential ingredient of separation and equilibration of powers.”³¹

This rhetoric suggests that federal judges view jurisdictional nonwaivability as a function of structural rights, rather than individual

21. *See infra* Part I.A.

22. *See infra* Part I.B.

23. *See infra* Part I.C.

24. *See infra* Part I.D.

25. *See, e.g.,* *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574, 586–87 (1999); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 505 (1975) (Rehnquist, J., dissenting); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971).

26. *Mapp v. Ohio*, 367 U.S. 643, 657–58 (1961); *see also* *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970) (“Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case.”).

27. *See, e.g.,* *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993).

28. *See, e.g.,* *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

29. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (quoting *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

30. *Ins. Corp. of Ir.*, 456 U.S. at 702.

31. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

rights.³² When a federal court disregards jurisdictional limits, it exercises power not authorized by the people's elected representatives, and usurps state judicial authority over the case.³³ Courts strictly enforce limitations on their own jurisdiction to guard against such intrusions, thus ensuring that they remain the "least dangerous branch."³⁴

When viewed this way, the nonwaivability of jurisdictional rules makes sense. In contrast to waivable individual due process rights (such as objections to personal jurisdiction³⁵ or the right to notice and a prior hearing³⁶), subject-matter jurisdiction protects *society at large* from unconstitutional judicial overreach.³⁷ Thus, in theory, jurisdictional limitations should not be waivable at the whim of individual litigants.

Among the bench, this notion of jurisdiction-as-structural-right almost always trumps other considerations, such as efficiency or economic waste.³⁸ Courts repeatedly emphasize that jurisdiction is a threshold requirement, and "no amount of 'prudential reasons' or perceived increases in efficiency" can justify adjudication when jurisdiction does not exist.³⁹ Indeed, one judge has even stated the "notion of judicial efficiency . . . is *essentially irrelevant*" to jurisdictional analysis in the federal courts.⁴⁰

Admittedly, this sweeping rhetoric is somewhat misleading. Efficiency concerns are not irrelevant; instead, those interests seep into

32. See, e.g., Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1541–43 (2007) (arguing that federal court subject-matter jurisdiction is a structural right); see also Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 4–5 (2009) (noting that individual rights provide recourse against government conduct targeting individuals, while structural rights protect all citizens against government conduct threatening the structure of the democratic system).

33. See 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3522, at 100, 125–26 (3d ed. 2008).

34. THE FEDERALIST NO. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

35. *Ins. Corp. of Ir.*, 456 U.S. at 702–03 ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").

36. E.g., *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972).

37. See *Ins. Corp. of Ir.*, 456 U.S. at 701–02; see also Vladeck, *supra* note 32, at 1543–44.

38. See, e.g., *McBeth v. Himes*, 598 F.3d 708, 722 (10th Cir. 2010) (rejecting "the notion that efficiency for the parties and the court can provide a reason to overlook a jurisdictional deficiency").

39. *Dow Jones & Co. v. Ablaise Ltd.*, 606 F.3d 1338, 1348 (Fed. Cir. 2010); see also *Laughlin v. Kmart Corp.*, 50 F.3d 871, 874 (10th Cir. 1995).

40. *Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 353 (5th Cir. 2012) (Clement, J., concurring in part and dissenting in part) (emphasis added); see also *Prof'l Managers' Ass'n v. United States*, 761 F.2d 740, 745 (D.C. Cir. 1985) (holding that federal courts lack the power to decide cases for which they have no jurisdiction, regardless of whether doing so would be efficient).

judicial opinions on jurisdictional issues from time to time.⁴¹ But, at the very least, federal court judges still feel the need to hide behind structural reasoning, if for no other reason than because they believe that it is the duty of Congress—not the courts—to weigh efficiency interests in the context of federal jurisdiction.⁴²

B. *Efficiency Values*

In contrast to this emphasis on structural values by federal judges, many scholars reason from efficiency values and focus on the social cost of jurisdictional nonwaivability.⁴³ In particular, commentators point to the litigation waste resulting from belated jurisdictional dismissals.⁴⁴ Because courts must dismiss cases lacking jurisdiction at any time (even for the first time on appeal), they sometimes dismiss actions on jurisdictional grounds after the parties have spent hundreds of thousands of dollars on discovery, motions practice, and perhaps even trial.⁴⁵

In addition to criticizing this waste, commentators argue that nonwaivability converts jurisdictional defects into strategic trump cards,⁴⁶ resulting in needlessly duplicative litigation. Parties with

41. *See, e.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 315 (2005) (analyzing the effect that an exercise of jurisdiction will have on federal court caseloads, vis-à-vis “the federal-state division of labor”); *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 (1996) (referring to “considerations of finality, efficiency, and economy” in the context of diversity jurisdiction).

42. For example, rather than authorizing the full scope of diversity jurisdiction allowable under Article III, Congress has limited diversity jurisdiction to cases in which there is complete diversity and a minimum amount in controversy. *See* 28 U.S.C. § 1332(a) (2012). The effect is that federal district court dockets are more manageable than they otherwise would be under the full scope of Article III jurisdiction.

43. *E.g.*, Dobbs, *supra* note 15, at 492 (arguing that jurisdictional nonwaivability is “inefficient”); Gao, *supra* note 15, at 2381 (noting that jurisdictional nonwaivability “hinder[s] the goals of fairness and efficiency”).

44. *See, e.g.*, William Marshall, *The “Facts” of Federal Subject Matter Jurisdiction*, 35 DEPAUL L. REV. 23, 26 (1985) (lamenting the “considerable expense, delay, and inconvenience to the parties” that results from belated jurisdictional dismissals); H.A. Stephens, Jr., *Estoppel to Deny Federal Jurisdiction—Klee and Di Frischia Break Ground*, 68 DICK. L. REV. 39, 40 (1963) (observing that nonwaivable jurisdictional rules incur an “incalculable waste of time, effort, energy, and money”); Wagman, *supra* note 16, at 1432 (arguing that “shifting cases to state courts after substantial progress has been made is costly and duplicative”); Kades, *supra* note 16, at 1 (noting that when a case is dismissed, “all of the resources expended by the parties and society in the adjudication are rendered worthless”).

45. *E.g.*, *Builders Mut. Ins. Co. v. Dragas Mgmt.*, 497 F. App'x 313, 315–18 (4th Cir. 2012) (appellate court vacated summary judgment on jurisdictional grounds, after more than two years of litigation); *Firstenberg v. City of Santa Fe*, 696 F.3d 1018, 1020 (10th Cir. 2012) (appellate court noticed jurisdictional defect after the parties had already completed a full round of briefing).

46. *See, e.g.*, Dobbs, *supra* note 15, at 492; Gao, *supra* note 15, at 2371.

knowledge of a jurisdictional defect can remain silent, choosing to raise the defect only if they receive an unfavorable result on the merits, in order to wipe the slate clean.⁴⁷ Nothing prevents a party who invoked jurisdiction at the outset of litigation from attacking jurisdiction after suffering an adverse decision on the merits.⁴⁸ Thus, nonwaivable jurisdictional rules can incentivize strategically inefficient behavior.

Of course, this focus on efficiency does not mean that scholars have ignored structural values. Commentators frequently point out that federal courts are courts of limited jurisdiction,⁴⁹ and often refer in passing to the structural interests that animate nonwaivable jurisdictional rules.⁵⁰ In particular, Michael Collins suggests that a focus on the efficiency of jurisdictional rules risks compromising essential structural values, and “seems calculated more toward guaranteeing a lack of care in the invocation of jurisdiction and in the courts’ consideration of it than toward the conservation of any significant resources.”⁵¹

That said, much of the existing scholarship on jurisdictional nonwaivability is largely indifferent—if not overtly hostile—to structural values. Although a few scholars attempt to harmonize structural and efficiency values,⁵² others are not so kind. Dan Dobbs has argued that nonwaivable jurisdictional rules produce “egregiously bad results” that “no high-minded talk of states’ rights or limited judicial power can obscure.”⁵³ And the American Law Institute has labeled jurisdictional nonwaivability a “fetish” that is “wholly inconsistent with sound judicial administration” and that “can only serve to diminish respect for a system that tolerates it.”⁵⁴

47. See, e.g., Dobbs, *supra* note 15, at 492; Gao, *supra* note 15, at 2371.

48. See, e.g., *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 7–8, 16–18 (1951) (defendant removed the case from state court to federal court, lost at trial, then successfully argued that the federal court lacked jurisdiction); *Capron v. Van Noorden*, 6 U.S. 126, 126–27 (1804) (plaintiff invoked federal court diversity jurisdiction, lost at trial, then successfully raised a jurisdictional defect).

49. See, e.g., Stephens, *supra* note 44, at 39; Gao, *supra* note 15, at 2372.

50. See, e.g., Marshall, *supra* note 44, at 25; Kades, *supra* note 16, at 1.

51. Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1895 (2007).

52. See, e.g., *id.* at 1883 (suggesting that, at least historically, jurisdictional waivability appears to be compatible with constitutional and statutory limits on federal jurisdiction); Gao, *supra* note 15, at 2401–02 (insisting that her proposal for an early cut-off of jurisdictional challenges would not offend federalism concerns).

53. Dobbs, *supra* note 15, at 524–25. Professor Dobbs does not pull punches. He argues that nonwaivable jurisdictional rules are “justifiable only on a radical view of ‘states’ rights,” *id.* at 525, and are based on “a misconceived notion, surely inherited from the Middle Ages, that it would be insulting for federal courts to try cases ‘belonging’ to state courts.” *Id.* at 529.

54. ALI STUDY, *supra* note 18, at 366; see also Dobbs, *supra* note 15, at 524.

C. *Problems Presented by the Structural-Efficiency Dichotomy*

I argue that these divergent structural and efficiency rationales reflect overly monistic theories of jurisdictional value, which fail to consider the full range of interests implicated by jurisdictional rules.⁵⁵ I also contend that the fractured dialogue among judges and commentators masks a significant obstacle for efforts to solve jurisdiction's social cost: Many of the values underlying federal jurisdiction are fundamentally incommensurable, and cannot be weighed out through a cost-benefit analysis.⁵⁶

1. *Value Monism*

Theories about law are either monistic or pluralistic. Monistic theories consider only one value or, more broadly construed, one homogeneous set of values.⁵⁷ The aim is to avoid the need to balance conflicting interests.⁵⁸ In contrast, pluralistic theories consider multiple competing interests.⁵⁹ Although pluralism can take many specific forms,⁶⁰ the overriding goal of a pluralistic approach is to balance several relevant values, rather than focusing on a single value set.⁶¹

By homing in on a single set of values, defenders and critics of jurisdictional nonwaivability advance competing monistic theories of jurisdictional value.⁶² As demonstrated above, judges invoke structural interests when discussing nonwaivable jurisdictional rules, but usually refuse to consider efficiency values.⁶³ Scholars focus on efficiency interests, often neglecting structural values.⁶⁴ Thus, each group has a

55. See *infra* Part I.C.1.

56. See *infra* Part I.C.2.

57. See Burton, *supra* note 19, at 537; Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1412 (2001) (observing that "monism is implicated any time an adjudicative choice is reduced to a single dimension").

58. Burton, *supra* note 19, at 537. For example, methods of constitutional interpretation such as formalism or originalism often rely on a single inquiry or value, to the exclusion of other considerations. Scharffs, *supra* note 57, at 1412–13.

59. Burton, *supra* note 19, at 537.

60. See *id.* at 544–45, 544 n.20 (distinguishing several varieties of pluralism).

61. *Id.* at 537. For example, some scholars have advanced pluralistic methods for constitutional interpretation, which draw on multiple principles or sources. See, e.g., Stephen M. Griffen, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1762–67 (1994).

62. Neither side identifies its theories as monistic. Nonetheless, I contend that structural and efficiency theories of jurisdictional nonwaivability "have monistic ambitions," even if "they are unspoken." Scharffs, *supra* note 57, at 1413.

63. See *supra* notes 25–42 and accompanying text.

64. See *supra* notes 43–54 and accompanying text.

tendency to default to a single value set, at the exclusion of other relevant interests.⁶⁵

Monistic theories are problematic in this context for at least two reasons. First, jurisdictional values are plural, not singular. The application of nonwaivable jurisdictional rules implicates *both* structural *and* efficiency values. Neither litigants nor courts can ignore constitutional or statutory restrictions on subject-matter jurisdiction when it would be efficient to do so. And even if a belated jurisdictional dismissal accommodates structural values, it does not absolve the parties of their sunk litigation costs. Simply put, monistic theories do not reflect jurisdictional reality.

Second, these monistic theories are problematic because they inevitably lead courts and commentators to seek maximization of a single value set, while ignoring other relevant considerations.⁶⁶ In the context of jurisdictional rules, the implicit goal of both sides appears to be maximization. Courts maximize structural values by insisting on nonwaivability.⁶⁷ Commentators maximize efficiency values by proposing jurisdictional cut-off points at an early stage of litigation.⁶⁸ Neither side is considering all relevant values.

In a sense, existing monistic approaches to jurisdictional value are analogous to baking a cake with either dry ingredients or wet ingredients, but not both. Maximizing only one value set while ignoring the other ruins the cake. Likewise, monistic theories of jurisdictional value are undesirable because they fail to consider all interests implicated by nonwaivable jurisdictional rules.

65. Although I cast each of the two relevant value sets (structural values and efficiency values) as monistic and homogenous, several sub-interests admittedly comprise each set of values, and those sub-interests may be in conflict at times. Within Article III structural values, for example, a specific jurisdictional rule may accommodate separation-of-powers concerns while still offending notions of federalism. I do not mean to suggest that structural and efficiency values are incapable of sub-categorization; instead, my point here is that judges and critics primarily resort to two different—and sometimes conflicting—value sets when discussing nonwaivable jurisdictional rules.

66. See Scharffs, *supra* note 57, at 1412 (“Maximization is an almost necessary corollary of monism: if there is only one relevant value, then it is difficult to imagine a persuasive reason for choosing any option other than the one that will maximize the realizations of that value.”).

67. See, e.g., *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975).

68. See, e.g., ALI STUDY, *supra* note 18, at 64 (proposing that parties be required to raise jurisdictional issues before “the commencement of trial on the merits” or, alternatively, before a “decision . . . that is dispositive of the merits”); Gao, *supra* note 15, at 2405 (proposing that jurisdictional challenges be foreclosed when “the initial pleadings, answers, and motions under Federal Rule of Civil Procedure 12 have been made”).

2. *Incommensurability*

In addition to the trappings of maximization, existing monistic theories of jurisdictional value assume away problems associated with incommensurability.⁶⁹ I argue that jurisdictional values are not only pluralistic; they are to some degree incommensurable—structural and efficiency values are not always capable of being reduced to (or measured by) a common value or metric. Because some jurisdictional values are incommensurable, we cannot weigh them out through cost-benefit analysis. We must use a different approach.

At the risk of oversimplification, values are commensurable if they can be expressed in terms of a single, common value or metric.⁷⁰ Obviously, many goods are commensurable because we can reduce their worth to dollars.⁷¹ Some metrics—such as inches and centimeters—provide different ways to measure a particular value, and are commensurable because we can express one metric in terms of the other.⁷²

But other values or items are irreducible in terms of a common metric, and are thus incommensurable. Examples include weight and length;⁷³ a career in the law versus a career as a clarinetist;⁷⁴ a Mozart concerto versus one of Bob Dylan's hit albums;⁷⁵ and the choice between hiking in England and riding horses in Kentucky.⁷⁶ In each of these pairings, there is no common, all-encompassing value that fully expresses all considerations that would be relevant to a choice between the two options.⁷⁷

Incommensurability does not mean we should refuse to choose between our options, however. Rational choice is possible among incommensurable values.⁷⁸ After all, some law school graduates choose

69. See Scharffs, *supra* note 57, at 1413.

70. Sunstein, *supra* note 20, at 796. See generally INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1997); Matthew Alder, *Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998).

71. Cass R. Sunstein, *Incommensurability and Kinds of Valuation: Some Applications in Law*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 70, at 238.

72. Scharffs, *supra* note 57, at 1390.

73. *Id.* at 1391.

74. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 332 (1986).

75. See Sunstein, *supra* note 20, at 799–800.

76. Sunstein, *supra* note 71, at 240.

77. See Scharffs, *supra* note 57, at 1390.

78. E.g., Gregory S. Alexander, *Pluralism and Property*, 80 *FORDHAM L. REV.* 1017, 1019 (2011); Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a*

careers as clarinetists, and some clarinetists choose careers as lawyers.⁷⁹ Within the law, legislators, judges, and rule makers often must choose among two or more incommensurable values.⁸⁰ When deciding among plural, incommensurable values, the goal should be a rationally defensible choice, supported by reasoning that is persuasive to others.⁸¹

Admittedly, these choices will be uncertain and debatable to some extent, given that there is no common metric that we can use to definitively compare incommensurable values.⁸² As several commentators have argued, however, we should recognize and embrace these uncertainties, rather than forcing incommensurable values through a one-dimensional cost-benefit analysis, which can have difficulty measuring unquantifiable effects.⁸³

The interests underlying jurisdictional nonwaivability illustrate the challenges associated with incommensurable values. There is no single, common value that can fully express all considerations relevant to a choice between structural values (such as federalism and separation of powers) and efficiency values (such as a desire to avoid litigation waste).⁸⁴ For example, many efficiency values can be reduced to a monetary amount; at least some structural values likely cannot.⁸⁵ And

Reconceptualization of Rational Choice in Contract Law, 146 U. PA. L. REV. 1235, 1259 (1998).

79. For example, lawyer/clarinetist Paul Green turned down the co-principal clarinet position with the Jerusalem Symphony Orchestra in order to attend law school; after several years as a practicing attorney and law professor at Brooklyn Law School, he returned to a full-time career as a clarinetist. *About Paul Green*, PAULGREENMUSIC.COM, <http://www.paulgreenmusic.com/about-paulgreen.php> (last visited Aug. 10, 2013). Incommensurability of the values underlying these careers did not prevent him from choosing between the two—not once, but twice.

80. See Scharffs, *supra* note 57, at 1410–11.

81. See *id.* at 1383; Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009) (insisting that “despite the incommensurability of values, rational choice remains possible through reasoned deliberation,” including “non-deductive, non-algorithmic reflection” that is “both principled and contextual,” and that draws upon “critical judgment, tradition, experience, and discernment.”).

82. Scharffs, *supra* note 57, at 1404.

83. For critiques of cost-benefit analysis based on problems associated with incommensurability, see, e.g., Frank Ackerman & Liza Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1553, 1563–64 (2002); Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, 29 J. LEGAL STUD. 971, 986–89 (2000).

84. Indeed, there may not even be a common value or metric that we can use to fully compare sub-categories of each value set. For example, how does one measure effects on federalism versus effects on separation of powers?

85. Arguably, some structural values underlying federal jurisdiction can be quantified and weighed under a metric commensurable with efficiency values. For example, Judge Richard Posner has used economic analysis to examine the optimal scope of federal jurisdiction. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 273–303 (1996). As Judge Posner

although consideration for the proper role of federal courts within the American system of government is a common thread among structural values,⁸⁶ efficiency values are likely agnostic to such concerns. In this way, jurisdictional values are incommensurable.⁸⁷

In light of the incommensurability of these values, it would be futile to use a cost-benefit analysis to sort out the advantages and disadvantages of nonwaivable jurisdictional rules.⁸⁸ Suppose that we were able to quantify the average efficiency gains that would result from making jurisdictional restrictions waivable at the whim of the parties, reducing those gains to a dollar amount. Even if this were possible, how would we weigh these monetary efficiency gains against structural values that are decidedly nonmonetary in nature?⁸⁹ For example, if waivable jurisdictional rules would save a federal court litigant \$5,000 on average, does that outweigh the corresponding incursion on federalism values that would result from federal courts hearing disputes that belong in the state court system?⁹⁰

A cost-benefit analysis between these incommensurable values is difficult, if not impossible.⁹¹ Revisiting the cake analogy above, weighing incommensurable jurisdictional values would be akin to weighing the costs of a half-cup more sugar versus the benefits of a half-hour more baking time. Although both sugar and baking time are

himself admits, however, not all structural sub-values can be analyzed in this way. *See id.* at 275 (“Although my discussion will be in a scientific spirit, I emphasize that the relation between the states and the federal government cannot be regarded solely as an expedient one . . .”).

86. *See, e.g.*, Henry P. Monaghan, *Federal Courts, Cases and Materials*, 83 HARV. L. REV. 1753, 1754 (1970) (book review).

87. Note that I argue that these values are incommensurable, not that they are incomparable. The absence of a single value or metric to *fully express* structural and efficiency interests does not mean there is *no* basis for rational comparison between those interests. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 973 (1987) (“Competing interests are not, by definition, incomparable. Apples and oranges can be placed on a fruit scale or assigned a price in dollars per pound.”).

88. *See* Ackerman & Heinzerling, *supra* note 83, at 1563–64; Richardson, *supra* note 83, at 986–89.

89. *See, e.g.*, John M. Heyde, Comment, *Is Contingent Valuation Worth the Trouble?*, 62 U. CHI. L. REV. 331, 353 (1995) (noting “that monetary values, when encouraged by the law, tend to drive out other important, nonmonetary values”).

90. *See* Kades, *supra* note 16, at 1, 3 (referencing cost-benefit analysis as a potential tool for evaluating the desirability of nonwaivable jurisdictional rules, but declining to weigh structural and efficiency values).

91. This difficulty is consistent with the tendency among scholars to identify the interests underlying nonwaivable jurisdictional rules, while declining to resolve the tension between those interests. *See, e.g.*, Collins, *supra* note 51, at 1895; Marshall, *supra* note 44, at 25–26; Stephens, *supra* note 44, at 39–40.

important values, they affect the cake in fundamentally different ways. There is no direct trade-off between these values, rendering cost-benefit analysis and other weighing approaches unhelpful.

D. *The Search for Equilibrium Among Competing Values*

How then can we reason about—and resolve—conflicts among jurisdictional values? In light of the inadequacy of maximization and weighing approaches, I argue that courts and rule makers must take a full inventory of relevant jurisdictional interests, and seek equilibrium among those values. This new approach recognizes that jurisdictional values are both pluralistic and incommensurable, and would ensure that jurisdictional rules more accurately reflect the true nature of the various interests at play.

Initially, we must resist the temptation to force jurisdictional values through a bipolar constitutional balancing test.⁹² When considering the scope of constitutional rights, courts tend to use balancing mechanisms that weigh an individual's right against the countervailing costs (usually the interests of the government).⁹³ This type of balancing is essentially a two-dimensional exercise in constrained maximization: it aims to maximize individual rights subject to any corresponding governmental interests that outweigh those rights.⁹⁴

Bipolar balancing is problematic for resolving conflicts among jurisdictional values, however, because those conflicts tend to be multipolar in nature.⁹⁵ In each case, consideration of jurisdictional issues can implicate a plurality of interests. First, the adjudication of jurisdictional issues obviously affects the benefits and costs of the parties before the court, as well as the court itself.⁹⁶ Second, any

92. See, e.g., Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1466 (2013) (noting that Article III “implies a ‘bipolar model of the lawsuit, which assumes a dispute between two unitary, diametrically opposed interests,’ rather than ‘a multipolar model in which the party structure is sprawling and amorphous’” (quoting Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 250 (1990))).

93. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970); see also Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 792 n.8 (2007) (noting that balancing “applies across the spectrum of constitutional rights”).

94. See Huq, *supra* note 92, at 1469 (“In individual rights matters, a judge’s core task involves balancing an individual’s constitutional privilege against the aggregated interests of society at large as represented by the government.”).

95. I do not contend that conflicts in jurisdictional values cannot be bipolar in nature; instead, I argue that most conflicts between these values are multipolar, implicating more than two broad categories of interests.

96. Kades, *supra* note 16, at 1 (identifying the litigation costs that accompany jurisdictional rules); see also Dustin E. Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105, 128–32

decision on jurisdiction that is binding or persuasive authority would affect nonparty incentives as well.⁹⁷ Third, the decision by a federal court to exercise (or not exercise) jurisdiction can affect the interests of a multitude of institutional actors—i.e., Congress's role in demarcating jurisdictional limits;⁹⁸ the delicate “federal balance” between state and federal governments;⁹⁹ and perhaps even a desire by one or more branches of the federal government to control the path of adjudication or limit judicial review.¹⁰⁰

Because jurisdictional values are multipolar, our goal should be equilibration, not maximization.¹⁰¹ Rather than maximizing particular interests or weighing values on a bipolar scale, courts and rule makers must promulgate jurisdictional rules by juggling a complex set of values.¹⁰² Initially, they should take a full inventory of the relevant interests at play.¹⁰³ They then should formulate a rule that achieves equilibrium among these values.¹⁰⁴ The goal is to find a rule that honors and accommodates all values, rather than maximizing one value set at the expense of another.

As an alternative way to think of this equilibrium approach, I appropriate a metaphor that Brett Scharffs has invoked in the context of reasoning about incommensurables—the metaphor of a recipe.¹⁰⁵ Professor Scharffs notes that choices that encompass all relevant values implicitly rely on judgments as to “which values should be combined in

(2012) (discussing how personal jurisdiction rules alter private-party benefits and costs).

97. See, e.g., Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 227 (1999) (identifying the precedential value of judicial decisions as a public benefit of suit).

98. See, e.g., *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850).

99. E.g., *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring); see also JENNA BEDNAR, *THE ROBUST FEDERATION: PRINCIPLES OF DESIGN* 68–69 (Stephen Ansolabehere et. al. eds., 2009) (noting that federalism implicates various types of behavioral incentives among state and federal actors).

100. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 786–92 (2008).

101. Cf. Huq, *supra* note 92, at 1471–72 (noting that when the Supreme Court adjudicates structural issues, it “aims to strike an equilibrium among the branches,” rather than maximizing the power or interests of any one branch).

102. See *id.*

103. See Aleinikoff, *supra* note 87, at 977.

104. Ideally, this process would generate a jurisdictional rule that would apply across the board to all cases, eliminating the need for an ad hoc case-by-case balancing of jurisdictional values, and enhancing certainty. See MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* §§ 2.02–2.03 (1992) (contrasting “definitional” and “ad hoc” balancing).

105. Scharffs, *supra* note 57, at 1420–22.

what proportions to achieve an ideal of the type under consideration.”¹⁰⁶
This dovetails nicely with our cake analogy:

[J]ust as baking a good cake will not be a matter of putting in as much of each ingredient as possible, reaching an [all things considered] judgment will involve not an attempt to maximize as many of the relevant values as possible, but rather will involve an effort to find or fashion a solution that will result in the proper mixture of values in the proper quantities. There may also be analogies to matters of timing and technique that are relevant to following a recipe.¹⁰⁷

Thus, when reasoning about jurisdiction, it may be useful to view the underlying values as ingredients, and the optimal jurisdictional rule as a carefully refined recipe that combines those ingredients.

Fortunately, judges are familiar with this type of approach. To some extent, courts already balance multipolar interests and seek equilibrium when resolving conflicts between structural values.¹⁰⁸ For example, the Supreme Court’s description of both separation of powers and federalism suggests that it aims for equilibration of the component interests.¹⁰⁹

And yet, I do not pretend that it will be easy for courts to adopt an equilibration approach in the jurisdictional context. I anticipate two primary criticisms of the approach that I describe here. First, some may say that the process of describing component values and seeking equilibration among those interests is inherently subjective and untethered.¹¹⁰ Although I agree equilibration of jurisdictional values

106. *Id.* at 1421.

107. *Id.*

108. *See, e.g.*, *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (using a multipolar balancing test to assess the constitutionality of legislative courts); *United States v. Nixon*, 418 U.S. 683, 705–06 (1974) (rejecting absolute presidential immunity from judicial process, in part because of a “confrontation with other [separation-of-powers] values”).

109. *E.g.*, *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (“Separation of powers . . . operates on a horizontal axis to secure a proper balance of legislative, executive, and judicial authority.”); *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (“[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.”); *see also* Benjamin R. Civiletti, *The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 43 OP. ATT’Y GEN. 275, 276 (1980) (describing separation of powers as “the equilibrium established within our constitutional system”).

110. Commentators already have raised this objection in response to courts’ tendency to seek equilibration among structural values. *See, e.g.*, M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1194 (2000) (arguing that, in the context of separation of powers, “[w]e do not know what ‘balance’ means, and we do not know how it is

cannot produce a single answer with absolute certainty,¹¹¹ it is not my intention to do so. Instead, my goal is to let the debate begin—to encourage a dialogue among courts and scholars that considers the full range of jurisdictional values, with the shared goal of improving jurisdictional rules.

Second, the approach I advocate here undoubtedly is contrary to the traditional notion of rigid, inflexible jurisdictional rules. As a result, some will point out that this simply is not how jurisdiction works.¹¹² Indeed, it is possible that this line of attack would lead courts and commentators to reject an equilibration approach out of hand.¹¹³

That said, I am not convinced that jurisdiction is as unyielding as some suggest. After all, judicially-created limitations exist that restrict the invocation of jurisdictional defects—most notably, litigants cannot collaterally attack the jurisdictional basis of a final judgment.¹¹⁴ Additionally, during the first century of the Republic, federal jurisdiction was malleable, and waivable by the parties in some instances.¹¹⁵ During that time, federal courts relied on the pleadings to determine the existence of jurisdiction,¹¹⁶ and it was relatively easy for parties to manipulate federal jurisdiction through collusion.¹¹⁷ And to the extent that our modern mandatory and rigid jurisdictional norms are grounded

achieved or maintained”).

111. Stated another way, multiple equilibria may be possible in the context of jurisdictional rules—several different combinations of jurisdictional values may produce a stable (and perhaps even desirable) jurisdictional rule.

112. *See, e.g.*, Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1441 (2011) (noting that courts and commentators repeatedly reference the unbending nature of jurisdictional rules, “entrench[ing] the idea of jurisdiction as a rigid antipode to nonjurisdictional law”); Laura S. Fitzgerald, *Is Jurisdiction Jurisdiction?*, 95 NW. U. L. REV. 1207, 1214 (2001) (“The Supreme Court has always declared subject matter jurisdiction an absolute precondition to the exercise of federal judicial power.”).

113. *See, e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (describing subject-matter jurisdiction as “inflexible and without exception” (quoting *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884))); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (same).

114. *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982).

115. *See, e.g.*, Collins, *supra* note 51, at 1838–40; Fitzgerald, *supra* note 112, at 1245–73.

116. Collins, *supra* note 51, at 1838–40; *see also* *Sheppard v. Graves*, 55 U.S. (14 How.) 505, 510 (1853) (noting that “wherever jurisdiction shall be averred in the pleadings, . . . it must be taken *prima facie* as existing”).

117. Common law procedures traditionally required the defendant to file a plea in abatement in order to contest jurisdiction. *See* Collins, *supra* note 51, at 1838–39. A defendant’s failure to do so was tantamount to waiver of the jurisdictional objection. *Id.* at 1839.

in the commands of constitutional language,¹¹⁸ federal courts have shown a willingness to adopt multifaceted balancing approaches in similar contexts.¹¹⁹

II. DECONSTRUCTING JURISDICTIONAL VALUES

For these reasons, courts should adopt a pluralistic approach to jurisdictional questions, and should aim for equilibration among values, rather than using a categorical, monistic approach. In this Part, I catalogue the various values implicated by nonwaivable jurisdictional rules. Using the recipe metaphor, this Part provides our *mise en place*¹²⁰—a set of ingredients federal judges and rule makers should draw on when refining an optimal jurisdictional recipe.

I start by analyzing structural values underlying jurisdictional rules, including separation-of-powers and federalism concerns.¹²¹ I then examine the efficiency interests implicated by jurisdictional nonwaivability.¹²²

A. *Delineating Structural Values*

Federal court jurisdiction under Article III implicates “the two great structural principles of the Constitution—federalism and separation of powers.”¹²³ Courts tend to treat these two structural value sets as monolithic, deferring to the legislative prerogatives of Congress when discussing separation-of-powers values, and to the prerogatives of states when considering federalism values.

These structural values are not so simple, however. In reality, the structural values underlying jurisdictional rules are decidedly pluralistic.

118. See U.S. CONST. art. III, §§ 1–2.

119. Judicial interpretation of the First Amendment provides an example of courts’ willingness to depart from seemingly absolute constitutional language. Although the Constitution states that “Congress shall make no law respecting an establishment of religion,” U.S. CONST. amend. I (emphasis added), the Supreme Court has used several multifaceted tests for determining whether government conduct violates the Establishment Clause. See, e.g., *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 592–94 (1989) (applying endorsement test); *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (providing a three-pronged test for Establishment Clause violations).

120. See MARGUERITE-MARIE DUBOIS, *DICTIONNAIRE FRANÇAIS ANGLAIS* 477 (1981) (defining “mise en place” as “placing, putting, setting”); Pete Wells, *Cooking with Dexter: Prep School*, N.Y. TIMES MAG., Sept. 14, 2010, at 40 (noting that “mise en place” refers “to the practice of having all the ingredients and tools set to go before you even light the stove”).

121. See *infra* Part II.A.

122. See *infra* Part II.B.

123. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 205 (1985).

I argue that separation-of-powers values include two discrete sets of sub-values, one focused on legislative prerogatives and the other on judicial prerogatives.¹²⁴ Similarly, in the context of jurisdictional rules, federalism implicates interests vital to states and the federal government; both Congress and the federal courts play essential roles in identifying and demarcating relevant sub-values.¹²⁵

1. Separation of Powers: Legislative and Judicial Prerogatives

In the jurisdictional context, judicial rhetoric casts separation of powers as a one-dimensional value: the role of the courts is to merely respect and effectuate jurisdictional boundaries, as defined by Congress. Federal judges repeatedly stress they are powerless to hear cases and controversies outside of their jurisdiction,¹²⁶ and point to Congress's broad power over such matters.¹²⁷ They also insist that transcending jurisdictional boundaries would amount to judicial usurpation of the federal constitutional design.¹²⁸ Taken at face value, these statements suggest separation of powers is a one-way street: legislative prerogatives trump all other considerations, and Congress alone gets to decide which cases federal courts hear.

This conventional notion of separation of powers is somewhat incomplete, however. Nonwaivable jurisdictional rules implicate at least *two* discrete separation-of-powers sub-values: legislative prerogatives to demarcate jurisdictional boundaries, and judicial prerogatives to preserve the essential role of federal courts.

Congress clearly has broad power over federal jurisdiction.¹²⁹ It has significant power to curtail or eliminate the Supreme Court's appellate jurisdiction,¹³⁰ and has wide power over the jurisdiction of the lower

124. *See infra* Part II.A.1.

125. *See infra* Part II.A.2.

126. *E.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998); *United States v. Pomales-Lebron*, 513 F.3d 262, 269 (1st Cir. 2008); *Orff v. United States*, 358 F.3d 1137, 1149 (9th Cir. 2004); *Crotwell v. Hockman-Lewis Ltd.*, 734 F.2d 767, 769 (11th Cir. 1984).

127. *See, e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

128. *E.g.*, *Stone v. Powell*, 428 U.S. 465, 515 (1976) (Brennan, J., dissenting); *Fed. Mar. Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 523 n.8 (1958).

129. Many scholars have emphasized this point over the years. *See, e.g.*, Paul Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1037–41 (1982); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 917–22 (1984); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965).

130. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).

federal courts.¹³¹ As one judge has noted, “[w]hen it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth, and the Congress taketh away.”¹³² Thus, Congress arguably is the only institutional actor with the ability to consider the policy interests underlying jurisdictional rules—i.e., litigation incentives, litigation waste, and the allocation of cases between state and federal courts.

Congressional power over federal jurisdiction is not unlimited, however.¹³³ Legislative demarcation of jurisdictional boundaries must comply with constitutional provisions external to Article III, such as the Due Process Clause and Suspension Clause.¹³⁴ Several scholars also have argued that Congress cannot limit jurisdiction in a way that interferes with the essential role of the federal courts in the constitutional design.¹³⁵ Moreover, federal judges retain at least some control over the parameters of their own jurisdiction—for example, judicially-created abstention doctrines allow courts to stay or dismiss cases for which jurisdiction exists.¹³⁶

Thus, in reality, separation of powers is a two-way street, and it would be inaccurate to frame jurisdictional values as exclusively rooted in legislative prerogatives. Jurisdiction implicates values important to the judiciary as well—something that federal judges explicitly recognize

131. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (stating that “Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies,” and that “[c]ourts created by statute can have no jurisdiction but such as the statute confers.”).

132. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973).

133. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953) (rejecting the notion that Congress has plenary control over federal jurisdiction).

134. See *Boumediene v. Bush*, 553 U.S. 723, 771–92 (2008) (holding that Congress must comply with the requirements of the Suspension Clause when limiting federal court review of enemy combatant determinations by Combatant Status Review Tribunals); *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) (“[T]he exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment.”).

135. E.g., Hart, *supra* note 133, at 1365; Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201–02 (1960). Some have even suggested that Article III obligates Congress to vest *some* federal court with jurisdiction over certain cases. E.g., Amar, *supra* note 123, at 206; Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 749–50 (1984); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 532–33 (1974).

136. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 783 (5th ed. 2007) (noting that abstention doctrines are “judicially created rules” that allow federal courts to avoid deciding some matters “even though all jurisdictional and justiciability requirements are met”).

from time to time, particularly when pushing back against legislative efforts to circumscribe meaningful judicial review.¹³⁷ Granted, judges often assert judicial prerogatives subtly, framing their interests in ways that appear consistent with the prerogatives of other branches.¹³⁸ But my underlying point remains true: separation-of-powers values are multifaceted in the jurisdictional context. Both Congress and federal courts have skin in the game, and also the ability to craft jurisdictional rules.

2. *Federalism: State and Federal Prerogatives*

Judicial opinions on jurisdictional issues also have a tendency to cast federalism as a one-dimensional value. When discussing the implications of subject-matter jurisdiction, federal courts tend to emphasize state prerogatives, sometimes ignoring the interests of the federal government in the process.¹³⁹ The opinions that do reference federal interests frequently stress that Congress is the only actor that can define and assert those interests in our federal system.¹⁴⁰

State interests certainly are important. States have an interest in their own courts being able to hear disputes without undue interference by federal courts.¹⁴¹ Additionally, as Richard Fallon notes, one of the major premises of a Federalist model of federal jurisdiction is that “[s]tate courts are constitutionally as competent as federal courts to adjudicate

137. See, e.g., *Boumediene*, 553 U.S. at 771–92 (striking down the Detainee Treatment Act, partly on separation-of-powers grounds); *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1077 (N.D. Cal. 2013) (holding that the National Security Letter statute violates separation-of-powers principles because it “attempts to circumscribe a court’s ability to review the necessity of nondisclosure orders”).

138. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 173–77 (1803) (refusing to issue a writ of mandamus to Marbury on jurisdictional grounds, while establishing the power of judicial review); see also Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 771 (2005) (“As generations of American law students have learned, [Chief Justice] Marshall and his Court may have ‘lost the battle’ over Marbury’s commission, but they ‘won the war’ of judicial power by advancing the principle of judicial review.”).

139. See, e.g., *Anderson v. H&R Block, Inc.*, 287 F.3d 1038, 1041 (11th Cir. 2002) (referencing “the states’ authority to resolve disputes in their own courts,” but not interests associated with federal courts’ authority to resolve disputes), *rev’d on other grounds*, 539 U.S. 1 (2003). But see *In re Carter*, 618 F.2d 1093, 1098 (1980) (stating that under the federalism inquiry, courts must give “due regard for the constitutional allocation of powers between the state and federal systems”).

140. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) (noting that congressional limitations on federal jurisdiction “must be neither disregarded nor evaded”); *Chase Bank USA, N.A. v. City of Cleveland*, 695 F.3d 548, 553 (6th Cir. 2012) (noting that federal courts can adjudicate only those claims “that have been entrusted to them by a jurisdictional grant by Congress”).

141. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941).

federal issues.”¹⁴² To some extent, conveyance of jurisdiction to federal courts implies the opposite—that state courts are inadequate.¹⁴³ In this way, federal jurisdiction unquestionably implicates state interests.

Much like separation-of-powers concerns, however, federalism values are not monolithic. Legislative conveyance of federal court jurisdiction¹⁴⁴—as well as statutory authorization for removal of cases from state to federal court¹⁴⁵—reflects Congress’s judgment that significant *federal interests* justify the availability of a federal forum.¹⁴⁶ And at times it can even reflect Congress’s conclusion that federal courts provide a superior forum for the adjudication of certain matters.¹⁴⁷

Moreover, Congress is not the only federal actor that defines this federal interest. Courts also play an essential role in asserting and evaluating federal interests, sometimes at the expense of state court jurisdiction. For example, the judicially developed test for evaluating whether a state law claim presents a federal question explicitly requires a “substantial” and “serious federal interest.”¹⁴⁸ Conversely, the Supreme Court has cited state interests underlying federalism as the primary reason for its occasional abstention from exercising jurisdiction that otherwise exists.¹⁴⁹

142. Richard H. Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1153 (1988).

143. Section 1983—creating a claim for violations of federal constitutional rights by state actors—is perhaps the most telling example of a congressional judgment that state courts are (or at least can be) inadequate. See 42 U.S.C. § 1983 (2012); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (“The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights . . .”).

144. See, e.g., 28 U.S.C. § 1330(a) (2012) (jurisdiction for actions against foreign states); *id.* § 1331 (federal question jurisdiction); *id.* § 1332 (diversity jurisdiction); *id.* § 1333 (admiralty and maritime jurisdiction).

145. See 28 U.S.C. § 1441 (2012) (providing for removal of civil actions).

146. See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 28 (1995), reprinted in 166 F.R.D. 49 (1996) (encouraging Congress to vest federal courts with jurisdiction over civil cases only when it “further[s] clearly defined and justified federal interests”).

147. See, e.g., 28 U.S.C. § 1338(a) (2012) (vesting federal courts with exclusive jurisdiction over copyright and patent claims). I do not mean to wade too far into the literature on federal and state court parity here. See generally RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 278–83 (6th ed. 2009) (citing literature and empirical studies on parity). As I have argued elsewhere, the structure of the Constitution—specifically Congress’s power to establish or not establish lower federal courts—seems to assume that parity can exist, while delegating judgment on matters of parity to Congress. See Dustin E. Buehler, *Revisiting Rooker-Feldman: Extending the Doctrine to State Court Interlocutory Orders*, 36 FLA. ST. U. L. REV. 373, 398–99 (2009).

148. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 313 (2005).

149. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 237–38 (1984).

In other words, much like separation of powers, federalism is a two-way street. It implicates both state prerogatives and federal prerogatives.¹⁵⁰ Furthermore, the legislative branch does not have a monopoly on defining federal interests—instead, both Congress and the federal judiciary play key roles in identifying and guarding the federal government's prerogatives.¹⁵¹

3. *Working with Structural Values*

Any attempt to incorporate the full scope of these values into a new approach to jurisdiction begs the question: How do we work with these structural ingredients, and how rigid or malleable are they? I make a few observations here that will be relevant to the discussion below.

First, jurisdictional values are more flexible than they appear—we can mitigate many structural concerns by using Congress as the actor for reform.¹⁵² By vesting Congress with broad power over federal jurisdiction, the Constitution arguably gives the legislative branch discretion to demarcate an optimal balance between state and federal courts.¹⁵³ Moreover, as long as jurisdictional rules do not interfere with the essential role of the federal courts, they incorporate separation-of-powers values by fully respecting both legislative and judicial prerogatives.¹⁵⁴

Second, federal courts can (and already do) play a key role in ensuring that jurisdictional rules are flexible and accommodate federal prerogatives. For example, federal courts have grafted the “legal certainty” test onto the statutory amount-in-controversy requirement for diversity jurisdiction,¹⁵⁵ and impose a “time of filing” rule for assessing

150. See Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 349 (2010) (“Respect for federalism does not mean that state interests should always trump federal interests; rather, it requires fair consideration of and deliberation about state interests.”).

151. See, e.g., John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 121–22 (2004) (arguing that courts are often in a better position than Congress to assert and evaluate federalism interests). *But see* LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 131, 135 (2004) (arguing that courts should have minimal involvement in federalism issues).

152. Alternatively, Congress can pass a law delegating rulemaking authority to another entity. See, e.g., 28 U.S.C. § 2072 (2012) (delegating procedural rulemaking authority to the Supreme Court).

153. See FALLON ET AL., *supra* note 147, at 7–9 (recounting the history of the Madisonian Compromise, under which Congress can choose whether to create lower federal courts).

154. See *supra* notes 133–135 and accompanying text.

155. See *St. Paul Mercury Ins. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89 (1938).

the citizenship of the parties.¹⁵⁶ Under these judge-made rules, diversity jurisdiction exists as long as the complaint pleads a jurisdictionally sufficient amount, and as long as diversity of citizenship existed at the time plaintiff commenced her action—even when the amount later proves to be insufficient or the parties change their citizenship.¹⁵⁷ Both rules show federal courts' willingness to put a judicial gloss on jurisdictional statutes when there is good reason to do so.

Third, there is an outer limit to the flexibility of jurisdictional rules—at some point we run up against structural concerns that trump other considerations. Most notably, although Congress could make *statutory* jurisdictional requirements waivable, it probably cannot render *constitutional* requirements waivable.¹⁵⁸ And even if that were possible, jurisdictional waivability at some point would violate separation-of-powers notions by encroaching on essential judicial prerogatives.¹⁵⁹ For example, if jurisdiction were completely waivable at the whim of the parties, then a party's waiver of jurisdictional defects could possibly insulate important Article III questions from judicial review.

Ultimately, there are two key take-away points here. First, our current police-jurisdiction-at-all-costs approach fails to consider the full implications of structural values underlying jurisdictional rules. Second, a completely passive judicial approach (allowing unlimited private-party waiver of jurisdiction) is problematic as well. Jurisdictional rules must be more flexible, but courts must stay involved.

B. *Unpacking Efficiency Values*

Having examined structural values, I now turn to the efficiency values underlying nonwaivable jurisdictional rules. In doing so, I provide one of the first economic analyses of jurisdiction's social cost.¹⁶⁰ First, I outline the goal of an efficiency approach: socially optimal jurisdictional rules.¹⁶¹ I then describe the various private-party incentives underlying

156. See *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539–40 (1824).

157. RICHARD D. FREER, *CIVIL PROCEDURE* 184, 188 (2d ed. 2009).

158. I say “probably” here because some have made the argument 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 [constitutional] jurisdictional questions.” 13 WRIGHT ET AL., *supra* note 33, § 3522, at 137; see also Dobbs, *supra* note 15, at 520–21. But see Collins, *supra* note 51, at 1888 (questioning the validity of this argument).

159. See *supra* notes 133–136 and accompanying text.

160. My analysis builds on an excellent paper by Eric Kades, which examines various incentives underlying jurisdictional rules. See Kades, *supra* note 16.

161. See *infra* Part II.B.1.

jurisdictional rules.¹⁶² I contend that nonwaivable jurisdictional rules incentivize inefficient behavior by both plaintiffs and defendants. Finally, I note that federal judges have inadequate incentives to police their own jurisdiction early on in many cases.¹⁶³

1. *The Goal: Socially Optimal Jurisdictional Rules*

From an efficiency standpoint, jurisdictional rules are socially optimal if they encourage procedural litigation and jurisdictional dismissals only when society's economic benefits from litigation and dismissal exceed total social costs.¹⁶⁴

The efficiency costs of jurisdictional litigation and dismissals include, most notably, the parties' litigation costs and the court's adjudication costs.¹⁶⁵ They also include consequential expenses, such as the cost of duplicative proceedings in state court following a federal court dismissal,¹⁶⁶ or the cost of the entire federal court proceedings (discovery, motions practice, trial, etc.) in cases where jurisdictional dismissal occurs late in the trial court process or for the first time on appeal.¹⁶⁷

Although the costs of jurisdictional litigation often overshadow its benefits, benefits do exist. First, positive externalities can arise from jurisdictional litigation.¹⁶⁸ Published jurisdictional decisions have precedential value for similarly situated litigants,¹⁶⁹ and deter other

162. *See infra* Part II.B.2.

163. *See infra* Part II.B.3.

164. For the sake of brevity and expositional clarity, I am glossing over more intricate definitions and measures of social optimality. *See, e.g.*, Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890, 913 n.116 (2010) (acknowledging "various definitions of efficiency, including Pareto optimality and Kaldor-Hicks efficiency," but arguing that "in the context of implementing a previously established goal, efficiency can be defined as achieving [a] goal at the lowest cost, subject to all applicable constraints").

165. Most commonly, such costs include the expenses associated with a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. *See* FED. R. CIV. P. 12(b)(1).

166. *See* Hoagland v. Sandberg, Phoenix & Von Gontard, P.C., 385 F.3d 737, 739–40 (7th Cir. 2004) (noting that, as a result of a federal court's dismissal on jurisdictional grounds, "the parties will often find themselves having to start their litigation over from the beginning [in state court], perhaps after it has gone all the way through to judgment").

167. *See* Christianson v. Colt Indus. Operating Corp., 486 U.S. 2166, 2179 (1988) ("Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction.").

168. A "harmful externality is defined as a cost or benefit that the voluntary actions of one or more people imposes or confers on a third party or parties without their consent." ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 45 (1988).

169. *See* Lederman, *supra* note 97, at 227.

parties from transcending jurisdictional boundaries. Second, jurisdictional litigation effectuates the structural values discussed above, giving courts an opportunity to consider and assert interests relating to separation of powers and federalism.¹⁷⁰

In terms of social benefits, social costs, and other efficiency sub-values, the *timing* of jurisdictional litigation is important.¹⁷¹ Ideally, jurisdictional rules should incentivize private-party actors and courts to raise jurisdictional defects at a point that maximizes social welfare (defined as social benefits minus social costs).¹⁷²

For most cases, the outset of litigation presumably would be the socially optimal moment to raise jurisdictional defects.¹⁷³ At that moment, the parties and court have incurred minimal litigation and adjudication costs, and a jurisdictional dismissal would be less wasteful than it would be later on in the proceedings.¹⁷⁴ Moreover, the social benefits of jurisdiction arguably are maximized at that point as well—early action on jurisdiction serves as a clear affirmation of the structural values underlying jurisdictional nonwaivability.¹⁷⁵

2. *The Problem: Perverse Private-Party Incentives*

There appears to be a consensus among scholars, however, that jurisdictional rules often are inefficient and create needless social waste.¹⁷⁶ In part, I attribute this social cost to the perverse private-party

170. See *supra* Part II.A.

171. Cf. David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1415 (2011) (noting that “[a] delay in resolving civil litigation ordinarily causes the ultimate decision’s value to decline more rapidly for plaintiffs than the delay produces value for defendants, making it socially inefficient”).

172. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 2–3 (2004) (noting that an economic analysis of the law seeks to adopt legal rules that maximize social welfare).

173. Although this statement is true for most cases, it is not true for all cases. If a case is fairly straightforward on the merits but presents thorny or complex jurisdictional issues, then adjudication of jurisdiction at the outset of the suit may be inefficient in that particular case.

174. See Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 615 (2009) (observing that “dismissal . . . at an early stage of the litigation may conserve judicial resources, whereas dismissal at a later stage of an action, when significant judicial resources have already been expended, may waste judicial resources”).

175. Stated another way, if a court proceeds with an adjudication of the merits without adequately analyzing jurisdictional issues, there is a risk that the court is exercising power it does not have.

176. See, e.g., Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 947 (1994) (arguing that “jurisdictional rules need to be clear and certain, so that the resources of the parties and the courts are not wasted in elaborate proceedings to determine if there is subject matter jurisdiction”); Jonathan Remy Nash, *On the Efficient*

incentives of nonwaivable jurisdictional rules. First, existing rules incentivize parties to file jurisdictionally suspect lawsuits in federal court.¹⁷⁷ Second, the rules incentivize defendants to adopt a wait-and-see approach—the defendant waits until the federal court renders a decision on the merits, and uses a jurisdictional defect as a tool to vacate an adverse judgment.¹⁷⁸ Third, because existing rules allow either party to raise a jurisdictional defect at any time, plaintiffs have incentives to wait as well.¹⁷⁹ Meanwhile, the parties and court continue to incur litigation costs.

a. Incentives to File Jurisdictionally Suspect Lawsuits

Many—perhaps most—plaintiffs file lawsuits in federal court only after concluding federal subject-matter jurisdiction exists.¹⁸⁰ Nevertheless, our current jurisdictional rules fail to adequately disincentivize plaintiffs from filing jurisdictionally suspect actions in federal court. Specifically, the absence of a particular moment early in litigation when jurisdiction is conclusively resolved—and beyond further challenge—makes the existence of jurisdiction (and the odds of jurisdictional litigation) highly uncertain in many cases. As a result of this uncertainty, some plaintiffs choose to roll the dice and file a lawsuit in federal court, even though they have knowledge of a potentially fatal jurisdictional defect.

At first blush, this seems counterintuitive—one would assume that many plaintiffs would seek to avoid the uncertainty of federal court jurisdiction by filing their lawsuits in state court. State court subject-matter jurisdiction is broad,¹⁸¹ and plaintiffs filing state court actions usually do not incur the costs and risks associated with jurisdictional litigation.¹⁸² In contrast, federal jurisdiction is more uncertain because

Deployment of Rules and Standards to Define Federal Jurisdiction, 65 VAND. L. REV. 509, 531 (2012) (noting that “scarce judicial resources may appear to have been wasted upon a belated decision that subject matter jurisdiction is absent”).

177. See *infra* Part II.B.2.a.

178. See *infra* Part II.B.2.b.

179. See *infra* Part II.B.2.c.

180. See FED. R. CIV. P. 8(a)(1) (requiring that a plaintiff’s complaint include “a short and plain statement of the grounds for the court’s jurisdiction”).

181. See 13 WRIGHT ET AL., *supra* note 33, § 3522 (noting that “[m]ost state courts are courts of general jurisdiction”).

182. This assumes that a plaintiff files in the *correct* state court. See Edson R. Sunderland, *Problems Connected with the Operation of a State Court System*, 1950 WIS. L. REV. 585, 585–86 (noting that state court systems often are divided into a variety of separate divisions handling specialized matters).

three alternative scenarios are possible: (1) jurisdictional litigation might occur, and a federal court might conclude it has jurisdiction, proceeding to the merits of the case;¹⁸³ (2) jurisdictional litigation might occur, and a federal court might conclude it does not have jurisdiction, dismissing the case so the plaintiff can re-file in state court;¹⁸⁴ or (3) jurisdictional litigation might not occur at all, perhaps because neither the defendant nor the court notices a jurisdictional defect.¹⁸⁵ Due to this uncertainty, in many cases a plaintiff's expected cost of litigating in federal court may be higher than litigating in state court.¹⁸⁶

There are circumstances, however, in which plaintiffs have an incentive to incur these risks and costs associated with uncertain federal jurisdiction, notwithstanding the social cost generated by jurisdictionally suspect lawsuits. For example, a plaintiff might roll the dice on federal court litigation—despite having knowledge of a jurisdictional defect—if a large positive disparity exists between the plaintiff's expected federal court benefit and expected state court benefit.¹⁸⁷ Similarly, a plaintiff

183. Plaintiff's expected benefit if jurisdictional litigation occurs, and if the federal court upholds its own jurisdiction and proceeds to the merits, would be $p_L [p_J (p_1 (L_1) - (c_1 + c_J))]$, where p_L represents the odds that jurisdictional litigation will occur, p_J represents the odds that the federal court will conclude that it has jurisdiction, p_1 is the probability that the plaintiff wins on the merits in federal court, L_1 represents plaintiff's expected judgment amount if plaintiff wins, c_1 represents plaintiff's costs of litigating the merits in federal court, and c_J is the cost plaintiff incurs to litigate jurisdiction.

184. Plaintiff's expected benefit if jurisdictional litigation occurs, the federal court dismisses for lack of jurisdiction, and the plaintiff then re-files the case in state court would be $p_L [(1 - p_J)(p_2 (L_2) - (c_2 + c_J))]$, where p_L represents the odds that jurisdictional litigation will occur, $(1 - p_J)$ represents the odds that the federal court will conclude that it lacks jurisdiction, p_2 is the probability that the plaintiff wins on the merits in state court, L_2 represents the expected judgment amount if the plaintiff wins in state court, c_2 represents plaintiff's costs of litigating the merits in state court, and c_J is the cost plaintiff incurs to litigate jurisdiction in federal court before the case is dismissed.

185. Plaintiff's expected benefit if jurisdictional litigation does not occur and the federal court proceeds to the merits would be $(1 - p_L)(p_1 (L_1) - c_1)$, where $(1 - p_L)$ represents the odds that jurisdictional litigation will not occur, p_1 is the probability that the plaintiff wins on the merits in federal court, L_1 represents the expected judgment amount if the plaintiff wins, and c_1 represents plaintiff's costs of litigating the merits in federal court.

186. The plaintiff's total expected federal court benefit would be $p_L [p_J (p_1 (L_1) - c_1) + (1 - p_J)(p_2 (L_2) - c_2) - c_J] + (1 - p_L)(p_1 (L_1) - c_1)$, which is the sum of the three alternative federal jurisdictional scenarios described above. In contrast, a plaintiff's expected benefit of litigating in a state court of general jurisdiction is simpler (reflecting an absence of jurisdictional litigation): $p_2 (L_2) - c_2$. If non-jurisdictional variables (i.e., probability that plaintiff wins, judgment amount, litigation costs) are constant between federal and state courts, plaintiffs would always choose to litigate in state court, in order to minimize litigation costs.

187. Most notably, this could occur if a plaintiff seeks to enforce a federal law claim. See Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 213-14 (1983) (noting that scholars have suggested that state courts can be "hostile to the vindication of [federal] rights").

may file a jurisdictionally suspect lawsuit if he or she thinks it is unlikely that the defendant or the court will discover the jurisdictional defect.¹⁸⁸ And even if a plaintiff's intentions are entirely noble, the cost of investigating jurisdiction before the commencement of suit may deter the plaintiff from doing so.¹⁸⁹

The problem is that our current approach to jurisdictional rules further incentivizes this type of inefficient behavior by plaintiffs. There is no moment early in litigation when federal district courts conclusively resolve jurisdictional issues;¹⁹⁰ instead, jurisdictional questions linger like a cloud of doubt over many lawsuits. If the parties do not file a Rule 12(b)(1) motion, a jurisdictional defect can easily escape a court's attention at the moment when dismissal is least costly.¹⁹¹ Even if the parties litigate jurisdiction early on, an order that erroneously upholds jurisdiction is not immediately appealable,¹⁹² and the parties might litigate for years before an appellate court conclusively resolves whether jurisdiction exists. Faced with this uncertainty, plaintiffs who are otherwise inclined to file lawsuits in federal court know there is a good chance they can get away with a jurisdictional defect—if not forever, at least until they can obtain a more favorable settlement.

b. Incentives for Defendants to Wait and See

Jurisdictional nonwaivability incentivizes inefficient behavior by defendants as well. Sometimes the defendant has little incentive to investigate and raise a jurisdictional defect early on, when the social costs of a defect can be minimized. Instead, it may be in the defendant's interest to wait to fully investigate jurisdiction, or to withhold a jurisdictional objection until after the court renders a judgment on the merits. If there is an adverse result at that point, the defendant then has a powerful incentive to fully investigate jurisdiction, using any defect as a procedural trump card to vacate the judgment.

Once a plaintiff files a lawsuit in federal court, the defendant has two

188. Even worse, the plaintiff may take a chance on a jurisdictionally suspect lawsuit if he or she thinks it is possible to *hide* the jurisdictional defect from the defendant and the court.

189. For example, in low-dollar disputes the plaintiff would probably want to avoid any litigation costs that are not absolutely necessary. In many such cases, it would probably be cheapest for the plaintiff to go ahead and file a lawsuit in federal court, and voluntarily dismiss the action without prejudice if a thorny (and costly) jurisdictional issue arises. *See* FED. R. CIV. P. 41(a).

190. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. d (1982).

191. *See, e.g., Builders Mut. Ins. Co. v. Dragas Mgmt.*, 497 F. App'x 313, 314 (4th Cir. 2012); *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 479 F. App'x 657, 657 (5th Cir. 2012).

192. *E.g., United States v. Atwell*, 681 F.2d 593, 594 (9th Cir. 1982).

basic options when considering whether to challenge federal court jurisdiction and, if so, when to mount that challenge. First, the defendant can choose to contest jurisdiction at the outset of litigation.¹⁹³ The expected costs from contesting federal jurisdiction at the outset equal the sum of the defendant's jurisdictional investigation and litigation costs,¹⁹⁴ expected state court costs (if the jurisdictional challenge is successful),¹⁹⁵ and expected federal court costs (if the jurisdictional challenge is unsuccessful).¹⁹⁶

Most commonly, the defendant will raise jurisdictional issues up front when expected federal court costs significantly exceed expected state court costs, at which point the defendant has a clear preference for litigating in state court. This makes sense—the greater the defendant's expected federal court costs are relative to the expected state court costs, the more likely the defendant will be willing to incur the expense of investigating and litigating jurisdiction as a means to an end.¹⁹⁷

Second, the defendant could adopt a wait-and-see approach, rather than investigating and challenging federal jurisdiction at the

193. Most commonly, this is accomplished through a Rule 12(b)(1) motion to dismiss. *See* FED. R. CIV. P. 12(b)(1).

194. These costs represent a certain loss for the defendant if he or she files a motion to dismiss. They are limited to the defendant's *own* costs, however—the defendant pays neither the plaintiff's costs nor the state's costs.

195. I am assuming that a plaintiff will re-file the case in state court following a jurisdictional dismissal. Thus, the defendant incurs expected state court costs when making a motion to dismiss: those costs equal the probability that the defendant will *win* the motion to dismiss, multiplied by the sum of defendant's state court litigation costs and expected state court liability amount. Expressed formally, these expected state court costs would be $(1 - p_j)(c_2 + p_2(L_2))$, where $(1 - p_j)$ is the probability that the federal court lacks jurisdiction, c_2 is the defendant's cost of litigating the merits in state court, p_2 is the probability that the state court will issue a judgment against the defendant on the merits, and L_2 is the state court judgment amount.

196. Similar to expected state court costs, the defendant's expected federal court costs equal the probability that the defendant will *lose* the motion to dismiss, multiplied by the sum of the defendant's federal court litigation costs and expected federal court liability amount. Thus, the defendant's expected federal court costs would be $p_j(c_1 + p_1(L_1))$, where p_j is the probability that the federal court has jurisdiction, c_1 is the defendant's cost of litigating the merits in federal court, p_1 is the probability that the federal court will issue a judgment against the defendant on the merits, and L_1 is the federal court judgment amount.

Combining these expected costs, the defendant's total expected cost from challenging jurisdiction at the outset of litigation would be $c_j + p_j(c_1 + p_1(L_1)) + (1 - p_j)(c_2 + p_2(L_2))$ (adding the notation c_j to represent defendant's cost of litigating jurisdiction).

197. Jurisdictional litigation also is more likely if the defendant's cost of raising jurisdictional issues is low, or if the odds of a dismissal are high. *See* Buehler, *supra* note 96, at 129 (noting that "a jurisdictional dispute occurs when a defendant's expected benefit (namely, the probability that the court will dismiss the case for lack of jurisdiction, multiplied by the defendant's net benefit from litigating in an alternative forum) exceeds its own costs of filing and litigating a motion to dismiss").

commencement of litigation. Under this approach, the defendant investigates and raises the jurisdictional defect only upon suffering an adverse decision on the merits in federal court.¹⁹⁸ This strategy uses jurisdiction as a procedural trump card to vacate an adverse judgment—the federal court dismisses the case, forcing the plaintiff to re-file in state court; the defendant then receives a second chance to prevail (often called “two bites at the apple”).¹⁹⁹

Obviously, the defendant will adopt a wait-and-see approach if the costs of doing so are less than the costs associated with investigating and raising jurisdiction at the outset.²⁰⁰ The defendant incurs several costs from a wait-and-see approach, including (1) the cost of litigating the merits in federal court;²⁰¹ (2) the cost of investigating and litigating jurisdiction if the defendant loses on the merits;²⁰² (3) expected federal court judgment costs (in the event that the defendant loses on the merits, and a subsequent jurisdictional challenge is unsuccessful);²⁰³ and (4) expected state court costs (in the event that the defendant loses on the merits, and a subsequent jurisdictional challenge is successful).²⁰⁴

198. Kades, *supra* note 16, at 1.

199. *Id.*; see also Wagman, *supra* note 16, at 1419.

200. It is not unrealistic for a defendant to suspect that jurisdiction is lacking but nonetheless forgo jurisdictional investigation and/or litigation entirely. For example, it is not in the defendant's interest to hunt for a jurisdictional defect if the combined cost of investigating and litigating jurisdiction exceeds the expected reduction in the defendant's costs resulting from shifting the lawsuit from federal court to state court.

201. In various formal expressions below, I use c_f to denote the defendant's costs of litigating the merits in federal court. This represents a certain cost if the defendant waits to raise jurisdictional defects until after a decision on the merits.

202. The defendant's expected jurisdictional litigation costs must be multiplied by the odds that the plaintiff will prevail on the merits in federal court (if the defendant wins, he or she will not raise the jurisdictional defect). As a result, the defendant's expected cost of litigating jurisdiction would be $p_f(c_f)$, where c_f represents the defendant's costs of investigating and litigating jurisdiction in federal court, and p_f represents the odds that plaintiff will prevail on the merits in federal court.

203. These costs would equal the federal court judgment amount, multiplied by both the odds that the defendant will lose on the merits in federal court, and the odds that the federal court will then conclude that it has jurisdiction over the case. In formal notation, the defendant's expected federal court judgment costs would be $p_f(p_f)(L_f)$, where p_f is the probability that the plaintiff will prevail on the merits in federal court, p_f is the probability that the federal court will conclude that it has jurisdiction, and L_f is the judgment that the defendant will be liable for if he or she loses on the merits in federal court.

204. Modeling expected state court costs is somewhat complicated, because the defendant incurs these costs only if several contingencies materialize. Stated as simply as possible, the defendant potentially would be on the hook for (a) the defendant's costs of litigating the merits in state court; and (b) the expected state court judgment amount should the defendant lose a second time. These costs would be multiplied by the probability that the defendant will lose on the merits in federal court (which would trigger a jurisdictional challenge), and the probability that the federal court will in turn decide that it lacks jurisdiction over the case (which would shift the lawsuit to

With these costs in mind, the defendant has an incentive to adopt a wait-and-see approach when it is possible that federal jurisdiction does not exist, and when the outcome of the merits in both federal and state court is highly uncertain (i.e., the parties have roughly even odds of prevailing).²⁰⁵ If it is unclear whether the defendant has a better chance of prevailing in state court than federal court, there is no incentive to spend resources on a jurisdictional fight up front—doing so would trade a certain loss for no apparent gain.²⁰⁶ Instead, the defendant will litigate the merits first in federal court, gambling on the chance of a favorable outcome.²⁰⁷ If the outcome is unfavorable, the defendant can use jurisdiction to get a dismissal, allowing another try in state court.²⁰⁸

Nonwaivable jurisdictional rules—and defendants' perceptions about the relative advantages of state courts and federal courts—exacerbate this tendency for defendants to wait-and-see. To the extent that litigants view federal courts as “defendants' courts,”²⁰⁹ the defendant will be naturally disinclined to investigate and contest jurisdiction at the start of federal court litigation, because doing so would potentially move the litigation away from a favorable forum.²¹⁰ And nonwaivable

state court). Expressed formally, the defendant's expected state court costs would be $p_1[(1 - p_j)(c_2 + (p_2(L_2)))]$, where p_1 is the probability that the plaintiff will prevail on the merits in federal court, $(1 - p_j)$ is the probability that the federal court will dismiss the case for lack of jurisdiction, c_2 is the defendant's costs of litigating the merits in state court, p_2 represents the odds that the plaintiff will prevail on the merits in state court, and L_2 represents the judgment that the defendant will be liable for if he or she loses on the merits in state court.

Combining all of the costs discussed above, the defendant's total expected cost from taking a wait-and-see approach to jurisdiction would be $c_1 + p_1[c_1 + p_j(L_1) + (1 - p_j)(c_2 + (p_2(L_2)))]$.

205. Kades, *supra* note 16, at 19.

206. The desirability of a wait-and-see approach also depends in large part on the relationship between the cost of litigating the merits and the cost of litigating jurisdiction. An incentive to wait and see exists when the costs of litigating jurisdiction are high in relation to the costs of litigating the merits—by waiting to raise the jurisdictional issue, the defendant avoids spending money on a jurisdictional fight unless the defendant first loses on the merits. *See* Kades, *supra* note 16, at 18–19. Additionally, the defendant will be more likely to adopt a wait-and-see approach if the judgment amount is large in relation to his or her total litigation costs. If that is the case, the defendant will find it worthwhile to expend a relatively small amount of resources to challenge jurisdiction and relitigate the merits in state court, to possibly wipe away a large unfavorable federal court judgment on the merits.

207. Kades, *supra* note 16, at 1.

208. *Id.*

209. 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: FEDERAL PRACTICE DESKBOOK § 25, at 190 (2d ed. 2009).

210. Of course, the defendant may have inaccurate perceptions regarding some or all of the variables discussed above—the cost of litigating jurisdiction, the odds that jurisdiction exists, or the expected judgment amount (either in federal court or state court, or both). For example, the defendant's perceptions could be skewed as a result of lack of information, or optimism bias. *See*

jurisdictional rules give defendants a procedural trump card they can play if litigation goes sour at some point; they know courts have an obligation to dismiss,²¹¹ and that considerations relating to litigation waste or the parties' motives are largely irrelevant.²¹²

c. Incentives for Plaintiffs to Belatedly Challenge Jurisdiction

Even if the defendant wins on the merits in federal court, a jurisdictional defect does not necessarily fall by the wayside. Under that scenario, the *plaintiff* may have an incentive to make a belated challenge to the very jurisdiction that he or she invoked when filing the lawsuit. As a result, if a latent jurisdictional defect exists, it might not matter who wins in federal court—social waste probably is inevitable, thanks in large part to jurisdictional nonwaivability.

A belated jurisdictional challenge occurs when the plaintiff has lost on the merits in federal court, and concludes that the expected benefit from relitigating the merits in state court²¹³ outweighs the costs of doing so.²¹⁴ Significantly, “sunk costs” bias—the tendency of litigants to “throw good money after bad” in order to recoup previous litigation expenditures—may make this effect even worse, causing plaintiffs to scuttle the jurisdictional ship in order to have another shot at winning, this time in state court.²¹⁵

ROBERT G. BONE, *THE ECONOMICS OF CIVIL PROCEDURE* 85–91 (2003) (discussing optimism bias and information problems in the context of settlement). This too could incentivize the defendant to wait and see on jurisdictional issues—the sum of inaccurately inflated or deflated values could convert a positive-expected-value motion to dismiss into a negative-expected-value motion to dismiss.

211. *See, e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804).

212. *See, e.g.*, *Grupo Dataflux v. Atlas Global Grp.*, 541 U.S. 567, 575–76 (2004).

213. Plaintiff's expected benefit from a belated jurisdictional challenge would be the benefit plaintiff accrues from obtaining dismissal of the adverse federal court judgment (and the opportunity to relitigate the case in state court), multiplied by the odds that the plaintiff will prevail on a jurisdictional challenge. Thus, plaintiff's expected benefit would be $(1 - p_f)(p_2(L_2) - L_f) + p_f(L_f)$, where p_f represents the odds that the federal court has jurisdiction, $(1 - p_f)$ represents the odds that the federal court lacks jurisdiction, L_f is the amount of plaintiff's adverse judgment in federal court, p_2 is the probability that the plaintiff will prevail on the merits in state court, and L_2 is the amount that plaintiff will win if he or she prevails on the merits in state court.

214. Plaintiff's expected costs from a belated jurisdictional challenge include the cost of litigating jurisdiction and the cost of relitigating the merits in state court, multiplied by the odds that plaintiff will prevail on the jurisdiction challenge. Expressed formally, plaintiff's expected costs would be $c_L + c_f + (1 - p_f)(c_2)$, where c_L is plaintiff's sunk federal court litigation costs, c_f represents the cost of litigating jurisdiction, $(1 - p_f)$ represents the odds that the federal court lacks jurisdiction, and c_2 is plaintiff's expected state court litigation costs.

215. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary*

The circumstances in which plaintiffs are most likely to raise a belated jurisdictional defect are fairly obvious. Several factors can contribute to a belated jurisdictional challenge, including a high probability that plaintiff will win on the jurisdictional issue, low jurisdictional litigation costs, and low state court litigation costs (perhaps because plaintiff could use much of the discovery already produced in federal court). Moreover, the greater plaintiff's sunk costs are in the federal court lawsuit, the more likely he or she will seek dismissal of the federal action after suffering an adverse judgment, taking a gamble by relitigating in state court. The nonwaivability of jurisdictional rules makes this inefficient behavior possible.²¹⁶

3. *Inadequate Incentives for Early Adjudication of Jurisdictional Issues by Federal Courts*

In theory, this divergence between private-party incentives and social optimality would be cured as long as federal courts actively police their own jurisdiction and dismiss jurisdictionally suspect lawsuits early on. Unfortunately, existing rules provide inadequate incentives for courts to do so in many cases.

At first glance, it appears that federal court judges already have a powerful incentive to police their own jurisdiction—every case dismissed on jurisdictional grounds is one less case on the court's docket.²¹⁷ In other words, policing jurisdiction is a way for courts to reduce their caseloads and keep dockets manageable.²¹⁸ There is some evidence that this occurs, especially in the context of pro se filings, where federal courts screen plaintiffs' complaints and routinely dismiss suits early on jurisdictional grounds.²¹⁹

In many cases, however, courts remain passive until one of the parties raises a jurisdictional defect (or files some other motion, giving the court an opportunity to examine its jurisdiction sua sponte). For example, if

Judgment, 100 YALE L.J. 73, 113–14 (1990) (discussing the consequences of sunk costs bias).

216. *Capron*, 6 U.S. (2 Cranch) at 126–27 (plaintiff invoked federal jurisdiction but, after losing on the merits, argued successfully for the first time that jurisdiction did not exist).

217. See Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1633 (2012) (noting that federal court docket pressure gives those courts a significant incentive to dismiss lawsuits).

218. See *id.*

219. See, e.g., *McKinney v. Lichenstein*, No. CV 13–4403–GAF (DTB), 2013 WL 3337816, at *2 (C.D. Cal. June 29, 2013); *Arroyo v. Massachusetts*, No. CA 12–753 S., 2013 WL 3288106, at *3, *5 (D.R.I. June 28, 2013); *Martin v. State Bar of Tex.*, No. 3:12–CV–5063–N–BK, 2013 WL 3283729, at *1–2 (N.D. Tex. June 28, 2013).

the parties do not move for dismissal early on, the dispute will not command the court's attention in any meaningful sense, and the court may not have a chance to think about its own jurisdiction until after the parties have engaged in discovery or have filed summary judgment motions.²²⁰

Such is the nature of our adversarial system—until the parties present a dispute requiring adjudication, a judge has little incentive to invest time and resources on jurisdictional rulings (especially when there are pending motions in other cases on the court's docket).²²¹ The problem, of course, is that by the time an actual dispute arises, the parties may have already made a significant investment in an action that lacks jurisdiction, elevating the risk of litigation waste.²²²

In sum, social cost from jurisdictional rules exists in large part because a fundamental misalignment exists between private-party incentives and social optimality. Under the various circumstances described above, jurisdictional nonwaivability incentivizes parties to file jurisdictionally suspect lawsuits in federal court, and to time jurisdictional litigation in ways that can generate significant social cost. Moreover, in many cases judges do not have an incentive to hunt for jurisdictional defects early on.

III. A NEW APPROACH FOR SOLVING JURISDICTION'S SOCIAL COST

How then do we solve jurisdiction's social cost? In this Part, I propose a new way in which we can achieve equilibrium among the various structural and efficiency values discussed above. First, I critique existing proposals to curb the negative consequences of jurisdictional nonwaivability.²²³ Second, I offer a solution to jurisdiction's social cost: courts must affirmatively adjudicate and resolve all jurisdictional issues at the outset of litigation.²²⁴

220. See, e.g., *Chambers v. Kan. City Kan. Cmty. Coll.*, No. 11–CV–2646–CM–DJW, 2013 WL 3322315, at *2–3 (D. Kan. June 28, 2013) (dismissing claims on jurisdictional grounds while adjudicating a motion for summary judgment), *vacated on other grounds*, 2014 WL 326021 (D. Kan. Jan. 29, 2014); *In re Motor Fuel Temperature Sales Practices Litig.*, MDL No. 1840, 2013 WL 3283859, at *1–3 (D. Kan. June 28, 2013) (analyzing jurisdiction six years after the action was filed while summary judgment motions were pending).

221. See Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649, 649 (2010) (noting that “in an adversarial system such as ours, the court’s role is constrained” and that “the decision of the court is based solely on the information that the litigants presented”).

222. See *supra* notes 193–216 and accompanying text.

223. See *infra* Part III.A.

224. See *infra* Part III.B.

A. *Critique of Existing Proposals*

In the last half-century, commentators have advanced several proposals for reducing the waste associated with jurisdictional nonwaivability.²²⁵ Many of these proposals involve a cut-off point for jurisdictional challenges, with limited exceptions.²²⁶ None of these proposals achieve optimal equilibrium among jurisdictional values, however.

The American Law Institute has advanced the most significant proposal to date to limit the negative consequences of nonwaivable jurisdictional rules.²²⁷ The proposal would require parties to raise jurisdictional issues before the beginning of trial or, alternatively, before a dispositive decision on the merits (such as dismissal for failure to state a claim, or summary judgment).²²⁸ After that time, federal courts are barred from considering jurisdictional defects, unless exceptional circumstances exist—for example, the defect is intertwined with the merits; a reasonable party could not discover the defect in a timely manner; or there is evidence that the parties colluded to fabricate jurisdiction.²²⁹ Courts also could consider a defect at any time if doing so “is required by the Constitution.”²³⁰ The plan sought to eliminate the negative effects of jurisdictional nonwaivability, while preserving flexibility.²³¹

225. See ALI STUDY, *supra* note 18, at 64–66, 370–74; Collins, *supra* note 51, at 1893–96; Dobbs, *supra* note 15, at 508–10; Gao, *supra* note 15, at 2405.

226. See, e.g., ALI STUDY, *supra* note 18, at 64–65, 371–72; Gao, *supra* note 15, at 2405.

227. See ALI STUDY, *supra* note 18, at 64–66, 366–74; Jessica J. Berch, *Waving Goodbye to Non-Waivability: The Case for Permitting Waiver of Statutory Subject-Matter Jurisdiction Defects*, MCGEORGE L. REV. (forthcoming), available at <http://ssrn.com/abstract=2314633> (advocating the adoption of the ALI’s proposal).

228. ALI STUDY, *supra* note 18, at 64.

229. *Id.* at 64–65, 371–72. The proposal also provided an exception to its cut-off rule for appellate review of district court jurisdictional decisions. *Id.* at 65; see also *id.* at 372.

230. *Id.* at 65. Interestingly, the commentary accompanying the ALI proposal insists that a mandatory cut-off point for jurisdictional defects—“even issues going to the court’s power under Article III”—would be perfectly constitutional. *Id.* at 368–69; see also *id.* at 426–36 (providing a memorandum in support of the constitutionality of the ALI’s approach). The proposal’s drafters relied on preclusion law principles for this theory, citing cases that held *res judicata* precluded collateral attack on a prior judgment rendered without jurisdiction. See *id.* at 386 (citing *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Stoll v. Gottlieb*, 305 U.S. 165 (1938)).

231. See ALI STUDY, *supra* note 18, at 367. The ALI’s stated goal was “to provide every incentive to both sides to seek resolution of the issue of subject-matter jurisdiction prior to the commencement of trial.” *Id.* That said, the proposal intentionally avoided a requirement that federal courts make a “pretrial jurisdictional determination in every case” because the ALI drafters reasoned that “the ordinary case does not involve any substantial question of subject-matter

Recently, Qian Gao used the ALI's study as a starting point, and proposed linking the jurisdictional cut-off rule to the pleading stage, rather than trial.²³² She argued the ALI's recommendation did not adequately curb social waste associated with jurisdictional rules, because "a cutoff point at commencement of trial may give parties several years to prepare such a jurisdictional challenge."²³³ Gao proposed an earlier bar, cutting off jurisdictional challenges when "the initial pleadings, answers, and motions under Federal Rule of Civil Procedure 12 have been made."²³⁴ After that point, a court can consider jurisdiction only if there is evidence of "fraud, misrepresentation, collusion, or misconduct" by the parties.²³⁵

In comparison, Dan Dobbs argues that much of the social waste associated with jurisdictional nonwaivability can be eliminated by reinterpreting jurisdictional rules.²³⁶ Specifically, he contends that notions of jurisdictional nonwaivability arise from an overly broad interpretation of Supreme Court case law.²³⁷ Professor Dobbs maintains that these cases do not allow jurisdictional challenges at any time and for any reason; instead, litigants have an absolute right to raise a jurisdictional defect at any time only if it "appears affirmatively from the record."²³⁸ Otherwise, district courts have *discretion* to permit tardy challenges to jurisdiction, but are not required to do so.²³⁹

Finally, some advocate for incremental changes. Michael Collins

jurisdiction and . . . such a case should not be bogged down by unnecessary procedural requirements." *Id.* at 367–68.

232. *See* Gao, *supra* note 15.

233. *Id.* at 2397.

234. *Id.* at 2405.

235. *Id.*

236. *See* Dobbs, *supra* note 15.

237. *Id.* at 508; *see also id.* at 507 (arguing that "judicial opinions grossly exaggerate existing rules that permit tardy jurisdictional attacks").

238. *Id.* (quoting *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 386 (1884)). For example, Professor Dobbs interprets the Supreme Court's seminal opinion in *Mansfield* narrowly, arguing that it condones belated dismissals for lack of jurisdiction only when the jurisdictional allegations in the pleadings are insufficient, or when the jurisdictional defect is obvious from the record. *See* Dobbs, *supra* note 15, at 521. He also explains away portions of the *Mansfield* opinion that state that the parties or court can raise any jurisdictional defect at any time by noting that, "these passages are, on the facts, clearly dicta." *Id.* at 508–09.

239. Dobbs, *supra* note 15, at 510. Professor Dobbs also argues that jurisdictional statutes merely codified these narrow circumstances in which litigants have a right to mount a belated jurisdictional attack. *Id.* at 512–13. For example, he contends that the 1875 Judicial Act "certainly does not contain the remotest suggestion that the parties have standing to make a belated jurisdictional attack," and does not "impose upon the judge a duty to hear or initiate such an attack." *Id.* at 513.

recently argued that the history of jurisdictional nonwaivability likely supports a more limited approach to solving jurisdiction's social cost.²⁴⁰ He suggests that historical practices might lend support for a proposal to "resurrect some aspects of the older prima facie jurisdiction regime" used by courts in the nineteenth century.²⁴¹ For example, Congress may be able to pass a statute giving evidentiary weight to allegations of jurisdictional fact in the pleadings, allowing courts to rely on that evidence to dismiss a belated jurisdictional attack.²⁴² Professor Collins is skeptical of an across-the-board cut-off for jurisdictional objections, however.²⁴³

Although these proposals are commendable, none achieves an optimal equilibrium of jurisdictional values. The cut-off point in the ALI proposal is too late; cutting off jurisdictional objections at the commencement of trial or a dispositive ruling on the merits allows too much waste—namely, the increasingly exorbitant cost of discovery in civil litigation.²⁴⁴ Although Qian Gao's proposal cuts off jurisdictional objections earlier, it does not address another problem with the ALI plan—the unpredictability of its exceptions to the cut-off rule, which likely would create social cost instead of eliminating it.²⁴⁵ Professor

240. See Collins, *supra* note 51, at 1893–96.

241. *Id.* at 1893.

242. *Id.* at 1893–94. In particular, Professor Collins suggests selective use of prima facie jurisdiction in certain categories of cases. *Id.* at 1896. For instance, Congress could target circumstances in which a party invokes jurisdiction and then attacks it after losing on the merits, or the defendant has knowledge of a jurisdictional defect but adopts a wait-and-see approach. *Id.* He also notes that it might make sense to soften the consequences for common jurisdictional mistakes—i.e., jurisdictional rules governing the citizenship of unincorporated business organizations in diversity cases. *Id.*

243. *Id.* at 1895. Professor Collins notes that a sweeping cut-off rule would be similar to the old common-law jurisdictional pleading regime, which he argues is inferior to the modern approach ushered in by the 1875 Judiciary Act. *Id.* Although he admits that the modern approach incurs social waste at times, Professor Collins contends that "foreclosing objections too quickly is likely to result in unnecessary expenditure of federal judicial resources overall." *Id.* Additionally, he rightly points out that ad hoc exceptions to a cut-off rule would present "usual problems of unpredictability and unevenness of application associated with non rule-like solutions." *Id.*

244. See, e.g., Emily C. Gainor, Note, *Initial Disclosures and Discovery Reform in the Wake of Plausible Pleading Standards*, 52 B.C. L. REV. 1441, 1441–42 (2011) (citing a case in which a district court ordered production of nearly 660,000 documents, constituting around eighty percent of the responding party's office emails).

245. For example, under the ALI plan, a party could make an end-run around the cut-off rule and belatedly challenge federal court jurisdiction if the facts underlying the jurisdictional defect would have eluded a party of "reasonable diligence." ALI STUDY, *supra* note 18, at 64. Similarly, a federal court could ignore the cut-off rule if it concludes there has been "collusion or connivance" to hide a jurisdictional defect. *Id.* These terms are not always easy to define. Although Gao's proposal avoids some of this uncertainty, it still includes an exception for "fraud, misrepresentation, collusion, or misconduct by any or all parties," which may lead to uncertainty in practice. Gao,

Dobbs's proposal also is problematic in this regard, as it would create costly uncertainty for litigants by giving district courts the discretion to permit belated jurisdictional challenges on an ad hoc basis.²⁴⁶

Additionally, these proposals are not sensitive enough to the structural values underlying jurisdictional nonwaivability. While the ALI plan includes an exception to the cut-off rule that permits a belated jurisdictional attack "required by the Constitution,"²⁴⁷ it elsewhere echoes Professor Dobbs's suggestion that it would be constitutional for Congress to foreclose jurisdictional objections that are rooted in Article III.²⁴⁸ This theory is dubious in light of Supreme Court precedent,²⁴⁹ and disregards judicial prerogatives underlying separation-of-powers values (specifically, the ability of the federal courts to protect the essential role of the judiciary).²⁵⁰ Moreover, by tying the cut-off for jurisdictional objections to the actions (or inaction) of private-party litigants, the ALI and Gao proposals severely limit the ability of federal courts to effectuate federalism and separation-of-powers values by policing their own jurisdiction.²⁵¹

Professor Collins's suggestion that a prima facie jurisdiction approach could provide a limited, but nonetheless significant, path to curbing some of the socially undesirable effects of jurisdictional nonwaivability is intriguing, but not without its own drawbacks.²⁵² On one hand, giving evidentiary significance to the jurisdictional allegations in the parties' pleadings could streamline jurisdictional litigation, saving costs. On the other hand, Professor Collins seems to significantly underestimate the advantage of some kind of cut-off point to mitigate the social cost of jurisdiction.²⁵³ As the discussion above demonstrates, a mandatory cut-

supra note 15, at 2405.

246. See Collins, *supra* note 51, at 1895 ("Discretion to allow tardy objections on an ad hoc basis . . . carries with it the usual problems of unpredictability and unevenness of application associated with non rule-like solutions.").

247. ALI STUDY, *supra* note 18, at 65.

248. See *id.* at 368–69, 426–36; Dobbs, *supra* note 15, at 520 ("[T]here is no real question of constitutionality involved in foreclosing jurisdictional issues at an early stage of litigation.").

249. See, e.g., *Muskrat v. United States*, 219 U.S. 346, 362 (1911) (holding that Congress cannot expand federal court jurisdiction beyond the scope provided by Article III).

250. See *supra* notes 133–136 and accompanying text.

251. See ALI STUDY, *supra* note 18, at 64 (deeming jurisdictional issues barred if the parties do not raise those issues before "the commencement of trial on the merits" or before a "decision . . . that is dispositive of the merits"); Gao, *supra* note 15, at 2405 (tying a similar cut-off rule to the pleading stage).

252. See Collins, *supra* note 51, at 1893–96.

253. At one point, Professor Collins even suggests that "assigning a cut-off date for objections as early as the initial responsive pleading seems calculated more toward guaranteeing a lack of care

off point could go a long way toward realigning private-party incentives with the social good.

B. A New Approach: Achieving Jurisdictional Equilibrium

Given the shortcomings of these existing proposals, how can we achieve equilibrium among jurisdictional values while solving jurisdiction's social cost? I advance a simple yet bold approach: we should frontload jurisdictional adjudication. The rules should require federal district courts to affirmatively certify the existence of jurisdiction in every case, shortly after the onset of litigation.²⁵⁴ After that point, objections to statutory federal jurisdiction will be waived.²⁵⁵ To accommodate both structural and efficiency values, appellate courts also should have discretion to immediately review jurisdictional orders when the benefits of doing so would outweigh the costs.²⁵⁶ Finally, courts should use the threat of sanctions to deter private-party abuse of jurisdictional rules.²⁵⁷

1. Early Jurisdictional Rulings

The best way to effectuate both structural and efficiency values is to ensure the early adjudication of jurisdictional issues. I argue federal district courts should affirmatively certify the existence of subject-matter jurisdiction early on in each case.²⁵⁸ To facilitate jurisdictional certification, we also should consider shifting to a fact-based jurisdictional pleading standard, with appropriate limitations on jurisdictional discovery.²⁵⁹

a. Mandatory Jurisdictional Certification

The clarity and finality of jurisdictional decisions serve both structural and efficiency interests. To that end, federal district courts should be required to issue a "jurisdictional certification" order at the

in the invocation of jurisdiction and in the courts' consideration of it than toward the conservation of any significant resources." *Id.* at 1895.

254. *See infra* Part III.B.1.

255. *See infra* Part III.B.2.

256. *See infra* Part III.B.3.

257. *See infra* Part III.B.4.

258. *See infra* Part III.B.1.a.

259. *See infra* Part III.B.1.b.

close of the pleadings.²⁶⁰ The order would certify (and conclusively resolve) the existence of statutory federal subject-matter jurisdiction, and would include all factual findings and legal conclusions necessary to the jurisdictional ruling. Alternatively, the order would dismiss the case for lack of jurisdiction.

Conceivably, a court would satisfy this requirement in many cases simply by ruling on the defendant's Rule 12(b)(1) motion to dismiss.²⁶¹ I argue for a more expansive notion of jurisdictional certification, however: district courts should issue an explicit decision on the existence of subject-matter jurisdiction at an early stage in *every case*, as a matter of course. Functionally, this type of threshold determination would be analogous to certification of class actions under Rule 23,²⁶² or the initial screening of subject-matter jurisdiction for in forma pauperis complaints.²⁶³

Mandatory jurisdictional certification would further efficiency values for several reasons. First, it would force parties to litigate jurisdiction at the outset, before incurring other litigation costs.²⁶⁴ Second, the court's affirmative obligation to rule on jurisdiction makes it less likely that jurisdictional defects will linger unnoticed.²⁶⁵ Third, issuance of a jurisdictional certification order serves as a "dispatch" moment for an interlocutory appeal of the jurisdictional issue.²⁶⁶ Fourth, an order that

260. This requirement would not be novel; the federal rules already require district courts to issue various rulings and orders early on in civil cases, because such judicial action serves important interests. *See, e.g.*, FED. R. CIV. P. 16 (requiring district courts to issue orders relating to case scheduling).

261. *See* FED. R. CIV. P. 12(b)(1).

262. *See* FED. R. CIV. P. 23(c)(1); *Besinga v. United States*, 923 F.2d 133, 135 (9th Cir. 1991) (using "a bright line rule requiring trial courts to certify a class in a written order which clearly sets out the class's compliance with Rule 23"). Of course, my proposal differs in a significant way from rules governing class certification: unlike decertification of class actions under Rule 23, I would not allow courts to decertify jurisdiction. *See* FED. R. CIV. P. 23(c)(1)(C). An ability by courts to do so would mitigate the efficiency gains from my proposal.

263. *See* 28 U.S.C. § 1915(e) (2012); *see, e.g.*, *Martin v. State Bar of Tex.*, No. 3:12-CV-5063-N-BK, 2013 WL 3283729, at *1 (N.D. Tex. June 28, 2013) ("Before screening an *in forma pauperis* complaint under 28 U.S.C. § 1915(e), the Court should always examine, *sua sponte*, if necessary, the threshold question of whether it has subject matter jurisdiction.").

264. As discussed below, the requirement of jurisdictional certification would be paired with a cut-off rule. *See infra* notes 295–311 and accompanying text. As a result, parties would know that they need to make jurisdictional arguments prior to certification, or lose the right to do so.

265. *Cf.* Kristen M. Blankley, *Did the Arbitrator "Sneeze"?—Do Federal Courts Have Jurisdiction Over "Interlocutory" Awards in Class Action Arbitrations?*, 34 VT. L. REV. 493, 518 (2010) (noting, in the context of federal court review of class action arbitration procedures, that "a large number of cases say absolutely nothing about whether jurisdiction actually exists, but instead simply assume jurisdiction exists in order to reach a decision on the merits").

266. *Cf.* *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956) (noting the district court's

includes all factual findings and legal conclusions relevant to a court's jurisdictional determination provides a clear rationale, reviewable on appeal.²⁶⁷

Additionally, my proposal is sensitive to the structural values underlying federal jurisdiction. Jurisdiction is an expression of a court's power to adjudicate,²⁶⁸ and judicial determination of the existence of jurisdiction presents an opportunity for federal courts to assert and assess various state, federal, legislative, and judicial prerogatives.²⁶⁹ Other proposals fail to take this into account when they tie a cut-off rule for jurisdictional objections to the actions of private-party litigants.²⁷⁰ By requiring the district court to issue an order on jurisdiction, a mandatory certification approach respects the institutional role of the federal courts. The parties' desire to waive jurisdiction is not enough; the court must also weigh in.²⁷¹

Of course, this approach is not without potential drawbacks.²⁷² Most notably, the costs of mandatory jurisdictional certification in every case could outweigh its benefits.²⁷³ Forcing federal courts to issue orders confirming jurisdiction in the vast majority of cases—when jurisdiction obviously exists—might be unnecessarily costly. And when cases present difficult jurisdictional issues, frontloading those issues will force litigants and courts to allocate resources to jurisdictional litigation early on, which could undesirably affect plaintiffs' incentives to file suits²⁷⁴ and the parties' incentives to settle.²⁷⁵ Indeed, these costs would be even

“dispatcher” role in the context of Rule 54(b), which allows district courts to certify an immediate appeal of a final decision on a particular claim, even though other claims in the lawsuit remain pending).

267. See 1 JOSEPH M. McLAUGHLIN, *McLAUGHLIN ON CLASS ACTIONS* § 3:5 (10th ed. 2013) (observing that the issuance of written class certification orders under Rule 23 facilitates appellate review).

268. *E.g.*, *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 81 (2009).

269. See *supra* Part II.A.

270. See ALI STUDY, *supra* note 18, at 64; Gao, *supra* note 15, at 2405.

271. In this sense, it would be inaccurate to view my position as an argument for “waivable jurisdiction” (despite my description of the current jurisdictional rules as “nonwaivable”). The mandatory jurisdictional certification component of my proposal ensures that jurisdiction is not completely waivable by the parties.

272. See, *e.g.*, Richard A. Epstein & M. Todd Henderson, *Do Accounting Rules Matter? The Dangerous Allure of Mark to Market*, 36 J. CORP. L. 513, 518 (2011) (noting that “new rules for old problems may help bring on new problems”).

273. I thank Daniel Klerman for raising and offering thoughts on this issue.

274. See Buehler, *supra* note 96, at 132 (arguing that an increase in the cost and frequency of procedural litigation can deter some plaintiffs from filing suit).

275. If we force plaintiffs with meritorious claims to bear the costs and risks that are associated with an initial round of procedural litigation, some of those plaintiffs (particularly those who are

more problematic in cases where jurisdictional issues are intertwined with the merits.²⁷⁶

Such concerns are significant, but not insurmountable. In most cases, jurisdiction will be apparent in the pleadings, and the cost of issuing a terse order confirming its existence will be de minimis.²⁷⁷ In more difficult cases courts might be able to minimize costs by sequencing other potentially dispositive procedural issues before subject-matter jurisdiction.²⁷⁸ And if determining jurisdiction at an early stage in the remaining cases is still too costly, perhaps that suggests it is time for Congress and the federal courts to simplify jurisdictional rules²⁷⁹ or pare back the scope of jurisdictionality.²⁸⁰ Ultimately, even if mandatory jurisdictional certification incurs a marginal net loss in efficiency values, the corresponding gain in structural values (namely, the court's consideration of separation-of-powers and federalism values in every case) arguably justifies that cost.

b. Facilitating Certification: Jurisdictional Pleading and Discovery

To facilitate jurisdictional certification, we also should consider a shift to fact-based jurisdictional pleading, and limits to the scope of

risk-averse) might accept a settlement that is significantly less than the net amount they could receive through the litigation process. Conversely, if defendants in unmeritorious cases are forced to bear those costs and risks, they might be inclined to settle even though they would otherwise prevail on the merits.

276. The ALI's proposal recognized as much, creating a specific exception to its cut-off rule for jurisdictional issues that are "sufficiently related to the merits . . . to justify deferring the matter until trial." ALI STUDY, *supra* note 18, at 371.

277. For example, in a straightforward diversity case, the following language would suffice: "The court concludes it has jurisdiction under 28 U.S.C. § 1332. Based on the facts alleged in the pleadings, the court finds plaintiff is a citizen of Oregon, defendant is a citizen of California, and plaintiff has made good faith allegations that this action has an amount in controversy of \$200,000."

278. *See, e.g., Sinochem Int'l Co. v. Malay. Int'l Shipping Co.*, 549 U.S. 422, 432 (2007) (holding that district courts have discretion to dismiss on forum non conveniens grounds before reaching subject-matter jurisdiction); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999) (holding that district courts have discretion to decide straightforward personal jurisdiction issues before deciding difficult subject-matter jurisdiction issues). *See generally* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1 (2001).

279. *See, e.g., Grupo Dataflux v. Atlas Global Grp.*, 541 U.S. 567, 582 (2004) ("Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful").

280. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) (suggesting courts should presume that a statutory limitation is nonjurisdictional unless Congress clearly indicates otherwise); Howard Wasserman, *Jurisdiction, Merits, and Procedure*, 102 NW. U. L. REV. COLLOQUY 215, 216 (2008) (arguing that "courts should consider a provision of positive law as jurisdictional only when its plain language is addressed to the court and speaks in terms of judicial power about the class of cases that courts can hear and resolve").

jurisdictional discovery.

First, early jurisdictional adjudication gives the contents of the pleadings added importance.²⁸¹ To ensure the parties' pleadings contain adequate information to form the basis of a jurisdictional certification order, we may need to amend or reinterpret rules to require heightened pleading of jurisdictional facts.²⁸² Existing rules require minimal factual detail for jurisdictional allegations,²⁸³ and it is customary for complaints to offer no more than a cursory sentence or two on jurisdiction.²⁸⁴

A fact-based jurisdictional pleading standard—which would require plaintiffs to allege both the *basis* for jurisdiction and the *facts* supporting that basis—would root out vague and unhelpful averments.²⁸⁵ It would force parties to think through and support jurisdictional allegations before filing suit and, more importantly, before incurring litigation costs.²⁸⁶ And a fact-based jurisdictional pleading approach would give both the defendant and the court a more complete and adequate understanding of the jurisdictional basis of the lawsuit, allowing early adjudication.²⁸⁷

281. See Edward H. Cooper, *Simplified Rules of Civil Procedure?*, 100 MICH. L. REV. 1794, 1812–13 (2002) (“It is important to establish the basic framework of the pleadings as early as possible so that other pretrial activities can proceed.”).

282. After the Supreme Court’s decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), reinterpreted the Rule 8(a)(2) pleading standards for stating a claim for relief, it is somewhat unclear whether the federal rules require factual plausibility for jurisdictional allegations under Rule 8(a)(1). Compare *Heirs of Deskins v. Consol. Energy, Inc.*, No. 1:11CV00069, 2012 WL 503636, at *2 (W.D. Va. Feb. 12, 2012) (suggesting that *Twombly* does not apply to jurisdictional averments), with *Coal. for a Sustainable Delta v. Fed. Emergency Mgmt. Agency*, 711 F. Supp. 2d 1152, 1158–59 (E.D. Cal. 2010) (holding that *Twombly* applies to jurisdictional facts). My argument for a fact-based approach to jurisdictional pleading assumes that *Twombly* and *Iqbal* do not already require something akin to fact-based pleading for jurisdictional allegations, which is a question for another day.

283. See FED. R. CIV. P. 8(a)(1) (merely requiring “a short and plain statement of the grounds for the court’s jurisdiction”).

284. This is not surprising, considering the paucity of factual detail included in Form 7 of the federal rules, which gives examples of jurisdictional allegations that would be sufficient at the pleading stage. See FED. R. CIV. P. Form 7.

285. This heightened standard would be similar to the fact-pleading approach that some state courts use to assess whether plaintiff has stated a claim for relief. See, e.g., *Harvey v. Eastman Kodak Co.*, 610 S.W.2d 582, 584 (Ark. 1981) (adhering to a fact-pleading approach, rather than a notice-pleading approach); *Teter v. Clemens*, 492 N.E.2d 1340, 1342 (Ill. 1986) (same).

286. As a result, mistaken invocation of federal court jurisdiction would be less likely. It also would be difficult for parties to use conclusory allegations to intentionally hide potential jurisdictional defects. Equally important, the defendant would be in a better position to make an accurate assessment of the costs and benefits of making a motion to dismiss on jurisdictional grounds.

287. I am not arguing that we turn back the clock to the days of common law pleading, when courts dismissed claims with prejudice if litigants did not adhere to hyper-technical procedural

Admittedly, fact-based pleading has potential disadvantages. Ferretting out jurisdictional facts in the early stages of litigation is not costless, and it is possible that defendants may use heightened pleading rules in strategic ways that incur social costs.²⁸⁸ In the vast majority of cases, however, the jurisdictional facts will consist of fairly straightforward information that is not costly to gather.²⁸⁹ And in cases that present more jurisdictional complexity, the costs imposed by a fact-based pleading standard will appropriately cause the plaintiff to think through these issues before filing suit.

Second, efficiencies gained through early jurisdictional rulings will mean little unless we also address the social cost arising from jurisdictional discovery.²⁹⁰ It is increasingly common for parties to engage in a labor-intensive, costly round of discovery early in the litigation process, prior to the court's decision on a motion to dismiss.²⁹¹ To make matters worse, there is a dearth of case law in this area, and the standards governing the scope of jurisdictional discovery are vague and uncertain.²⁹²

Rule makers and courts should consider revising the standards for jurisdictional proof to streamline the process and minimize the need for discovery prior to adjudication of jurisdictional issues. Perhaps courts could operate on the assumption that facts alleged in the pleadings are sufficient for jurisdictional adjudication.²⁹³ In the event that more detail

formalities. *See* FREER, *supra* note 157, at 290. Instead, the jurisdictional fact-pleading standard I envision would require a minimal level of factual heft, so parties and courts can accurately assess subject-matter jurisdiction at an early stage.

288. For example, the defendant might strategically seek dismissal based on sparse jurisdictional allegations in the complaint, even when jurisdiction likely exists. *See* Emil Petrossian, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1309 (2007) (noting that well-financed defendants frequently initiate costly procedural litigation "to dry out the plaintiff's resources").

289. *See, e.g.*, *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 957 (7th Cir. 2003) (Wood, J., dissenting) ("Inquiries into diversity jurisdiction are often . . . straight forward, even though fact-finding might be necessary in the occasional case . . .").

290. The federal rules do not explicitly authorize discovery of jurisdictional facts. That has not stopped courts from authorizing jurisdictional discovery, however. *See* S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 497-501 (2010).

291. *Id.* at 536.

292. *Id.* at 492-93.

293. This is not unheard of. During much of the nineteenth century, federal courts heavily relied on the pleadings to determine the existence of jurisdiction. Collins, *supra* note 51, at 1838-40. "Prima facie" diversity jurisdiction existed if the plaintiff's complaint alleged that the parties were citizens of different states, and such allegations were sufficient for federal courts to adjudicate the merits, even when there was no jurisdiction in fact. *Id.* at 1837-39.

is necessary, parties could use affidavits to present additional facts.²⁹⁴ But courts should refuse to allow jurisdictional discovery unless the need for that discovery clearly outweighs its costs.

In other words, I argue that courts should reverse the existing presumption behind jurisdictional discovery: instead of starting from the assumption that discovery is appropriate, courts should assume that the pleadings and affidavits are sufficient to adjudicate the jurisdictional issue, and should order discovery only when it is absolutely necessary. Jurisdictional discovery likely would be rare under this approach, further reducing litigation costs.

2. *Foreclosing Jurisdictional Challenges*

Mandatory foreclosure of jurisdictional challenges after a specified cut-off point should be a cornerstone of any proposal to solve jurisdiction's social cost. I argue that challenges to *statutory* jurisdiction should be cut off at the close of the pleadings.²⁹⁵ After that point, courts could consider belatedly raised jurisdictional defects only if they implicate constitutional concerns.²⁹⁶

a. *Cutting off Objections to Statutory Jurisdiction*

Much of the social cost of jurisdictional nonwaivability would be mitigated if objections to statutory federal court jurisdiction were cut off early on—ideally, at the close of the pleadings, when the district court issues its jurisdictional certification order.²⁹⁷ This approach would provide incentives for the defendant to either make a motion to dismiss, or identify jurisdictional defects in her answer to the complaint.²⁹⁸

The main advantage to implementing this mandatory cut-off is that it provides incentives for parties to investigate jurisdiction and litigate jurisdictional defects early, before incurring other litigation costs. Notably, it would eliminate incentives for the defendant to adopt a wait-and-see approach, raising jurisdictional defects only after suffering an

294. Most relevant jurisdictional facts—such as the citizenship of the parties, the amount in controversy, and federal law issues arising from the plaintiff's claims—can be adduced from pleadings with sufficient factual detail. In the unlikely event that more detail is needed, it would be easy in most cases for the parties to attach affidavits or statements of jurisdictional fact to their pleadings or to briefing submitted in advance of jurisdictional certification.

295. *See infra* Part III.2.a.

296. *See infra* Part III.2.b.

297. *See* Gao, *supra* note 15, at 2404–07.

298. *See id.* at 2405–06.

adverse judgment on the merits.²⁹⁹ It also would prevent the plaintiff from mounting a belated challenge to the very jurisdiction that he or she invoked when initially filing the lawsuit in federal court.³⁰⁰

The primary criticism against this type of mandatory cut-off—particularly one that applies early in litigation—stems once again from concerns relating to litigation costs.³⁰¹ The argument goes like this: cases with latent jurisdictional defects are fairly rare, and the cost savings from an early cut-off of jurisdictional objections in those few cases would be greatly outweighed by the expense of parties investigating jurisdiction in *all* cases—especially cases in which jurisdictional litigation would not otherwise occur.

And yet, the federal court system already imposes other similar threshold procedural requirements as a matter of course. For example, Rule 26(a)(1) requires litigants in most civil actions to make initial disclosures of essential factual information to the other side shortly after the onset of litigation.³⁰² Similarly, Rule 11 requires the parties and their counsel to perform a reasonable inquiry into the factual allegations in the pleadings.³⁰³ Even in the jurisdictional context, existing doctrine prohibits litigants from collaterally attacking jurisdiction after a final judgment.³⁰⁴ We adhere to these rules—despite their short-term cost—because they promote efficiency and just outcomes over the long-term. I submit that an initial investment in jurisdictional matters by civil litigants is no different.

Indeed, I am not entirely sure what types of complexity and costs the doubters of a cut-off rule fear. Jurisdiction will almost certainly be easily investigated and easily alleged in the vast majority of federal court cases, at minimal cost to the parties. Most federal question complaints will simply list an applicable federal law cause of action.³⁰⁵ Likewise, most diversity pleadings will simply list the citizenship of parties who are

299. See *supra* notes 193–212 and accompanying text.

300. See *supra* notes 213–18 and accompanying text.

301. Collins, *supra* note 51, at 1895 (arguing that a jurisdictional cut-off rule would “result in unnecessary expenditure of federal judicial resources overall”).

302. FED. R. CIV. P. 26(a)(1). See generally Gainor, *supra* note 244, at 1452–58.

303. FED. R. CIV. P. 11(b). See generally Jerold S. Solovy et al., *Sanctions Under Rule 11: A Cross-Circuit Comparison*, 37 LOY. L.A. L. REV. 727, 727–45 (2004) (analyzing the circumstances in which Rule 11 is used by courts to sanction improper pleading practices).

304. See, e.g., *Durfee v. Duke*, 375 U.S. 106, 111–14 (1963); *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375–76 (1940).

305. See 28 U.S.C. § 1331 (2012); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (noting that “federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law”).

without a doubt completely diverse, along with an amount in controversy that is sufficient under plaintiff-friendly rules.³⁰⁶ If statements alleging subject-matter jurisdiction are more complex than that, the parties and court probably ought to be thinking about jurisdiction up front anyway.

b. Using Article III as a Jurisdictional Backstop

Note that I am advocating an early cut-off point for challenges to *statutory* jurisdiction only. Because federal courts probably have an obligation to assess the *constitutional* basis for subject-matter jurisdiction at any point,³⁰⁷ they should be able to consider belated arguments about Article III jurisdiction. Thus, even after litigation on statutory jurisdiction is cut off, Article III provides a “jurisdictional backstop,” ensuring that federal courts can assert and assess essential structural values if need be.

Under my proposal, jurisdictional litigation after the cut-off point presumably would be greatly reduced from status quo levels. At the close of the pleadings, the parties will have raised or waived arguments that would be based on the often confusing intricacies of statutory subject-matter jurisdiction.³⁰⁸ Many latent issues as to the court’s constitutional jurisdiction will be relatively tame by comparison—i.e., whether there is a “federal ingredient” in federal question cases,³⁰⁹ or whether the parties are minimally diverse in diversity cases.³¹⁰ The outer boundaries of Article III jurisdiction likely will be litigated less frequently—and more predictably—than the contours of statutory

306. See 28 U.S.C. § 1332 (2012); *Mas v. Perry*, 489 F.2d 1396, 1400 (5th Cir. 1974) (“It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.”).

307. See *supra* note 158.

308. See, e.g., *Hertz Corp. v. Friend*, 559 U.S. 77, 89 (2010) (noting that the legal test for a corporation’s “principal place of business” for statutory diversity jurisdiction has been “difficult to apply”); *Grable*, 545 U.S. at 314–16 (stating and applying the multiple-factor test for statutory federal question jurisdiction).

309. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting) (noting that Congress can grant jurisdiction “whenever there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question”); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 824–25 (1824) (upholding the constitutionality of a court’s exercise of federal question jurisdiction under Article III because the federal question “forms an original ingredient” of the lawsuit).

310. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) (noting that Article III merely requires “minimal diversity,” which exists “so long as any two adverse parties are not co-citizens”).

jurisdiction,³¹¹ reducing social costs associated with the jurisdictional inquiry.

Undoubtedly, some thorny Article III jurisdictional issues will persist.³¹² For example, a cut-off point for statutory jurisdictional requirements does little to curb the costs of belated litigation on standing, ripeness, or mootness, which are rooted in constitutional limitations on federal jurisdiction,³¹³ and can involve elaborate and complex jurisdictional determinations.³¹⁴

But we should not let the perfect be the enemy of the good.³¹⁵ Mandatory jurisdictional certification, paired with an early cut-off rule for statutory jurisdictional challenges, likely will address most of the social waste at play.³¹⁶ Additionally, constitutional limits on jurisdiction arguably protect vital structural interests,³¹⁷ making it somewhat easier to justify the social cost of dismissals based on latent jurisdictional defects. Thus, even if a cut-off for challenges to statutory jurisdiction will not solve all problems associated with jurisdictional nonwaivability, it is a step in the right direction.

3. *Interlocutory Appeal of Jurisdictional Rulings*

In addition to jurisdictional certification and a cut-off point, one of the most significant ways to reduce jurisdiction's social cost would be to

311. Granted, the boundaries of Article III jurisdiction are not always clear, and are sometimes quite murky, due in no small part to the Supreme Court's efforts to sidestep questions of constitutional jurisdiction in the past. FALLON ET AL., *supra* note 147, at 763–73 (analyzing nuances in constitutional federal question jurisdiction). Even so, my proposal would at least give federal courts greater opportunity to clarify these boundaries.

312. I thank Kathryn Watts for raising and offering thoughts on this issue.

313. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

314. See, e.g., Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 484 (2004) (describing standing, ripeness, and mootness as “a maze of complicated and partially overlapping doctrines”).

315. M. de Voltaire, *La Begueule, Conte Moral*, in CONTES ET POÉSIES DIVERSES A3 (1772) (stating “le mieux est l'ennemi du bien”; translated, “the best is the enemy of the good”).

316. It appears that statutory federal question and diversity jurisdiction issues come up much more often than constitutional standing, mootness, and ripeness questions. A Westlaw search for all federal cases decided during June 2013 in which the word “jurisdiction” appears within 200 words of “federal question” or “diversity” yielded 800 results. In comparison, a similar search for June 2013 cases in which the word “jurisdiction” appears within 200 words of “standing,” “mootness,” or “ripeness” produced 350 results.

317. See, e.g., A. Christopher Bryant, *Presidential Signing Statements and Congressional Oversight*, 16 WM. & MARY BILL RTS. J. 169, 180 (2007) (suggesting, in the context of presidential signing statements, that Article III justiciability doctrines “protect core structural values by circumscribing the role of the judiciary in...highly politicized and policy-sensitive disagreements”).

allow interlocutory appeals of jurisdictional decisions at the discretion of the federal appellate courts.³¹⁸ This flies in the face of current practice—currently, rulings on jurisdictional issues are not immediately appealable, and normally are appealed only after the trial court issues a final judgment.³¹⁹ The final judgment rule arises from a desire to prevent wasteful piecemeal appeals.³²⁰

A limited ability by appellate courts to grant discretionary review of interlocutory jurisdictional rulings at an early stage of litigation could obviate significant waste in many cases.³²¹ This would be especially true when the jurisdictional issue is novel or uncertain, or when it is probable that the trial court's jurisdictional ruling is erroneous.³²² These circumstances make it more likely that the jurisdictional ruling eventually would be reversed on appeal, after the parties spend significant resources litigating the merits.³²³ Interlocutory review of jurisdictional rulings would be appropriate at that point, and would likely decrease overall social costs—in particular, wasted litigation resources—while respecting structural values.³²⁴

Fortunately, an analogous model for this type of discretionary appellate review already exists: under Rule 23(f), federal appellate

318. See Collins, *supra* note 51, at 1895 n.274 (noting that existing proposals for jurisdictional cut-off rules fail to address the significant costs of “eleventh-hour jurisdictional reversals” on appeal).

319. See, e.g., Khadr v. United States, 529 F.3d 1112, 1117–18 (D.C. Cir. 2008); Eastman v. Marine Mech. Corp., 438 F.3d 544, 549 (6th Cir. 2006).

320. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009).

321. Congress has recognized the efficiency benefit of interlocutory review in similar contexts. See, e.g., 28 U.S.C. § 1292(b) (2012) (allowing appellate courts to hear discretionary appeals of “order[s] involv[ing] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation”); see also S. REP. NO. 85-2434, at 2 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5255, 5256 (citing “the need for expedition of cases pending before the district courts” as the reason for § 1292(b)).

322. Indeed, if the jurisdictional issue is novel or uncertain, the district court and court of appeals likely could exercise their discretion and allow immediate appeal of the jurisdictional order under § 1292(b), meaning my proposal could be partially accomplished using existing jurisdictional statutes.

323. See, e.g., Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1177–78 (1990) (noting that decisions on uncertain law are more likely to be reversed by appellate courts).

324. Specifically, discretionary interlocutory review would serve as something akin to a litigation pressure-release valve—if the appellate courts notice a novel or uncertain jurisdictional issue, they could resolve that issue early on, allowing the parties to proceed with litigation with the certainty that jurisdiction exists (or re-file in state court if it does not). And there would be no structural concerns if the interlocutory review mechanism is statutory, because Congress will have given its consent.

courts have discretion to permit an immediate interlocutory appeal of “an order granting or denying class-action certification.”³²⁵ The rule does not facilitate undue delay,³²⁶ and interlocutory appeals on class action certification rulings are far from common.³²⁷

Similarly, Congress or rule makers could give federal courts discretionary authority to exercise immediate appellate review of jurisdictional rulings when the benefits of interlocutory review outweigh the costs of further jurisdictional litigation. The relevant statutes and rules could codify factors that appellate courts must consider when deciding whether to grant immediate review—i.e., the jurisdictional issue is novel, and delaying appellate review would cause the parties and courts to incur unnecessary costs.

Let me be clear: I do not advocate *mandatory* appellate review of interlocutory jurisdictional rulings, nor do I think it would be wise to have widespread use of a discretionary appellate review mechanism. Interlocutory appeal of jurisdictional rulings should be fairly rare, and strictly limited to cases in which there is good reason to think that immediate intervention by appellate courts would prevent social waste.

4. *Using Sanctions to Deter Abuse by Litigants*

Finally, some might argue that the proposed approach I outline here would strip a federal court of its discretionary ability to dismiss a case when it belatedly discovers that jurisdiction was fabricated or manufactured through “fraud, misrepresentation, collusion, or misconduct by any or all parties.”³²⁸ The thrust of this critique is that clear jurisdictional rules lack nuance that would allow courts to check against abuse by litigants.³²⁹

I do not dispute the importance of this point. Instead, I argue that

325. FED. R. CIV. P. 23(f). See generally Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97 (2001); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531 (2000). Other similar analogs also exist in limited niches of federal jurisdictional law. See, e.g., 28 U.S.C. § 1453(c)(1) (2012) (giving appellate courts discretion to hear an appeal from a remand order).

326. See FED. R. CIV. P. 23(f) (“An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”).

327. See 2 MCLAUGHLIN, *supra* note 282, § 7:2 (noting that federal courts have emphasized that “appellate review of class certification decisions should not be routine”).

328. Gao, *supra* note 15, at 2405.

329. See, e.g., ALI STUDY, *supra* note 18, at 372 (justifying the nuance of the exceptions to its jurisdictional cut-off approach in part because “federal courts should remain free at all times to reject improper efforts to impose jurisdiction by consent”).

abuse can be discouraged through other means. Most notably, courts could use the threat of ex post sanctions for collusion and connivance to incentivize proper litigant behavior ex ante.³³⁰ As long as sanctions are severe enough to deter wrongful conduct, litigants presumably will behave.³³¹

The key point is that courts must set the expected sanction amount so that it exceeds the litigants' expected benefit from manufacturing jurisdiction or colluding to hide a jurisdictional defect.³³² Suppose, for example, that plaintiff and defendant's collective net benefit from hiding a jurisdictional defect (and litigating in federal court instead of state court) is \$50,000.³³³ Suppose also that there is only a ten percent chance that the federal court will discover the defect and the parties' collusion. If that is the case, the magnitude of the sanction must be set in excess of \$500,000, so that the parties will be properly deterred. For example, if the court sets the magnitude of the sanction at \$500,001, then the expected sanction (after multiplying the sanction magnitude by a ten percent probability of enforcement) will be \$50,000.10. Theoretically, that amount will be enough to deter parties who would otherwise receive \$50,000 collectively if they colluded to manufacture jurisdiction.

Proper use of sanctions would render discretionary exceptions for collusion or other litigant misbehavior unnecessary. This in turn would enhance the clarity and predictability of jurisdictional rules—Congress or rule makers could adopt a strict, mandatory jurisdictional cut-off rule, while using sanctions to guard against litigant misbehavior.

330. *E.g.*, Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 619 (1994) ("The development of judicially-imposed sanctions in litigated proceedings . . . has had beneficial effects on litigative behavior: discouragement of frivolous assertions and deterrence of tactical litigation abuses.").

331. A complete analysis of the desirability and workability of sanctions in the context of jurisdictional allegations is beyond the scope of this Article. My point here is more general: there are other methods—including sanctions—that Congress, rule makers, and courts can use to deter litigant abuse.

332. Additionally, a court may need to use nonmonetary sanctions—such as its power to hold litigants in contempt—when a litigant's expected benefit from manufacturing jurisdiction exceeds its assets. *See* SHAVELL, *supra* note 172, at 230–31 (noting that judgment-proof individuals view losses exceeding their assets as merely equaling their assets, and are inadequately deterred).

333. There are several scenarios in which a federal forum would be mutually preferable to both plaintiff and defendant. Perhaps the plaintiff has greater faith that federal courts will enforce federal law claims. Perhaps the defendant simultaneously believes that a federal court jury will be more defendant-friendly than a state court jury.

CONCLUSION

Federal court subject-matter jurisdiction rules create significant social cost. They inflate litigation expenses, increase jurisdictional litigation, and make it more likely that litigants will play games with the rules for their own advantage. In light of this social cost, it is quite remarkable that litigants, scholars, and judges are so willing to accept the disadvantages of nonwaivable jurisdictional rules, without arguing more forcefully for change.

Change starts with a new mindset, and a new approach to our jurisdictional rules. We must view the structural and efficiency values underlying jurisdictional nonwaivability for what they are: multipolar, pluralistic, incommensurable, and at times conflicting. Rather than framing these values in a traditional, monistic way, we should seek solutions that identify and accommodate all relevant value sets, and achieve equilibrium among the various interests at play. Of course, those interests are, as always, more complicated than they first appear.

Solving the social cost of jurisdiction will not be easy. And yet, it remains a noble goal. Adoption of the proposals outlined in this Article—mandatory jurisdictional certification, a cut-off point for jurisdictional objections, an opportunity for interlocutory appeal of jurisdictional rulings, and sanctions to deter litigant abuse—would go a long way toward achieving equilibrium among structural and efficiency values. And even if some or all of these ideas do not come to fruition, perhaps they will at least provoke a meaningful debate on jurisdictional values, and our nonwaivable jurisdictional rules.