

August 2016

## Waiving Jurisdiction

Jessica Berch  
*Concordia University School of Law*

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>



Part of the [Jurisdiction Commons](#)

---

### Recommended Citation

Jessica Berch, *Waiving Jurisdiction*, 36 Pace L. Rev. 853 (2016)

DOI: <https://doi.org/10.58948/2331-3528.1929>

Available at: <https://digitalcommons.pace.edu/plr/vol36/iss3/4>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

---

---

# Waiving Jurisdiction

Jessica Berch\*

## Introduction

James D. Kroger died of electrocution when a nearby steel crane came into contact with a utility line.<sup>1</sup> His widow filed a wrongful death suit in federal court against Owen Equipment and Erection Company (“Owen”), arguing that Owen’s crane contributed to her husband’s death.<sup>2</sup> Mrs. Kroger invoked diversity jurisdiction by alleging that Owen was “a Nebraska corporation with its principal place of business in Nebraska,” while she resided in Iowa.<sup>3</sup> In its answer, Owen admitted its incorporation under Nebraska law, but denied everything else.<sup>4</sup> At that time, Mrs. Kroger and her attorneys did not suspect any defect in jurisdiction.

The case proceeded. Pleadings closed. Discovery ended. Trial began. Then, three days into trial, a surprise. Owen’s counsel called Owen’s Secretary, one Mr. Petersen, to the stand.<sup>5</sup> Mr. Petersen testified that Owen’s principal place of business was in Iowa, not Nebraska.<sup>6</sup> That meant that an Iowa plaintiff had sued an Iowa defendant, and diversity was lacking. That same afternoon, Owen’s counsel filed a motion challenging federal subject-matter jurisdiction.<sup>7</sup> The lower

---

\* Associate Professor of Law, Concordia University School of Law. Many thanks to the participants of the Inland Northwest Scholars Workshop and to my diligent research assistant, J.B. Evans.

1. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 367 (1978). For a thorough discussion of this case by another Berch, my wonderful father, please see Michael A. Berch, *The Erection of a Barrier Against Assertion of Ancillary Claims: An Examination of Owen Equipment and Erection Company v. Kroger*, ARIZ. ST. L.J. 253 (1979).

2. *Kroger*, 437 U.S. at 367–68.

3. *Id.* at 367–69 (citation omitted).

4. *Id.* at 369.

5. *Kroger v. Owen Equip. & Erection Co.*, 558 F.2d 417, 419 (8th Cir. 1977), *rev’d sub nom. Kroger*, 437 U.S. at 377.

6. *Kroger*, 558 F.2d at 419.

7. *Id.*

courts denied the motion, pointing out the gamesmanship by Owen, but the United States Supreme Court ultimately reversed.<sup>8</sup> In doing so, the Supreme Court recited the black-letter law pertaining to subject-matter jurisdiction defects: “[i]t is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.”<sup>9</sup>

And, with that, the Supreme Court rewarded Owen for filing an incomplete and possibly intentionally misleading answer, delaying filing a dispositive motion to dismiss, waiting to see how the case would unfold at trial, wasting court time and party resources, and finally, belatedly raising the defect only after the applicable statute of limitations had expired, thus potentially preventing Mrs. Kroger from refiling her lawsuit in state court.<sup>10</sup>

This Article explains why courts treat subject-matter jurisdiction as sacrosanct, demonstrates why this reaction is unwarranted, and advocates that, in cases like *Kroger*, a defect in the district court’s subject-matter jurisdiction should be deemed waived if not raised before trial begins or any adjudication is made on the merits.<sup>11</sup>

This Article addresses timely issues. On May 26, 2015, the United States Supreme Court paved the way for a revised view

---

8. *Kroger*, 437 U.S. at 369, 377.

9. *Id.* at 374.

10. Although we do not know for sure that Owen was purposely deceptive in its answer or in the timing of the motion to dismiss, many believe that is the case. See Igor Potym, *Federal Jurisdiction—Ancillary Jurisdiction—Independent Grounds of Jurisdiction Required for Plaintiff’s Claim Against Third Party Defendant* (Owen Equipment and Erection Co. v. Kroger), 98 S. Ct. 2396 (1978), 62 MARQ. L. REV. 89, 99 (1978) (“Owen concealed its true citizenship until after the Iowa statute of limitations had expired.”).

11. Cf. ARIZ. R. CIV. P. 42(f)(1)(D) (describing when waiver occurs for the right to notice a judge; waiver occurs after “(aa) the judge rules on any contested issue; or (bb) the judge grants or denies a motion to dispose of one or more claims or defenses in the action; or (cc) the judge holds a scheduled conference or contested hearing; or (dd) trial commences”). Merely holding a scheduled conference or the contested hearing should not trigger waiver of subject-matter jurisdiction in federal court. The other events, however, should trigger such waiver.

of constitutional jurisdiction.<sup>12</sup> In *Wellness International Network, Ltd. v. Sharif*, the Court held that parties' consent cures a court's constitutional jurisdictional deficiency.<sup>13</sup> In this seemingly innocuous bankruptcy case—lost amid the blockbuster same-sex marriage,<sup>14</sup> Affordable Care Act,<sup>15</sup> and workplace discrimination<sup>16</sup> cases of the 2014 Term—the Supreme Court quietly swept away formal jurisdictional categories and embraced practical solutions to jurisdictional defects.<sup>17</sup>

Before taking up the Supreme Court's charge and launching a full frontal attack on the doctrine, this Article first briefly reviews some fundamentals. Subject-matter jurisdiction is the court's power to adjudicate a case.<sup>18</sup> Because subject-matter jurisdiction restricts a court's authority to hear a case and render a decision, courts say that they must treat it differently from other defects in a court proceeding; that is, they must treat it as "inflexible and without exception."<sup>19</sup> As part of this inflexibility, courts typically determine whether they have subject-matter jurisdiction at the outset of the litigation.<sup>20</sup> But because jurisdiction is so important, defects in subject-matter jurisdiction may be raised at any time before the trial court and throughout the appeals process, even if the

---

12. *See Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

13. *Id.* at 1939.

14. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

15. *King v. Burwell*, 135 S. Ct. 2480 (2015).

16. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015); *Young v. UPS, Inc.*, 135 S. Ct. 1338 (2015).

17. *See Wellness Int'l*, 135 S. Ct. at 1944. Perhaps *Wellness International* will be like *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Erie*, too, originally "went unnoticed until Justice Stone wrote privately to Arthur Krock of the New York Times, calling to his attention 'the most important opinion since I have been on the court.'" STEPHEN YEAZELL, *CIVIL PROCEDURE* 243 (Aspen 8th ed. 2012) (citation omitted).

18. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citation omitted).

19. *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884); *see also Arbaugh*, 546 U.S. at 514 (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.").

20. *Houston v. Murmansk Shipping Co.*, 667 F.2d 1151, 1154 (4th Cir. 1982) ("[J]urisdiction is typically determined at the outset of litigation from the plaintiff's complaint.").

issue was not raised at the trial-court level.<sup>21</sup> Judges may get in on the action and raise the issue themselves, even if no party has pointed out a potential defect.<sup>22</sup> As a result of these late-raised attacks on subject-matter jurisdiction, some judgments are reversed after lengthy trials and even after appeals have begun or have reached the Supreme Court.<sup>23</sup> It is this understanding of the doctrine that led the Supreme Court to find that the federal courts lacked jurisdiction in Mrs. Kroger's case.<sup>24</sup>

Despite that seemingly iron-clad rhetoric, federal courts are not always so quick to dismiss cases with suspect jurisdiction. At times, particularly to ameliorate the sting of belated attacks on jurisdiction, federal courts have created

---

21. *Arbaugh*, 546 U.S. at 506 (citations omitted) ("The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment."). The treatises agree. *See, e.g.*, 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3522 (3d ed. 2015) [hereinafter *WRIGHT & MILLER*] ("The parties cannot confer on a federal court jurisdiction that has not been vested in that court by the Constitution and Congress. This means that the parties cannot waive lack of subject matter jurisdiction by express consent, or by conduct, or even by estoppel. The subject matter jurisdiction of the federal courts is too fundamental a concern to be left to the whims and tactical concerns of the litigants. . . . Even if the parties remain silent, a federal court, whether trial or appellate, is obliged to notice on its own motion its lack of subject matter jurisdiction, or the lower court's lack of subject matter jurisdiction when a case is on appeal."); 2 JAMES WM. MOORE ET. AL., *MOORE'S FEDERAL PRACTICE* § 12.30[1] (Matthew Bender & Co., Inc. 3d ed. 1997) ("Lack of subject matter jurisdiction may be raised at any time. Indeed, even if the litigants do not identify a potential problem in that respect, it is the duty of the court—at any level of the proceedings—to address the issue sua sponte whenever it is perceived."); *RESTATEMENT (SECOND) OF JUDGMENTS* § 1 cmt. a (AM. LAW INST. 1982) ("The requirement of subject matter jurisdiction stands on different footing [from personal jurisdiction and notice requirements]. Broadly speaking, an objection to subject matter jurisdiction may be taken at any time during an action, even on appeal, and may be taken after the action has become final under a wider variety of circumstances than the objection to territorial jurisdiction.").

22. *FED. R. CIV. P.* 12(h)(3) ("If the [district] court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). If federal courts do change the timeframe for waiver, they will also need to spearhead a change to this rule. *See also supra* note 21.

23. *See, e.g.*, *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Belleri v. United States*, 712 F.3d 543 (11th Cir. 2013); *Arena v. Graybar Elec. Co.*, 669 F.3d 214 (5th Cir. 2012).

24. *Kroger*, 437 U.S. at 374.

exceptions to the allegedly inflexible doctrine.<sup>25</sup>

The only readily admitted exception to the treatment of subject-matter jurisdiction as mandatory, inflexible, and nonwaivable is that subject-matter jurisdiction may not be raised on collateral attack;<sup>26</sup> a judgment that has been upheld on appeal, or for which appeals or appeal periods have expired, becomes final and must generally be allowed to stand.<sup>27</sup> But, despite the lack of popular acknowledgement, courts have created other exceptions to the uniform treatment of subject-matter jurisdiction defects.<sup>28</sup>

In earlier scholarship, I addressed these other exceptions, which include the following: federal courts may decide other jurisdictional issues, such as personal jurisdiction and *forum non conveniens*, before determining whether they have subject-matter jurisdiction; federal “courts may issue, and need not unwind, non-dispositive orders even if the courts ultimately determine that they lack” the power to issue such orders; federal courts have the discretion to consider claims over which they have no subject-matter jurisdiction, “even if they have dismissed all the claims over which they did have subject-matter jurisdiction[;]” and, at least in removal cases, parties may cure statutory subject-matter jurisdiction defects that have persisted throughout the case and should have nullified federal-court authority to adjudicate.<sup>29</sup>

To complicate matters further, courts do not consistently follow the no-waiver rule or apply the exceptions.<sup>30</sup> The result

---

25. See *infra* Section I.A.2.

26. See *infra* Section I.A.2.a.

27. The no-waiver rhetoric suggests that parties should be permitted to raise the lack of subject-matter jurisdiction on collateral attack. The general rule, however, is that subject-matter jurisdiction may not be collaterally attacked. See *Kontrick v. Ryan*, 540 U.S. 443, 455 n.9 (2004) (citations omitted) (“Even subject-matter jurisdiction, however, may not be attacked collaterally.”). But see *Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940) (permitting collateral attack because of the unique statutory scheme).

28. See *infra* Section I.A.2.b–c (discussing other exceptions to the no-waiver rule).

29. Jessica Berch, *Waving Goodbye to Non-Waivability: The Case for Permitting Waiver of Statutory Subject-Matter Jurisdiction Defects*, 45 MCGEORGE L. REV. 635, 669, 685, 692 (2014).

30. By way of example, compare *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64 (1996) (permitting an exception to the no-waiver rule), with *Grupo*

is a haphazard landscape that produces inconsistencies in our system.<sup>31</sup> Without the exceptions, the existence of a late-discovered defect in subject-matter jurisdiction may prove harsh for the parties as the federal court dismisses the case, and may also prove costly to the courts as the case ends in one system and potentially begins anew in another; however, with the possibility of exceptions, the state of affairs may be even worse. The *ad hoc* exceptions “fail to provide guidance for future cases, facially conflict with the rules governing subject-matter jurisdiction, and add” to the uncertainty, costs, and delay of litigation.<sup>32</sup>

These many exceptions to subject-matter jurisdiction show that the rhetoric espousing absolute rules is outdated, and worse, no longer aligns with practice. In practice, courts often treat subject-matter jurisdiction more like other trial defects; namely, as waivable and even subordinate to other issues. Finding support in the actual treatment of subject-matter jurisdiction, rather than from the rhetoric surrounding the doctrine, I have previously argued that defects in a district court’s statutory subject-matter jurisdiction should be deemed waived if not timely raised.<sup>33</sup> In the case of statutory subject-matter jurisdiction, “timely” should not be read, as it is widely read today, to include direct appeals. Drawing on work from the 1969 American Law Institute’s (“ALI”) *Study on the Division of Jurisdiction Between State and Federal Courts*, I have advocated that statutory subject-matter jurisdiction should be deemed waived if not raised by the time trial begins or there is a dispositive ruling on any significant merits issue.<sup>34</sup>

But my earlier scholarship did not address *constitutional* subject-matter jurisdiction.<sup>35</sup> It seemed straightforward enough to make the argument that *statutory* subject-matter

---

Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 582 (2004) (declining to permit an exception to the no-waiver rule).

31. See generally Berch, *supra* note 29, at 640–42.

32. *Id.* at 640.

33. *Id.* at 642–43.

34. *Id.* at 642–43, 678–81.

35. See *id.* at 680. At the time I wrote that Article, *Wellness International Network Ltd. v. Sharif* had not been decided, and the case for permitting waiver of constitutional subject-matter jurisdiction defects was, accordingly, much weaker.

jurisdiction could be subject to waiver. After all, Congress surely has the power to change by statute the consequences of a late-raised statutory defect. And federal courts are inclined to allow waiver even now, when the rhetoric allegedly prohibits such practice. In any event, jurisdiction's strong rhetoric of "inflexibility" and "without exception," grounded in constitutional norms, did not seem to apply to statutory subject-matter jurisdiction.

Now, prodded by the Supreme Court's recent endorsement in *Wellness International* of a more flexible constitutional jurisdictional doctrine,<sup>36</sup> I take the next step and argue that defects in a district court's constitutional subject-matter jurisdiction, just like defects in its statutory subject-matter jurisdiction, should be deemed waived if not raised by the commencement of trial or by any disposition on the merits, and the ALI's proposal should be expanded to cover constitutional defects in a district court's original jurisdiction, in addition to statutory defects.<sup>37</sup> This waiver principle should apply only in district courts, not in cases originally filed in the Supreme Court or cases that have original jurisdiction in the district courts, but may be lacking appellate jurisdiction in a particular circuit court.<sup>38</sup>

---

36. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015).

37. Clearly, Congress may enact a statute detailing the consequences of a late-raised statutory subject-matter jurisdiction defect. What about a *constitutional* defect? The Constitution itself says nothing about when a federal court must determine its jurisdiction. Nor does it decree that constitutional subject-matter jurisdiction defects cannot be waived. Indeed, in the 1800s, the practice was to the contrary—and parties themselves could confer federal jurisdiction merely by pleading it. See Berch, *supra* note 29, at 685–88. Given that waiver issues themselves are not mentioned in the text of the Constitution, but result simply from court practice, Congress may be able to enact this statute. Alternatively, and likely preferably, the Supreme Court may alter constitutional practice. Indeed, the Supreme Court has sometimes suggested that it has more leeway in changing constitutional precedent because Congress cannot correct the Court's constitutional decisions. See, e.g., *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–10 (1932) (Brandeis, J., dissenting).

38. Regarding original jurisdiction, consider this hypothetical based on *Marbury v. Madison*, 5 U.S. 137 (1803). Assume that Secretary of State Madison had appeared before the Supreme Court and did not raise lack of jurisdiction. If the Supreme Court had sent the case to a Special Master for determination of the facts, all the while not suspecting a lack of jurisdiction, the Court should be able, at a later time, to dismiss the case for lack of



One brief caveat regarding waiver: one could say, at the extreme, that this thesis would allow federal courts to declare their own jurisdiction—to arrogate unto themselves the power to hear all cases, even in direct contravention of the words of the Constitution, or, perhaps worse, that it would allow parties to confer jurisdiction on federal courts. But permitting waiver of late-discovered defects is not as radical as it may first appear. Historically, the United States Supreme Court treated waiver of subject-matter jurisdiction very differently than it does today.<sup>39</sup> Until the late 1800s, parties waived objections to jurisdiction “if the objection was not made by a pre-answer plea.”<sup>40</sup> In the late 1800s, the pendulum began swinging toward nonwaivability.<sup>41</sup> By the early 1900s, the change was complete, and courts had started cloaking subject-matter jurisdiction with the strict no-waiver mantra that survives to this day.<sup>42</sup> The Aristotelian Mean suggests that a middle ground is preferable, and this proposal helps bring our understanding of subject-matter jurisdiction back to that more stable middle ground. Parties cannot confer jurisdiction on the courts at the pleading stage; but nor should parties be able to withhold a jurisdictional defense until late stages of the proceedings, including appeals. Under this new proposal, courts and parties should, as they have always done, strive to act in conformity with the Constitution. Parties should bring cases in federal court, and federal courts should hear those cases, only where the cases plausibly present federal jurisdiction. But in those instances where the system fails—where the parties did not timely object, the court did not notice,

---

jurisdiction. After all, there would have been no trial or other disposition on the merits. Regarding appellate jurisdiction, consider a case properly heard in district court, but incorrectly appealed to a numbered circuit court, rather than the Federal Circuit. That circuit court should be able to dismiss for lack of jurisdiction (lack of *appellate* jurisdiction), even though the case had progressed beyond trial. For the remainder of this Article, when discussing the waiver principle, I mean waiver of the district court’s original jurisdiction.

39. See Berch, *supra* note 29, at 685–88.

40. Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1832 (2007).

41. *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 381 (1884) (allowing subject-matter jurisdiction defect to be raised after trial).

42. Berch, *supra* note 29, at 687.

and trial has begun—the case should now proceed to judgment.

This Article proceeds in four parts. Part I briefly reviews why the current system of strong rhetoric, riddled with myriad exceptions, is cumbersome, confusing, and unnecessary. Part II examines other structural constitutional doctrines that courts have nonetheless deemed waivable: mootness, sovereign immunity, and territorial conceptions of personal jurisdiction.<sup>43</sup> In Part III, the Article explores why these other doctrines provide justifications for the waivability of constitutional subject-matter jurisdiction.<sup>44</sup> Finally, Part IV demonstrates how this new proposal could extend beyond jurisdiction to other justiciability doctrines and statutory prerequisites to suit.

### I. The Current System is Unworkable

Subject-matter jurisdiction's paramount importance and resulting alleged inflexibility stems from its basis in the Constitution.<sup>45</sup> A federal court cannot overlook a constitutional requirement, particularly a constitutional requirement limiting the court's power over the very matter at issue.<sup>46</sup> Nor may a party simply sidestep constitutional requirements by inattention or scheme to do so by guile.<sup>47</sup> The Constitution stands as the irreducible minimum with which courts, parties, and attorneys must comply. For these reasons, subject-matter jurisdiction must be present in every federal-court action; and, according to today's doctrine (at least before *Wellness*

---

43. The criminal law right to a fair trial may also partake of these attributes. However, criminal law implications are beyond the scope of this Article.

44. I do not claim perfect alignment, merely useful comparisons; so, in Part III, I also acknowledge weaknesses in the analogies between these doctrines and subject-matter jurisdiction.

45. See, e.g., 5B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3d ed. 2015) (noting that subject-matter jurisdiction involves the courts' power to hear cases and comes from Article III of the Constitution).

46. RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. d (AM. LAW INST. 1982) (“[A] court is powerless to decide a controversy with respect to which it lacks subject matter jurisdiction.”).

47. *Am. Fiber & Finishing, Inc. v. Tyco Healthcare Grp.*, 362 F.3d 136, 139 (1st Cir. 2004) (citation omitted) (“Just as a federal court cannot expand its jurisdictional horizon, parties cannot confer subject matter jurisdiction on a federal court by indolence, oversight, acquiescence, or consent.”).

*International*), if a party or the court discovers a potential defect at any time, even on appeal, the defect may be raised and may serve as a reason to undo any judgment and dismiss the action.<sup>48</sup>

That is the allegedly smooth landscape covering subject-matter jurisdiction. On closer viewing, however, the landscape has ditches, crags, streams, hills, and rocky terrain as well. Courts do permit subject-matter jurisdiction defects to be waived, deferred, or pretermitted in favor of other, easier issues and resolutions.<sup>49</sup> This section of the Article briefly reviews both the inflexible rhetoric and its exceptions.<sup>50</sup>

### A. *Why the Current System is Unworkable*

#### 1. Inflexible Rhetoric

Sometimes, as in *Kroger*, federal courts follow the inflexible rhetoric of subject-matter jurisdiction and dismiss cases—even mature cases near resolution. Probably the most famous (or infamous) example of dismissal for lack of subject-matter jurisdiction occurred in *Louisville & Nashville Railroad Co. v. Mottley*.<sup>51</sup> The Mottleys had received free train passes from the Louisville & Nashville Railroad. When the Railroad ceased to honor the passes, citing a federal statute purportedly disallowing such free passes, the Mottleys sued for breach of contract.<sup>52</sup> The case was a state-law breach of contract matter, but all the contested issues involved federal law; namely, the interpretation and constitutionality of the federal statute on which the Railroad had relied in its defense.<sup>53</sup> After the lower

---

48. Dan B. Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C. L. REV. 49, 49 (1962) (“In the name of this saintly precept a plaintiff may choose his forum, lose his suit and try again in another forum on the ground that the first court had no jurisdiction.”).

49. See Berch, *supra* note 29, at 662–75.

50. For a more in-depth exploration of this topic, see Berch, *supra* note 29, at 675–92. If you have read that piece, or are otherwise familiar with subject-matter jurisdiction’s practice-rhetoric gap, you may jump to Part I.B, *infra*.

51. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908).

52. *Id.* at 150–51.

53. *Id.* at 151–52.

federal court ruled on the merits in the Mottleys' favor, the United States Supreme Court dismissed the case for lack of subject-matter jurisdiction because neither the federal statutory nor the constitutional issues arose on the face of the Mottleys' well-pleaded complaint.<sup>54</sup>

Other cases of late-raised defects followed by dismissal grace the pages of the reporters with little fanfare, such as *Belleri v. United States*,<sup>55</sup> *Builders Mutual Insurance Co. v. Dragas Management*,<sup>56</sup> and *Arena v. Graybar*.<sup>57</sup> These circuit cases proceeded to judgment in district court before the issue of subject-matter jurisdiction was raised for the first time. These are just a few examples. One article reports that approximately five-hundred cases fall to late-raised defects

---

54. *Id.* at 152.

55. *Belleri v. United States*, 712 F.3d 543 (11th Cir. 2013). In *Belleri*, a plaintiff sued the United States and federal officials. *Id.* at 545–46. At first, all of the parties agreed that the plaintiff, as a citizen of the United States, could maintain the action. *Id.* On appeal, however, the defendants, for the first time, alleged that the plaintiff was, instead, an alien. *Id.* at 547. Aliens cannot institute actions under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *Id.* at 544. The Eleventh Circuit remanded the case to the district court for purposes of determining subject-matter jurisdiction. *Id.*

56. *Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, No. 11-1722, 2012 WL 5861255, at \*2 (4th Cir. Nov. 20, 2012). In *Builders Mutual Insurance Co.*, Builders filed a declaratory judgment action against its insured, seeking a judgment that it owed no duty to indemnify. Builders named a second insurer, Fireman's Insurance Company, as a defendant. On appeal, the insured argued, for the first time, that Fireman's should be realigned as a plaintiff and that such realignment would destroy complete diversity. The Fourth Circuit agreed with both arguments and ordered the case to be dismissed. *Id.* at \*\*1–2, 4.

57. *Arena v. Graybar Elec. Co., Inc.*, 669 F.3d 214, 217 (5th Cir. 2012). In *Arena*, the plaintiff sued the defendants for violations of a federal statute and supplemental state-law claims. The case proceeded to trial. At the beginning of trial, the district court dismissed the federal claim, but decided to keep the state-law claims. At the end of the bench trial, the court entered judgment for the plaintiff. Only after judgment did the defendants request dismissal for lack of subject-matter jurisdiction, alleging that there had never been jurisdiction over the federal claim and that, therefore, the district court could not have retained jurisdiction over the state-law claims. The district court disagreed; but, on appeal, the Fifth Circuit held that the alleged federal claim had been "fatally defective" on its face and, therefore, the district court never had jurisdiction over the case. In other words, never having had jurisdiction in the first instance, the district court could not have exercised supplemental jurisdiction over the state-law claims. Seven years after the start of litigation, the case was dismissed. *Id.* at 217–18, 221, 225.

each year.<sup>58</sup>

As if this inflexibility were not bad enough for the efficiency of our civil justice system, the inflexibility sometimes yields to exceptions. The overlay of these *ad hoc* exceptions makes it hard to predict whether the rule or an exception will apply in any particular case. This leads to inconsistent applications of the subject-matter jurisdiction doctrine and leaves parties and attorneys guessing as to which way the court will rule on their particular subject-matter jurisdiction squabble.

## 2. Ad-Hoc Exceptions

### a. *Subject-Matter Jurisdiction May Not Be Raised On Collateral Attack*<sup>59</sup>

The most well-known exception to the rule that subject-matter jurisdiction may be raised at any time is that the defect may not generally be reviewed on collateral attack.<sup>60</sup> This is true whether a party (or the court) raised the defect in the original proceeding or not.<sup>61</sup> Some courts and treatises take this exception a step further and advocate that even a defendant who defaults may not raise subject-matter jurisdiction on collateral attack, under the theory that the court, at least, was policing this issue just as the defendant would have had he appeared in the original action.<sup>62</sup>

---

58. Dustin E. Buehler, *Solving Jurisdiction's Social Cost*, 89 WASH. L. REV. 653, 655 (2014).

59. Collateral attacks are attacks on judgments other than by way of direct appeal. *Collateral Attack*, BLACK'S LAW DICTIONARY (10th ed. 2014).

60. See *supra* note 27 and accompanying text.

61. Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 313 (2011) ("[A] judgment resting on assumed subject-matter jurisdiction can nonetheless stand safe from challenge. Notwithstanding all the slogans about subject-matter jurisdiction's fundamental importance, the offense to the systemic interests at stake is not great enough always to warrant relief from judgment . . .").

62. 13D WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3536 (3d ed. 2015) ("Thus, it seems appropriate to assume that the court entering the default judgment did make a determination that it had subject matter jurisdiction. After all, the court had no business entering a judgment unless

The rule that subject-matter jurisdiction defects cannot be collaterally attacked is a rule about waiver. A defect that remains unnoticed through the original proceedings has been waived, despite the no-waiver rhetoric.

*b. Courts May Rule on Other Matters Before Addressing Subject-Matter Jurisdiction*

At least one other exception to subject-matter jurisdiction's lofty status is also well-known, if not popularly acknowledged as an exception: courts may rule on other matters before determining whether they have subject-matter jurisdiction over the case.<sup>63</sup> These rulings remain in effect even if the court later determines it lacked subject-matter jurisdiction and therefore lacked the power to issue the prior rulings.<sup>64</sup> This exception shows that subject-matter jurisdiction defects may be ignored—at least for a time—in favor of other matters, even if those matters prove dispositive of the action.

One prominent example of this phenomenon is that federal courts may rule on personal jurisdiction defects before addressing subject-matter jurisdiction defects.<sup>65</sup> The Supreme Court has unanimously sanctioned the practice, if only when the alleged subject-matter jurisdiction defect presents thorny

---

it had already determined that the case was properly before it.”). *But see* RESTATEMENT (SECOND) OF JUDGMENTS § 65 (AM. LAW INST. 1982) (permitting collateral attack of a default judgment).

63. *See Berch*, *supra* note 29, at 666–72; *see also* *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 435 (2007) (permitting district courts to decide *forum non conveniens* motions before subject-matter jurisdiction issues); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999) (granting district courts the flexibility to decide easy personal jurisdiction issues before complicated subject-matter jurisdiction issues); *In re LimitNone LLC*, 551 F.3d 572, 576–78 (7th Cir. 2008) (deciding venue before subject-matter jurisdiction). Other interim orders may also be issued. 13 WRIGHT & MILLER, *supra* note 21, § 3522 (“Despite the lack of subject matter jurisdiction, a federal court may be justified in ordering payment of just costs upon dismissal, assessing attorney’s fees or costs for improperly removed cases, imposing sanctions under Civil Rule 11 if it finds an abuse of the judicial process, imposing sanctions for improper conduct related to discovery under Civil Rule 37, or ordering other appropriate relief concerning inappropriate behavior.”).

64. *E.g.*, *Willy v. Coastal Corp.*, 503 U.S. 131, 135–36 (1992).

65. *Ruhrgas*, 526 U.S. at 587.

issues while the personal jurisdiction issue presents a straightforward inquiry with a clear resolution.<sup>66</sup>

From that fairly humble starting point, federal courts have greatly expanded their power to rule on other procedural issues before determining whether they have subject-matter jurisdiction. Federal courts have dismissed actions under the *forum non conveniens* doctrine without first determining whether they have subject-matter jurisdiction.<sup>67</sup> Federal courts have also taken the liberty of deciding venue issues before confirming their subject-matter jurisdiction.<sup>68</sup> The United States Supreme Court has even found it appropriate to decide class certification issues before subject-matter jurisdiction.<sup>69</sup> In all of these examples, from personal jurisdiction to class certification, the federal courts are making a pragmatic choice: it is more expedient to decide these other issues, some of which may resolve the action, before trying to resolve a more complex question of subject-matter jurisdiction.

Relatedly, federal courts may issue a variety of other orders even though they may ultimately lack subject-matter jurisdiction over the action. Federal courts may permit parties to conduct discovery, and the courts may continue “to issue sanctions, to hold a trial, and to assess costs . . . .”<sup>70</sup> In this vein, federal courts can, and do, hold trial in removal cases in which they lack subject-matter jurisdiction. The resulting judgment in such a case is valid as long as the parties cure the defect by the time the court enters judgment.<sup>71</sup>

With respect to the other sorts of interim orders—the ones that appear non-dispositive—the court may leave them in place, even if the court later discovers it lacks power over the action.<sup>72</sup> Some of these orders, such as important discovery

---

66. *Id.* at 588.

67. *Sinochem*, 549 U.S. at 435.

68. *In re LimitNone*, 551 F.3d at 576–78.

69. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999); *see also* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997).

70. Mary Elizabeth Phelan, *May a Federal District Court Dismiss a Removed Case for Want of Personal Jurisdiction Before Deciding Whether it Has Subject Matter Jurisdiction?*, 6 PREVIEW U.S. SUP. CT. CASES 315, 318 (1999).

71. *Caterpillar v. Lewis*, 519 U.S. 61, 76–77 (1996).

72. *Willy v. Coastal Corp.*, 503 U.S. 131, 135–36 (1992); *see also* *United*

rulings or preliminary injunctions, so vastly change the parties' leverage that they may have already settled, or settled on very different terms than otherwise would have seemed fair.<sup>73</sup> In other words, these orders, even when issued by courts lacking subject-matter jurisdiction, can effectively alter the parties' actions and end the action. This is another stark exception to subject-matter jurisdiction's alleged necessity and supremacy.

*c. Federal Courts May Retain Non-Diverse, State-Based Claims*

As a third example, federal courts may also decide entirely state-law issues between non-diverse parties, even after all federal claims have been dismissed. The supplemental jurisdiction statute, 28 U.S.C. § 1367,<sup>74</sup> provides trial courts wide discretion to keep or dismiss such actions.<sup>75</sup> Before the enactment of that statute, the common-law doctrine of pendent jurisdiction permitted similar flexibility.<sup>76</sup>

Although it rarely occurs, district courts sometimes do exercise their discretion to retain such state-based claims and are most apt to do so when the courts consider it "efficient."<sup>77</sup> In *Nowak v. Ironworkers Local 6 Pension Fund*, for example, the federal claim was dismissed only nine days before trial.<sup>78</sup> The district court kept the related state claims, and the Second Circuit affirmed that decision.<sup>79</sup>

In retaining these entirely state-based causes of action,

---

States v. United Mine Workers of Am., 330 U.S. 258 (1947).

73. Clermont, *supra* note 61, at 304.

74. 28 U.S.C. § 1367 (2012) (codifying the common-law doctrines of pendent and ancillary jurisdiction).

75. *Id.* at § 1367(c) (enumerating discretionary factors).

76. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 727–28 (1966).

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

78. *Nowak*, 81 F.3d at 1192; see also *Rauci*, 902 F.2d at 1054 ("The district court granted defendants summary judgment only on the section 1983 claims. The court retained jurisdiction over the pendent state negligence claims because at the time of the dismissal discovery was completed and dispositive motions had been decided in this case, which was ready for trial.").

79. *Nowak*, 81 F.3d at 1192.



these federal courts reach beyond their core jurisdictional purview, often because they deem it more efficient to retain jurisdiction over the claims to which the courts have already been exposed and in which they, and the parties, have invested significant time, energy, and resources.

\* \* \*

In sum, although we say that subject-matter jurisdiction is required before federal courts may exercise their power over the case, that jurisdiction must be determined at the outset of the litigation, and that subject-matter jurisdiction cannot be waived or passed over to decide other issues, the truth of the matter is that federal courts have some leeway in how and when to address the issue. The federal courts deploy exceptions when it seems “fair” or “efficient” to do so. The *ad hoc* nature of the current landscape makes it difficult for parties and attorneys to predict when the courts will keep a case or dismiss it and, therefore, difficult for courts and academicians to justify. If subject-matter jurisdiction can be waived (on collateral attack), excused (in favor of dismissal on another ground), deferred (in favor of an interim ruling), or expanded (to retain jurisdiction over state-law claims), then perhaps federal courts should simply abrogate the rigid rhetoric and forthrightly acknowledge that subject-matter jurisdiction defects can already be waived and deferred.

Our current system thus presents two layers of problems. First, the various exceptions conflict with the rhetoric. Second, even with the escape hatches, approximately 500 cases are belatedly dismissed on jurisdictional grounds each year.<sup>80</sup> This system neither possesses the coherency of the rhetoric nor the efficiency of the exceptions. It presents the worst of both worlds.

#### B. *Other Responses to the Problem*

This lamentable state of affairs is becoming more and more

---

80. Buehler, *supra* note 58, at 655.

evident and awkward. In the past decade, a flurry of scholarly activity has centered on the inconsistent manner in which our federal civil justice system handles subject-matter jurisdiction defects. Scholars have variously described the problem and offered differing solutions.<sup>81</sup> Some of these descriptions and solutions center on re-defining subject-matter jurisdiction to encompass a smaller universe, so fewer cases fall to delayed attacks;<sup>82</sup> others focus on blurring the line between subject-matter jurisdiction defects and other defects because of the particularly harsh results of calling a defect a “subject-matter” defect;<sup>83</sup> some advocate waiving statutory subject-matter jurisdiction defects early in the litigation;<sup>84</sup> and yet another group calls for jurisdictional resequencing to alleviate the pressure that delayed subject-matter jurisdiction attacks can cause.<sup>85</sup> Professor Dustin E. Buehler has a particularly provocative proposal: “[f]ederal 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 jurisdiction would be waived.”<sup>86</sup> All of these proposals seek to cure the ultimate defect—the inconsistency of the courts’ treatment of federal subject-matter jurisdiction.

---

81. *E.g., id.* at 689 (proposing that federal courts be required to affirmatively certify the existence of subject-matter jurisdiction at the outset of litigation); Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439 (2011) (discussing nonjurisdictional attributes of jurisdictional rules); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 365–67 (2010) (attempting to resolve the dichotomy between the liberal ethos of access to the courts and resolution on the merits with the restrictive nature of federal subject-matter jurisdiction); Steven Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 TULSA L. REV. 587, 603–04 (2009) (questioning the precedential force of cases in which subject-matter jurisdiction is later found lacking).

82. *See* Berch, *supra* note 29, at 645–51.

83. Dodson, *supra* note 81, at 1454 (“[J]urisdictionality is more malleable than [the traditional view] presupposes.”).

84. Qian A. Gao, Note, “*Salvage Operations Are Ordinarily Preferable to the Wrecking Ball*”: *Barring Challenges to Subject Matter Jurisdiction*, 105 COLUM. L. REV. 2369 (2005); *see generally* Berch, *supra* note 29.

85. Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1122 (2013).

86. Buehler, *supra* note 58, at 657–58.

The United States Supreme Court, too, has considered changing how our system handles late-raised subject-matter jurisdiction defects.<sup>87</sup> In the past few terms, the Court has taken extra care to label issues as nonjurisdictional, in part because of the harsh results that flow from the jurisdictional label.<sup>88</sup> As a consequence the Court has changed course and, while it once freely labeled issues as subject-matter jurisdiction and therefore nonwaivable, it is now more likely to call similar issues merits-based (that is, nonjurisdictional) and waivable.<sup>89</sup> The Court has admitted it regrets its previous handling of the issue and has asked the federal courts to take greater care in their jurisdictional labeling.<sup>90</sup>

For example, in its 2009 term, the Court decided four cases

---

87. For example, in the 2009 term, the Supreme Court decided four cases that turned on whether a certain issue was jurisdictional. In each case, the Supreme Court called the issue nonjurisdictional. *See generally* Morrison v. Nat'l Australian Bank Ltd., 561 U.S. 247, 254 (2010) (deciding that whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct regarding foreign securities is a merits inquiry, not a jurisdictional one); United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 273 (2010) (discussing whether an undue hardship finding in an adversary proceeding is a jurisdictional requirement); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157 (2010) (holding that the Copyright Act's registration requirement is not a restriction on subject-matter jurisdiction); Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 82–86 (2009) (concluding that the requirement that parties in minor disputes must attempt settlement is not a limitation on the National Railroad Adjustment Board's jurisdiction). In the 2014 term, the Supreme Court held that the time limitations in the Federal Tort Claims Act are not jurisdictional. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1629 (2015).

88. *See generally* Arbaugh v. Y & H Corp., 546 U.S. 500, 504 (2006) (holding that a fifteen-person requirement in Title VII was a merits issue, not a jurisdictional one).

89. *See supra* note 87 and accompanying text.

90. *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (alteration in original) (citations omitted) (“To ward off profligate use of the term ‘jurisdiction,’ we have adopted a ‘readily administrable bright line’ for determining whether to classify a statutory limitation as jurisdictional. We inquire whether Congress has ‘clearly state[d]’ that the rule is jurisdictional; absent such a clear statement, we have cautioned, ‘courts should treat the restriction as nonjurisdictional in character.’”); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91–92 (1998) (warning against “drive-by” jurisdictional rulings); *see also* *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 783 (10th Cir. 2013).

that addressed whether certain statutory requirements were jurisdictional or merits-based.<sup>91</sup> In all four cases, the Court deemed the requirements nonjurisdictional, thereby escaping both the harsh consequences of labeling the issues “subject-matter jurisdiction” and the subsequent necessity of deciding whether or not to deploy an exception.<sup>92</sup> In all four cases, the Court deemed the merits issue waived and allowed the case to proceed.<sup>93</sup>

Scholarship in the area shows how our system could plausibly handle core subject-matter jurisdiction defects (those that even the Supreme Court would, today, label jurisdictional) and offers interesting suggestions for changing the conceptualization of jurisdictional and nonjurisdictional rules. In addition, the Supreme Court’s careful delineation between jurisdictional and nonjurisdictional is a laudable step toward alleviating some of the current problems our system experiences in managing late-raised subject-matter jurisdiction defects. If subject-matter jurisdiction is narrowly defined, as the Supreme Court says it should be, fewer issues will fall within its purview, and fewer late-raised defects will be deemed to undermine the federal courts’ power, thereby triggering the harsh consequences of subject-matter jurisdiction’s no-waiver rule or necessitating the court to rely on a sense of “fairness” to maneuver around subject-matter jurisdiction’s no-waiver rule.

This Article agrees with much of the groundwork laid by the Justices and by other legal scholars and builds on it. Lawyers’ and courts’ profligate use of the term “subject-matter jurisdiction” creates problems and leads courts to employ the jurisdictional “raise anytime” rule too readily. The attempted rigid delineation of jurisdictional and nonjurisdictional rules also poses problems and leads courts—including the United States Supreme Court—to worry so much about the consequences of jurisdictional labeling that they waste judicial energy trying to ascertain into which doctrinal box an issue fits. Even then, their work is not complete, for they must

---

91. *Morrison*, 561 U.S. at 254; *United Student*, 559 U.S. at 273; *Reed*, 559 U.S. at 157; *Union Pac.*, 558 U.S. at 82–86.

92. See *supra* note 87 and accompanying text.

93. *Id.*

determine whether to apply the general rule to the situation, or an exception. This Article, however, goes further to alleviate these problems in our civil justice system.<sup>94</sup>

C. *The Time is Right to Change our Approach*

Despite the many solutions that have been offered up in the hopes of untangling subject-matter jurisdiction's tangled web, none seems to have gained traction.<sup>95</sup> Why another proposed solution? The United States Supreme Court's May 2015 decision in *Wellness International Network, Ltd. v. Sharif* indicates that the Court may now be willing to view jurisdiction more flexibly.<sup>96</sup> The case received little attention in newspapers or legal blogs, but it stirred vigorous debate among the Justices. While the majority took a flexible approach to its jurisdictional analysis, the dissent warned that the Court would soon regret its cavalier attitude toward constitutional subject-matter jurisdiction defects.<sup>97</sup>

*Wellness International* involved a bankruptcy; the case presented the question of whether Article III is violated when parties consent to the adjudication of non-core claims by a bankruptcy court.<sup>98</sup> If the parties had not consented, an Article III court would have been the appropriate federal forum to hear their claims.<sup>99</sup> In a departure from the long-held rule that parties may not confer jurisdiction by consent,<sup>100</sup> a majority of

---

94. Most notably, if the "raise anytime" rule does not apply to subject-matter jurisdiction, then the primary reason for ascertaining whether a late-raised defect relates to subject-matter ceases to exist. Whether subject-matter or merits, the issue has been waived.

95. See *supra* Section I.B.

96. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

97. *Wellness Int'l*, 135 S. Ct. at 1950 (Roberts, C.J., dissenting) ("The impact of today's decision may seem limited, but the Court's acceptance of an Article III violation is not likely to go unnoticed. The next time Congress takes judicial power from Article III courts, the encroachment may not be so modest—and we will no longer hold the high ground of principle. The majority's acquiescence in the erosion of our constitutional power sets a precedent that I fear we will regret. I respectfully dissent.").

98. *Id.* at 1939.

99. *Id.* (holding that "Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge").

100. *E.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833,

the United States Supreme Court concluded that parties' consent cures an Article I court's *constitutional* defect as long as the intrusion on Article III power is "*de minimis*."<sup>101</sup>

The majority knew it was entering delicate territory, and the Justices carefully distinguished the personal right inherent in Article III to an "impartial and independent federal adjudication of claims"<sup>102</sup> from the structural right "of the constitutional system of checks and balances,"<sup>103</sup> which assigns bankruptcy issues to Article I bankruptcy courts while reserving other issues for adjudication by Article III judges.<sup>104</sup> The majority reasoned that consent cures any personal defect, which explains why a "federal criminal defendant, for example, may knowingly and voluntarily waive his Sixth Amendment right to a jury trial by pleading guilty to a charged offense."<sup>105</sup> And although the Court seemed to hesitate before concluding that consent also cures the structural defect, that is ultimately what the majority decided.<sup>106</sup>

In the end, *Wellness International* permits a *de minimis* intrusion on the Article III power of the federal courts—transferring that power from Article III judges to Article I judges because the parties consented to the transfer.<sup>107</sup> *Wellness International* does so by looking past formalistic categories.<sup>108</sup> The Court embraced a practical solution to the problem of late-raised jurisdictional defects, suggesting that

---

850–51 (1986).

101. *Wellness Int'l*, 135 S. Ct. at 1943.

102. *Id.* (citations omitted). Interestingly, in the criminal context, the right to a fair trial is a structural right.

103. *Id.* (quoting *Schor*, 478 U.S. at 850–51). In the context of a bankruptcy action, the structural right reserves the judicial power to Article III judges as opposed to Article I judges. *Wellness Int'l*, 135 S. Ct. at 1950 (Roberts, C.J., dissenting). Outside of the bankruptcy context, the structural right reserves the judicial power to Article III judges as opposed to state-court judges.

104. Bankruptcy courts may hear "core proceedings" arising under the bankruptcy laws. 28 U.S.C. § 157(b)(1) (2012).

105. *Wellness Int'l*, 135 S. Ct. at 1950, 1955 (Roberts, C.J., dissenting) (citation omitted).

106. *Id.* at 1944.

107. *Id.* (explaining that the infringement is *de minimis* because "Article III courts retain supervisory authority over the process").

108. *Id.* at 1944 n.9 ("[T]he principal dissent's insistence on formalism leads it astray.").

the Court may be open to doing so in the future as well. The problem posed by late-raised defects can be solved “not by ‘formalistic and unbending rules,’ but ‘with an eye to the practical effect that the’ practice ‘will have on the constitutionally assigned role of the federal judiciary.’”<sup>109</sup> In other words, the Court permits some shuffling of constitutional power away from Article III courts, as long as the ebb does not recede too far. In the bankruptcy context, the outflow of power—that is, ceding a bit of power by allowing Article I judges to decide some issues by consent of the parties—is not too great because bankruptcy judges “are appointed and subject to removal by Article III judges,” “serve as judicial officers of the United States district court,” and “collectively ‘constitute a unit of the district court.’”<sup>110</sup> But aside from the caveats and the provisos, the message comes through clearly: parties may now consent to jurisdiction.

The dissent makes some cogent points. *Wellness International* has emanations far beyond the bankruptcy arena. But, as dissents often do, the doomsday predictions overstate the effect. And, to the majority’s credit, *Wellness International*’s frank recognition of the messy state of jurisdictional analysis is just what was needed to help clear the way for a thoughtful re-evaluation of the absoluteness of jurisdictional rules. Indeed, it paves the way for a cohesive theory of subject-matter jurisdiction that incorporates many of the *ad hoc* exceptions that have plagued the doctrine of subject-matter jurisdiction.<sup>111</sup>

The model proposed in this Article expands on the *Wellness International* framework. But it offers the reverse scenario: rather than arguing for a *de minimis* diminution of Article III power, as the Court does in *Wellness International*, the Article proposes a *de minimis* accretion of that power.

First, in the context of federal-versus-state subject-matter jurisdiction, just as in the Article-III-versus-bankruptcy scenario, there is both a personal and structural aspect. The personal aspect concerns the parties’ preference for where the

---

109. *Id.* at 1944.

110. *Id.* (citations omitted).

111. *See supra* Section I.A.2.

litigation takes place. In many cases, plaintiffs may choose to file in federal or state court, defendants may seek to remove, and plaintiffs may have the option to remand. Clearly, parties may consent to that personal aspect of jurisdiction (their preference on where to adjudicate the case) or waive the preference by not timely raising an objection. The structural aspect relates to the balance of power between state and federal courts, with federal courts hearing only certain types of claims. If Article III jurisdiction can be consented away from Article III courts, as *Wellness International* suggests, perhaps it can also be consented to Article III courts as well.

Second, any structural intrusion will be *de minimis*. After all, the solution advocated by this Article affects only cases with constitutional subject-matter jurisdiction defects that nobody—not the plaintiff, defendant, judge, or law clerk—noticed before trial or other resolution on the merits. Lawyers and courts will still be under ethical obligations to consider jurisdiction and not to hide deficiencies. Despite the *de minimis* structural intrusion, the efficiency gains will be enormous for those several hundred cases each year that will be permitted to remain in federal court.<sup>112</sup>

#### D. *Proposed Solution to the Problem*

Taking its cue from *Wellness International*, this Article proposes a single, uniform approach to the waiver of defects in district court subject-matter jurisdiction. The approach is based on a proposition advocated in 1969 by the American Law Institute (“ALI”), and for which I have provided support in previous scholarship,<sup>113</sup> but goes further than the ALI (or I, at least initially) was willing to go.

Previously, I have advocated that *statutory* subject-matter jurisdiction defects can be waived.<sup>114</sup> Indeed, federal courts

---

112. Buehler, *supra* note 58, at 656.

113. *See generally* Berch, *supra* note 29.

114. *Id.* Federal statutes heighten the requirements of the Constitution. With respect to federal question jurisdiction, for example, the Constitution requires a federal ingredient, while 28 U.S.C. § 1331 requires a federal question on the face of the plaintiff’s well-pleaded complaint. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (holding that “a suit



already subject late-raised defects to a *de facto*, albeit clandestine, waiver rule through the *ad hoc* exceptions.<sup>115</sup> And the additional statutory requirements—grafted onto the constitutional requirements—are not part of the core power limitations. Congress, which put those extra limitations on the federal courts, could easily remove them or, as my previous Article proposes, subject them to waiver.<sup>116</sup>

However, as explored in detail in the remainder of this Article, there is no substantial reason why defects having their bases in the Constitution should not also be subject to an explicit waiver rule. *Wellness International* surely goes partway in providing an analytical framework for that solution. The next section of the Article sweeps away the final debris. Ultimately, the solution to late-raised defects is simple and elegant: treat constitutional subject-matter jurisdiction requirements like statutory ones, and subject both to a waiver rule. Courts should treat district court subject-matter jurisdiction defects—whether constitutional or statutory—as waived if not raised prior to trial or any disposition on the merits.<sup>117</sup>

That time frame is neither too short nor too long. It is long enough to provide time for a party or a court to notice the defect, yet short enough that parties and the court will not have invested too much time, money, and effort in the case before its dismissal from the federal system, should that ultimately need to occur. Surely, the federal courts or the

---

arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution"); *Osborn v. Bank of the U.S.*, 22 U.S. 738, 823 (1824) (explaining "federal ingredient" test). With respect to diversity jurisdiction, the Constitution requires minimal diversity and imposes no minimum amount in controversy, while 28 U.S.C. § 1332 adds a complete diversity requirement and a \$75,000.01 floor. *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1986) (requiring complete diversity); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531 (1967) (endorsing minimal diversity in Article III). Therefore, a case may fail a statutory requirement, but nonetheless fall within the Constitution's ambit. In that scenario, I posited that any late-raised objection to the purely statutory subject-matter jurisdiction defect should be deemed waived.

115. See *supra* Section I.A.2 (explaining *ad hoc* exceptions).

116. See Berch, *supra* note 29, at 680–81.

117. Alternatively, Congress may be able to enact a statute dictating these same results. See *supra* note 37.

party that did not choose federal court will spot an egregious defect (such as a car accident between two California domiciliaries). The only cases that might elude notice by the time of any merits disposition are those about which a serious ground for disagreement regarding federal jurisdiction exists—for example, a case governed by the embedded federal question doctrine<sup>118</sup> or one in which domicile is in flux, and the federal courts may arguably have jurisdiction over such cases in any event. After all, the embedded federal question doctrine has inexact contours, and determining domicile is not a precise science.

Jurisdiction matters. But, as the Supreme Court acknowledged in *Wellness International*, it is not sacrosanct and may be subject to exceptions such as consent.<sup>119</sup> Moreover, many watchdogs protect jurisdiction and have incentives to point out jurisdictional defects. Parties who do not wish to proceed in federal court have incentives to scrutinize jurisdictional issues to ensure that the case is properly in federal court. Therefore, if a plaintiff brings a case in federal court and the defendant does not want to proceed there, the defendant has reason to double-check the Article III status of the matter. Likewise, if a defendant removes a case to federal court, the plaintiff should review the case's jurisdictional status. The federal judge presiding over the matter should verify the court's power to hear the case as well. These safeguards will cover the vast majority of cases. But if a matter manages to make it to trial despite a jurisdictional defect that neither the parties nor the judge observed, the matter should proceed to judgment. Otherwise, state-court judges will be required to re-read already read motions, re-decide already decided issues, and even re-hear already heard

---

118. For purposes of 28 U.S.C. § 1331, a case arises under federal law in two ways. First, a case arises under federal law when federal law creates the plaintiff's cause of action. *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). Second, a case may arise under federal law when the plaintiff's complaint invokes a state-law claim, but that claim "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

119. See *supra* Section I.C.

testimony. In today's world of shrinking budgets, particularly shrinking state-court budgets, the federal judicial system should not foist more work on state courts. Jurisdiction matters, but it does not matter more than the smooth, efficient, fair working of the judicial system.

## II. Other Structural and Constitutional Doctrines Are Waivable

*Wellness International* is not the only example of a policy-based or practical exception to jurisdictional imperatives. Other constitutional doctrines that serve to limit federal court power are also subject to waiver. As will be explored in this section, mootness, state sovereign immunity, and the territorial conception of personal jurisdiction all find their roots in the Constitution and purport to limit court power, yet are, at least in some instances, waivable.

### A. Mootness

Federal court cases must be “live” throughout their pendency;<sup>120</sup> a case must be “ripe”<sup>121</sup> at its inception, and not become “overripe” before its conclusion.<sup>122</sup> The mootness doctrine ensures that cases remain live. Although the Constitution does not explicitly use the term “mootness,” the United States Supreme Court has found this requirement inherent in the “case or controversy” language of Article III, and thus constitutionally required.<sup>123</sup> The Supreme Court has explained: “[o]ur lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the

---

120. *Hall v. Beals*, 396 U.S. 45, 48 (1969) (stating “a present, live controversy . . . must exist if we are to avoid advisory opinions on abstract propositions of law”).

121. *Reno v. Catholic Soc. Servs. Inc.*, 509 U.S. 43, 58 (1993) (noting that a challenge to an agency regulation “would not be ripe before the regulation’s application to the plaintiffs in some more acute fashion”).

122. Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 56–57 (1995) (explaining that mootness “may be a reflection” of ripeness, except that the case is “overripe, if anything”).

123. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726–27 (2013).

existence of a case or controversy.”<sup>124</sup> The federal courts implicitly recognize mootness’s constitutional status when they inquire into the issue for the first time on appeal.<sup>125</sup>

The requirement that a case must remain live serves as a structural limitation on federal-court power. Its location in Article III suggests as much; so does how it functions. Mootness limits the power of the courts so that they decide only live, adverse matters and keeps federal courts from issuing advisory opinions.<sup>126</sup>

Despite the constitutional and structural stature of mootness, courts may, in some instances, continue to hear moot cases. Federal courts recognize a handful of exceptions to mootness, each of which permits the case to remain in federal court despite its lack of continuing vitality between the current parties. The three most frequently applied exceptions to mootness are: capable of repetition but evading review, voluntary cessation, and class actions.<sup>127</sup> The exceptions are grounded in prudential norms like efficiency and sunk costs.<sup>128</sup>

---

124. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964).

125. *See Honig v. Doe*, 484 U.S. 305, 317–23 (1988) (considering a mootness issue raised for the first time during oral argument); *see also* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997) (discussing mootness raised for the first time before the Ninth Circuit); 13B WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3533.1 (3d ed. 2015) (footnotes omitted) (“In keeping with the Article III foundations of mootness doctrine, the question of mootness is often raised by the courts even though neither party has raised it, or when the party raising the question has suggested that the Court ignore it, or when both parties join in agreeing that the case is not moot.”).

126. *Kremens v. Bartley*, 431 U.S. 119, 134 n.15 (1977) (“The availability of thoroughly prepared attorneys to argue both sides of a constitutional question, and of numerous amici curiae ready to assist in the decisional process, even though all of them ‘stand like greyhounds in the slips, straining upon the start,’ does not dispense with the requirement that there be a live dispute between ‘live’ parties before we decide such a question.”).

127. Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 576 (2009) (footnotes omitted) (“[T]he three most frequently-applied [sic] exceptions to mootness doctrine [are] those applying to (1) claims ‘capable of repetition yet evading review’—that is, claims that raise issues that are of inherently short duration, and are likely to recur; (2) cases mooted by the defendant’s voluntary cessation of the challenged activity; and (3) class actions in which the named plaintiff’s claim has become moot.”). A fourth exception has to do with collateral consequences.

128. *Id.* at 563–64 (footnotes omitted) (“The exceptions to mootness do not appear to be based on any interpretation of Article III’s Case or

They make eminent practical sense, but are hard to square with the inflexible constitutional requirement of a live case or controversy.<sup>129</sup>

Take, for example, the capable-of-repetition-but-evading-review cases.<sup>130</sup> In those, the person who brought the case no longer has a continuing dispute with the defendant.<sup>131</sup> Nonetheless, the courts permit the admittedly defunct case to continue if the plaintiff's claim is of a class of cases that may recur and whose injuries have a shorter lifespan than the duration of a typical lawsuit.<sup>132</sup> This exception to mootness may apply even if the plaintiff herself cannot show that the injury will likely recur for *her*—as long as it is likely to recur for *someone*.<sup>133</sup>

---

Controversy Clause—as they would be if mootness were actually applied as a constitutionally mandated limit on federal court jurisdiction. Rather, as articulated and applied, they are based on prudential considerations, such as protection of judicial efficiency and authority, the preference for sufficiently-motivated [sic] parties, and avoidance of party gamesmanship. The frequent invocation of these exceptions by federal courts is thus hard to reconcile with the conventional understanding of mootness as a constitutionally mandated jurisdictional bar.”).

129. Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 490 (1996) (“These exceptions are incomprehensible if federal courts lack Article III jurisdiction to resolve moot cases at all.”).

130. See, e.g., *Honig*, 484 U.S. at 317–320.

131. 13C WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3533.8 (3d ed. 2015).

132. Pregnancy is a classic example. See, e.g., *Roe v. Wade*, 410 U.S. 113, 125 (1973). Thus, mootness admits of an exception that standing does not. In *Lyons*, the court held that the plaintiff could not maintain his action (that is, had no standing) because he could not show that he would likely be put in a choke-hold again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983).

133. *Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003) (alteration in original) (citations omitted) (“Furthermore, while canonical statements of the exception to mootness for cases capable of repetition but evading review require that the dispute giving rise to the case be capable of repetition *by the same plaintiff*, the courts, perhaps to avoid complicating lawsuits with incessant interruptions to assure the continued existence of a live controversy, do not interpret the requirement literally, at least in abortion and election cases, and possibly more generally, though we needn’t worry about that. If a suit attacking an abortion statute has dragged on for several years after the plaintiff’s pregnancy terminated, the court does not conduct a hearing on whether she may have fertility problems or may have decided that she doesn’t want to become pregnant again. And similarly in an election case the court will not keep interrogating the plaintiff to assess the likely

These cases no longer present a live case or controversy between the parties and, in that respect, they fail the Article III requirement. Yet, the capable-of-repetition-but-evading-review cases persist to resolution in federal court because of a judicially crafted exception to the constitutional mandate.<sup>134</sup> It makes sense for courts to keep these cases so that a resolution may be reached. Otherwise, the short duration of the injury would doom these disputes to endless purgatory with no resolution. Rather than continually starting and stopping the litigation, the court simply permits the case to proceed to judgment, allowing a final resolution of the issue sooner rather than later (or perhaps never).

Another exception to mootness—voluntary cessation—allows a court to keep a case that lost its adversity because the defendant ceased performing the objectionable conduct, unless the defendant makes it absolutely clear that it will not resume the conduct.<sup>135</sup> When a defendant stops engaging in the objectionable conduct, the dispute between the parties ceases to exist; unlike the capable-of-repetition-but-evading-review cases, other persons do not have the same dispute.

Nonetheless, courts generally retain these cases so that the defendant who has ceased the objectionable conduct is not free to resume again once the court dismisses the case. To preclude the defendant from being able to control the course of litigation by starting and stopping its actions, the court continues adjudicating the case, unless the defendant makes a strong showing that it will not resume the conduct.<sup>136</sup> And the court

---

trajectory of his political career.”).

134. Katherine Florey, Comment, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CALIF. L. REV. 1375, 1422 (2004) (“Federal question jurisdiction is, after all, a question of the extent of the court’s power, not an attempt to balance costs and benefits.”).

135. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted) (noting it must be “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur”); *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982) (“It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.”); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (explaining that voluntary cessation does not always moot a case; if it did, the defendant would be “free to return to his old ways”).

136. *Friends of the Earth*, 528 U.S. at 189 (citation omitted) (“The ‘heavy

does not merely hold the matter in abeyance in case the defendant resumes the conduct. The matter proceeds because of a hypothetical adversity that may rear its head if the court were to dismiss the case and the defendant then recommenced its bad acts. Courts allow the matter to continue because that makes practical sense.<sup>137</sup>

Similar analysis applies to the third principal exception to mootness: class actions.<sup>138</sup> In some situations, a class action may proceed even if the class representative's case no longer presents a live controversy.<sup>139</sup> In this scenario, courts are driven by the fact that other class members still have live claims; that is, despite the fact that the class representative no longer has a personal interest in the substantive outcome, the case still presents live issues.<sup>140</sup> In this situation as well,

---

burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness."); *W.T. Grant Co.*, 345 U.S. at 632 (noting that a defendant should not be "free to return to his old ways" and that there is a "public interest in having the legality of the practices settled").

137. See Hall, *supra* note 127, at 580 (footnotes omitted) ("Another problem that would follow from the uniform application of a rule requiring dismissal of moot claims is that it would empower defendants unilaterally to eliminate federal jurisdiction by temporary reform. Where defendant's own actions have mooted the plaintiff's claim for relief, courts have naturally been quite reluctant to deny judicial review, in part because of the concern that defendant's 'reform' may be fleeting or insincere, and that the challenged behavior will resume after the action has been dismissed. Thus, federal courts have long greeted with skepticism assertions of mootness based on defendant's voluntary discontinuance of the challenged conduct.").

138. Indeed, some have said that the class action exception is an expansion of the capable-of-repetition-but-evading-review exception. See *id.* at 583 ("The class action exception . . . might best be understood as an expansion of the capable-of-repetition exception to permit federal courts to review claims that are capable of repetition as to other class members, irrespective of whether they are also capable of repetition as to the named plaintiff.").

139. *Sosna v. Iowa*, 419 U.S. 393, 401 (1975) (emphasis added) ("Although the controversy is no longer alive as to appellant *Sosna*, it remains very much alive for the class of persons she has been certified to represent. Like the other voters in *Dunn*, new residents of Iowa are aggrieved by an allegedly unconstitutional statute enforced by state officials. We believe that a case such as this, in which, as in *Dunn*, the issue sought to be litigated escapes full appellate review at the behest of any single challenger, does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs.").

140. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); U.S. Parole

because other persons still possess adversity with the opposing party, the otherwise-dead case may proceed in federal court.<sup>141</sup>

These three exceptions to mootness show that policy may—at times—trump constitutional limits on court authority. In all three scenarios, cases that lack the typical “liveness” or “adversity” requirements nonetheless proceed. In other words, the case or controversy requirement that gives rise to the mootness doctrine is a constitutional, structural limitation that, under certain limited and defined circumstances, can be overlooked.

### B. *State Sovereign Immunity*

Sovereign immunity provides another example of a waivable jurisdictional doctrine. State sovereign immunity is the privilege of the sovereign States not to be sued in federal court.<sup>142</sup> The Eleventh Amendment limits “the judicial power of the United States.”<sup>143</sup> In *Pennhurst State School & Hospital v. Halderman*, the Supreme Court described sovereign immunity as “a constitutional limitation on the federal judicial power established in Art[icle] III.”<sup>144</sup> But immunity does not reside in the Eleventh Amendment alone; rather, sovereign immunity inheres in our constitutional structure as part of “our federalism.”<sup>145</sup> Thus, sovereign immunity is an overarching,

---

Comm’n v. Geraghty, 445 U.S. 388, 396 (1980).

141. *Geraghty*, 445 U.S. at 404.

142. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

143. *Id.*

144. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *see also* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (“[F]or over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States.”); *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996) (noting that immunity “restricts the judicial power under Article III”). *But see* *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (analogizing immunity to individual constitutional rights); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 267 (1997) (“The [Eleventh] Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary’s subject-matter jurisdiction.”).

145. Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the*



omnipresent doctrine that limits the sweep of Article III jurisdiction for federal courts and even limits the scope of state judicial power.<sup>146</sup> The United States Supreme Court calls state immunity “jurisdictional” for federal courts.<sup>147</sup>

Despite state sovereign immunity’s pedigree as constitutional, structural, and even jurisdictional, sovereign immunity is not absolute.<sup>148</sup> Courts have fashioned several exceptions to the constitutional doctrine. Suits alleging ongoing violations of federal law may be initiated against state

---

*Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1223 (2003) (“Thus, under both the official theory and the diversity theory, the possibility of waiver of state sovereign immunity ultimately stems from a recognition that the immunity bar does not derive from a textual, constitutional limit on federal judicial power, but from background principles of sovereign immunity (common law principles, diversity theorists would say; constitutional principles, according to the official theory).”).

146. *Alden v. Maine*, 527 U.S. 706, 713 (1999) (“[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.”).

147. *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (internal quotations omitted) (“For over a century now, this Court has consistently made clear that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.”); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (noting immunity “partakes of the nature of a jurisdictional bar”); Bradford C. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1833 (2010) (“Similarly, the Amendment is framed as a restriction on ‘[t]he Judicial power’ and therefore limits all forms of jurisdiction recognized by Article III.”).

148. 13 WRIGHT & MILLER, *supra* note 21, § 3524 (“But there are extremely important exceptions to [sovereign immunity]. Sovereign immunity does not bar suits against a state brought by the United States or by or another state. . . . There is authority for the commonsense proposition that the Eleventh Amendment does not bar an interstate commission created by Congress from enforcing the terms of an interstate compact from bringing suit against a signatory state in federal court.”). There are other exceptions as well. Congress may abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment, and states may waive their immunity. See *In re Charter Oak Assocs.*, 361 F.3d 760, 765 (2d Cir. 2004). Sovereign immunity could not be otherwise. Federal law reigns supreme and, therefore, binds even the states. If they violate federal law, they must be held accountable in some manner.

officers for prospective, nonmonetary relief, despite the realistic appraisal that such suits are, in all but name, suits against the state itself, and so intrude on sovereign immunity.<sup>149</sup> The United States and other States may sue a state, and that State may not defend itself by pleading its sovereign status.<sup>150</sup> Congress may abrogate immunity when acting under certain, limited powers, most notably Section 5 of the Fourteenth Amendment.<sup>151</sup> Alternatively, Congress may condition receipt of federal monies on the waiver of immunity.<sup>152</sup> In each of these instances, the constitutional, structural nature of state sovereign immunity bows to some other need of the justice system—perhaps an individual’s need to vindicate his own rights, or a neighbor State’s need to defend itself against the sued state’s belligerence, or Congress’s desire to encourage states to comply with important federal laws. Each of these exceptions undermines sovereign immunity.

There is yet another exception to state sovereign immunity of particular importance to this Article: a State may waive immunity.<sup>153</sup> The State may do so intentionally by affirmatively deciding to proceed with the suit.<sup>154</sup> Or it may waive sovereign immunity unintentionally. In *Lapides v. Board of Regents of the University of Georgia*, the United States

149. *Ex parte Young*, 209 U.S. 123 (1908).

150. *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904); *United States v. Texas*, 143 U.S. 621, 642–46 (1892). Textually, these exceptions make sense. The Eleventh Amendment applies when the plaintiff is a “citizen,” not when the plaintiff is the government. 13 WRIGHT & MILLER, *supra* note 21, § 3524.

151. Section 5 of the Fourteenth Amendment permits Congress to enforce the amendment through appropriate legislation, which permits congress to abrogate state sovereign immunity. *See also* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 378–79 (2006) (holding that Congress may abrogate state sovereign immunity under the Bankruptcy Clause); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). *But see* *Seminole Tribe v. Florida*, 517 U.S. 44, 44 (1996) (holding that Congress may not abrogate state sovereign immunity when acting under its commerce clause powers).

152. *South Dakota v. Dole*, 483 U.S. 203 (1987) (permitting Congress’s condition of 5% of federal highway money as not too coercive).

153. *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (holding that a state may waive its claim to sovereign immunity by intervening in a suit).

154. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985) (“[I]f a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action.”), *superseded by statute as stated in* *Lane v. Pena*, 518 U.S. 187 (1996).

Supreme Court held that the State of Georgia had waived its sovereign immunity when it removed the case from state court to federal court.<sup>155</sup> The Court reasoned as follows: despite being involuntarily dragged into state court, Georgia voluntarily chose to invoke the powers of the federal courts by removing the action.<sup>156</sup> Waiver, whether unintentional or intentional, has become part of the sovereign immunity doctrine.

In sum, state sovereign immunity exists in the constitutional structure and inheres in “our federalism.” The Supreme Court calls the doctrine jurisdictional and recognizes it as a limit on federal judicial power. Nonetheless, this constitutional, structural, even quasi-jurisdictional doctrine has exceptions and may be waived by an unintended misstep early in the litigation process.

### C. *Territorial Conception of Personal Jurisdiction*

Courts are also restricted in which defendants they may subject to their powers. Personal jurisdiction limits states from reaching out beyond their borders to drag non-consenting defendants before their courts if the defendants have not created meaningful contacts with the state.<sup>157</sup> This limitation

---

155. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002); *see also* *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) (holding that a state waives immunity when it sues in federal court); *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) (“[W]here a State voluntarily become[s] a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the [Eleventh] Amendment.”); *Clark*, 108 U.S. at 436 (noting that a state’s voluntary appearance as intervener in federal court waives sovereign immunity).

156. *Lapides*, 535 U.S. at 620.

157. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted) (“Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant’s person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair

derives from the Constitution, particularly the Due Process Clause.<sup>158</sup> Although in modern times, the common wisdom is that personal jurisdiction is a personal right—the right not to be sued in an unfair, inconvenient forum with which the defendant has few contacts—the older conception of personal jurisdiction was territory- and sovereignty-based.<sup>159</sup> It is that older conception of personal jurisdiction that provides some insight into structural, constitutional doctrines that are nonetheless waivable.

The older *Pennoyer* framework sprang from the notion that courts in one state have no authority to reach beyond their borders to adjudicate extraterritorial disputes or to levy binding judgments on defendants who are not present in the territory.<sup>160</sup> Even the name behind long-arm statutes suggests a territorial base: the long arm of the state had to reach beyond its borders. Personal jurisdiction was a structural, boundary-based doctrine.

The territorial conception of personal jurisdiction eventually gave way to a fairness notion.<sup>161</sup> But to do that, the courts, including the Supreme Court, had to reframe the doctrine from a limitation on court power to one involving personal freedom.<sup>162</sup> By the 1980s, the personal-rights aspect of personal jurisdiction had overtaken the sovereignty-based

---

play and substantial justice.”).

158. *Id.*

159. *Id.* (citation omitted) (noting that “[h]istorically . . . presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him”).

160. *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877) (“The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.”).

161. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (blending the territorial notion and the fairness notion by noting that personal jurisdiction “protects the defendant against the burdens of litigating in a distant or inconvenient forum” and that it “ensure[s] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system”).

162. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (stating that personal jurisdiction “represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty” and explaining the shift from territorial-based to fairness-based analysis in a footnote).

idea.<sup>163</sup> Today, however, the territorial notion of personal jurisdiction may be making a comeback.<sup>164</sup> Cases like *Nicastro* speak once again in terms of sovereign authority. The territorial notion of personal jurisdiction may once again come into vogue. Or it may not.

Whatever happens to the concept of personal jurisdiction in the future (whether it remains primarily a personal right or reverts to a largely structural limitation), in the era when personal jurisdiction was considered a territorial limitation, the issue still had to be raised by the defendant, not the court, and had to be raised early, lest the defendant be deemed to have consented to jurisdiction.<sup>165</sup> Thus, personal jurisdiction is constitutional, and at some points in history, has been considered structural. Yet, it has always been waivable.

### III. Toward a Theory of Jurisdictional Waiver

The roadblock—the purportedly inflexible nature of subject-matter jurisdiction defects—has been identified and dismantled. *Wellness International* shows a willingness by the Supreme Court to adjust its understanding of subject-matter jurisdiction. And, as just explored, the system already permits other structural constitutional rights to be deemed waived if not timely raised. Subject-matter jurisdiction should be treated more like these structural constitutional rights. Mootness, sovereign immunity, and (territorial) personal jurisdiction, singly, and in combination, offer insight into how our system could accommodate subject-matter jurisdiction's constitutional status without resorting to the harsh rules that currently govern the doctrine. This section lays a new path for

---

163. *Id.*

164. In *J. McIntyre Machinery, Ltd. v. Nicastro*, the plurality opinion continually references sovereign power. 131 S. Ct. 2780 (2011). The plurality does recognize that personal jurisdiction limits judicial power as a matter of liberty, not sovereignty, but immediately thereafter states that “whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.” *Id.* at 2789.

165. 4 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1064 (4th ed. 2015) (describing *Pennoyer* and stating “the Supreme Court did recognize that a person could waive a defense of lack of jurisdiction over the person and thereby consent to jurisdiction”).

subject-matter jurisdiction by using these constitutional doctrines as prototypes for the treatment of subject-matter jurisdiction, while also addressing their shortcomings as analogies.

A. *Mootness as a Roadmap*

Mootness provides support for allowing policy (at times) to trump certain constitutional requirements. When a federal court dismisses a case as moot, the court says that the parties lack continuing adversity, as required by the “case or controversy” language in Article III. When a federal court refuses to dismiss a case as moot because of an exception, the court acknowledges the substantial sunk costs and the need for a resolution to serve policy concerns other than those espoused by the “case or controversy” requirement. Thus, weighty practical policy considerations can be accommodated within constitutional doctrine.

The Court’s treatment of mootness sheds light on how subject-matter jurisdiction should be treated. With respect to subject-matter jurisdiction, the policy would not be, as in the capable-of-repetition exception, that future parties will benefit from knowing the court’s resolution of the matter. Rather, the policy is the broader policy found within the mootness exceptions generally; namely, that there are substantial sunk costs. And, indeed, federal subject-matter jurisdiction cases suffer from substantial sunk costs.

The Federal Supplement and the Federal Reporter contain thousands of examples of cases that have proceeded far in the litigation process, only to be dismissed for lack of subject-matter jurisdiction.<sup>166</sup> Some subject-matter jurisdiction dismissals are well known: *Mottley* and *Kroger* fall into this category.<sup>167</sup> Others, such as *Belleri v. United States*,<sup>168</sup>

---

166. Buehler, *supra* note 58, at 656.

167. See *supra* Section I.A.1; *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908).

168. See *supra* Section I.A.1; *Belleri v. United States*, 712 F.3d 543 (11th Cir. 2013).

*Builders Mutual Insurance Co. v. Dragas Management*,<sup>169</sup> and *Arena v. Graybar*,<sup>170</sup> are less well-known. But all of these cases—the ones that make it through pre-answer motions, through pleadings, through discovery, and to trial or beyond—pose substantial costs to our legal system in terms of court time (the judge's, law clerk's, and other court administrators' time), not to mention substantial costs to the parties and lawyers. If sunk costs can provide a reason for not dismissing a moot case, perhaps sunk costs should provide a reason for not dismissing a live case that may have been filed in the wrong court.<sup>171</sup>

That sentiment has already found some traction in the federal courts. Although federal courts do belatedly dismiss cases for lack of subject-matter jurisdiction, sometimes courts struggle to find exceptions that allow them to retain a matter despite its lack of subject-matter jurisdiction.<sup>172</sup> The mootness analogy will allow federal courts to continue to act in this manner, but will regularize and legitimize the practice.

Objectors may complain. The Constitution does not say anything about mootness, and all of the policy-based exceptions further prove that mootness is not a strong constitutional principle.<sup>173</sup> Therefore, they may say, mootness does not provide a firm foundation from which to show that constitutional doctrines may be waived.

The Supreme Court has explicitly rejected the first argument by recognizing mootness as a constitutional

---

169. See *supra* Section I.A.1; *Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, No. 11-1722, 2012 WL 5861255 (4th Cir. Nov. 20, 2012).

170. See *supra* Section I.A.1; *Arena v. Graybar Elec. Co.*, 669 F.3d 214 (5th Cir. 2012).

171. Cases that are clearly filed in the wrong court should have been discovered before trial or other disposition of the merits.

172. Berch, *supra* note 29, at 656–75.

173. Hall, *supra* note 127, at 563 (“[C]ourts routinely hear moot cases where strong prudential reasons exist to do so—a practice that cannot be reconciled with the belief that mootness is a mandatory jurisdictional bar. . . . Courts and scholars refer to the doctrines under which courts elect to hear moot cases as ‘exceptions’ to the mootness bar, but these exceptions do not ‘prove the rule’—they debunk it. The exceptions to mootness do not appear to be based on any interpretation of Article III’s Case or Controversy Clause—as they would be if mootness were actually applied as a constitutionally mandated limit on federal court jurisdiction.”).

doctrine.<sup>174</sup> The second argument is bootstrapping. To say a doctrine is not constitutional because there are sub-constitutional exceptions goes too far. Subject-matter jurisdiction, too, has exceptions.<sup>175</sup> That fact does not de-constitutionalize subject-matter jurisdiction. In the same vein, mootness, despite admitting of policy-based exceptions, still ranks as constitutional.<sup>176</sup> Like the other justiciability doctrines, mootness springs from the cases or controversies requirement of Article III. Courts count it among constitutional requirements. And the United States Supreme Court has clearly announced that mootness is a constitutional doctrine.<sup>177</sup>

An objector might also say “enough is enough.” Mootness should not admit of sub-constitutional exceptions; if anything, we should eliminate the exceptions for mootness, rather than expand the rationale underlying them to cover subject-matter jurisdiction. That is one route: eliminate the exceptions for mootness and thereby bring mootness into conformity with subject-matter jurisdiction. But the other route also lies open: the Court’s acceptance of policy-based exceptions to mootness opens the door for policy-based exceptions to other doctrines that find their basis in the “case or controversy” requirement of Article III. Both mootness and jurisdiction arise from that language. And both could be subject to the same, limited policy exceptions found in the mootness doctrine.

\* \* \*

Imperfect boundaries exist between the state and federal courts. Scholars, Supreme Court Justices, lower federal court judges, and practitioners will disagree about which cases, for example, evidence a sufficiently strong embedded federal question to make them cognizable in federal court.<sup>178</sup> Courts

---

174. *Liner v. Jafco, Inc.*, 375 U.S. 301, 307 (1964).

175. *See supra* Section I.A.2.

176. *See* *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726–27 (2013).

177. *Liner*, 375 U.S. at 306 n.3.

178. *See, e.g., Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986) (determining in a 5-4 decision that the case did not present an embedded federal question).



have undoubtedly made mistakes with respect to individual cases. Surely, federal courts have heard some cases that should have been heard in state court, and state courts likely have heard cases better suited for the federal system. The boundary between the state and federal system is pliable.

Given all of that, is the system really harmed if a federal court keeps a case that—to all involved—initially appeared to raise a federal issue (or to have diverse parties), but that months or years into the process reveals itself not to have that Article III requirement? The boundary between the state and federal systems might blur slightly in these situations, but the boundaries are not clean even now.

The mootness analogy is not on all fours with subject-matter jurisdiction. But the Article does not suggest that these other constitutional doctrines provide perfect blueprints for our treatment of subject-matter jurisdiction. The purpose in citing them is more modest than that; it is simply to highlight that our system has found ways to permit cases raising similar types of constitutional impediments to proceed, and to argue that our system should treat subject-matter jurisdiction in a similar fashion. The “flexible character of the Art[icle] III mootness doctrine” should be imported to subject-matter jurisdiction.<sup>179</sup>

### B. *Sovereign Immunity as a Roadmap*

While mootness provides a roadmap for treating constitutional matters as ignorable by the court when policy dictates, sovereign immunity provides a roadmap for treating constitutional matters as waivable by parties if the case proceeds to a certain point before the parties raise the issue.

Sovereign immunity is constitutional and (at least quasi) jurisdictional, yet waivable—even waivable by mistake.<sup>180</sup> By removing a case from state to federal court, state defendants implicitly agree to submit to federal jurisdiction, including the

---

179. U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 400 (1980).

180. Lippes v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002).

assertion of additional claims by the plaintiffs.<sup>181</sup> The Supreme Court has noted that sovereign immunity functions differently from other constitutionally compelled jurisdictional doctrines: sovereign immunity is a constitutional defense to suit, but it can be waived; the defense is jurisdictional and may be raised on appeal, but a federal district court does not need to police immunity for the state.<sup>182</sup> Thus, not all values that find their genesis in the Constitution are “inflexible and without exception,” not even all constitutional, jurisdictional doctrines.

By Supreme Court mandate, then, sovereign immunity contains an interesting blend of attributes. The Eleventh Amendment limits federal judicial power.<sup>183</sup> The limitation is constitutional and, as such, should be mandatory, not precatory; consent or inaction cannot excuse the failure to comply with a constitutional limitation on federal courts’ power. Yet, sovereign immunity is also subject to waiver or consent. This blending of attributes seems to work for sovereign immunity.<sup>184</sup> It works because, as Professor Siegel comments, “[P]ermitting assertion of state sovereign immunity at any time is simply not a sensible way to run a judicial system. It allows unfair tactics that would never be tolerated if used by other parties, and it wastes the resources of the plaintiff and the judicial system itself.”<sup>185</sup>

Allowing the assertion of subject-matter jurisdiction defects at any time is also not sensible. It may allow unfair tactics<sup>186</sup> and waste valuable resources. So why not treat subject-matter jurisdiction—even *constitutional* subject-matter jurisdiction—in the same fashion as sovereign immunity?<sup>187</sup>

---

181. *Id.* at 620.

182. *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389 (1998).

183. *See supra* notes 142–147 and accompanying text.

184. Perhaps it works because of the Court’s recognition that sovereign immunity is not, after all, derived from the Eleventh Amendment as a limitation on the power of the federal courts but is, instead inherent in our constitutional structure. *See Alden v. Maine*, 527 U.S. 706, 713 (1999) (“[T]he sovereign immunity of the states neither derives from, nor is limited by, the terms of the Eleventh Amendment.”).

185. Siegel, *supra* note 145, at 1228.

186. *See generally* *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

187. Or perhaps this reasoning suggests a different solution: rather than treating subject-matter jurisdiction like immunity (quasi-jurisdictional, yet

That is, acknowledge its basis as a constitutional jurisdictional limitation, yet also acknowledge its waivability under certain conditions. By filing in federal court and allowing the case to continue in federal court, at some point, the parties and the federal court should be deemed to have waived their objections to lack of federal-court power.<sup>188</sup> This would accord with the system's treatment of sovereign immunity.

Here, too, there may be objectors. Some may complain that sovereign immunity is an inapt analogy for subject-matter jurisdiction because sovereign immunity is constitutional and *personal*, while subject-matter jurisdiction is constitutional and *structural*. Surely personal rights can be waived, even if of constitutional stature. An individual may waive the right to a civil jury trial, Fourth Amendment protections, *Miranda* rights, or any other of the many personal protections the Constitution grants.<sup>189</sup> If, rather than a structural right, state

---

waivable), perhaps immunity should not be treated like subject-matter jurisdiction (that is, should not be considered jurisdictional), but instead like a personal right (more akin to personal jurisdiction). See *Schacht*, 524 U.S. at 394 (Kennedy, J., concurring) (suggesting that sovereign immunity may be characterized as a matter of personal jurisdiction). In her student Comment, Professor Katherine Florey argued that sovereign immunity's quasi-jurisdictional, yet waivable, status is untenable: "As the previous discussion attempts to show, the Supreme Court has frequently alluded to sovereign immunity as a matter of subject matter jurisdiction, while continuing to develop the doctrine in ways that call that view into question. This inconsistency is of more than theoretical importance. The existence of these essentially irreconcilable perspectives in Supreme Court precedent has created great difficulties for the lower courts. Since federal courts cannot overstep the limits of their subject matter jurisdiction, but also cannot arbitrarily decline to exercise jurisdiction they possess, the question of sovereign immunity's jurisdictional status is an important and urgent issue that lower courts have been obliged to address." Florey, *supra* note 134, at 1417 (citation omitted). But rather than worry about sovereign immunity's characterization, we ought to change the rules of jurisdiction. The "inconsistency" she finds in sovereign immunity is just one aspect of the larger schizophrenia involving any defect that may be labeled "jurisdictional."

188. This may lead to a more rigorous screening of cases on the front end, particularly by the court itself. In my opinion, that is a boon to the system. If courts more closely analyze subject-matter jurisdiction at the outset of cases, then fewer cases will proceed for any length of time before potential defects are uncovered.

189. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1943–44 (2015) (discussing various personal constitutional protections that individuals may waive). An individual may knowingly waive these personal rights. Sovereign immunity, however, inhering in the structure of our

sovereign immunity is a personal right, of course it is waivable—and that fact would provide scant support for the argument that subject-matter jurisdiction should be waivable.

Even if state sovereign immunity partakes of some personal attributes in that it protects one party from suit in federal court, sovereign immunity also partakes of some structural attributes.<sup>190</sup> The relationship between states and the courts is structural, as is the limitation on court power that flows from that relationship. Both scholarship and cases recognize the structural nature of sovereign immunity, which comes in part from the fact that the Eleventh Amendment limits Article III's sweep.<sup>191</sup> In fact, the Supreme Court has referred to immunity as a "jurisdictional bar"—a restriction on "the judicial power of the United States."<sup>192</sup> And, at least sometimes, courts permit immunity to be raised for the first time on appeal—just like a subject-matter jurisdiction defect—indicating its structural, nonpersonal status.<sup>193</sup>

At least some core notion of sovereign immunity is jurisdictional. The freedom from suit by a non-citizen—the most limited vision of the Eleventh Amendment—is a textual limitation on federal court jurisdiction.<sup>194</sup> Yet, the federal courts permit waiver even in this circumstance.

---

Constitution and in the relationship between the states and the federal government, partakes of at least some structural aspects.

190. In *Wellness International*, the Supreme Court recognized that Article III has both personal and structural implications. *But see generally* Florey, *supra* note 134.

191. Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1530 (1992) (advocating that sovereign immunity doctrine helps "maintain a proper balance among the branches of the federal government").

192. *Edelman v. Jordan*, 415 U.S. 651, 662 (1974); *see also* *United States ex rel. Long v. SCS Bus. & Tech. Inst.*, 173 F.3d 890, 893 (D.C. Cir. 1999) (describing sovereign immunity as "sufficiently jurisdictional").

193. This provides yet another reason to untangle the web of jurisdictional and nonjurisdictional. Sovereign immunity should not "sometimes" be waivable but sometimes be nonwaivable. How is a party or a court to know how to proceed?

194. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1626 (2002).

Others may object that sovereign immunity is an imperfect analogy to subject-matter jurisdiction because sovereign immunity is not wholly constitutional. But, at the very least, the text of the Eleventh Amendment bars diversity suits against a state. These cases, at a minimum, pose a structural limitation on federal-court power, even if other iterations of sovereign immunity are not found in the Constitution and therefore provide an inapt analogy for subject-matter jurisdiction. In addition, courts have expanded the Eleventh Amendment beyond its text and have called these expansions of sovereign immunity constitutional as well, suggesting that immunity, in addition to being “sufficiently jurisdictional,” is also “sufficiently constitutional.”<sup>195</sup>

\* \* \*

No analogy will be perfect, but the rationale behind the approval of waiving sovereign immunity helps to bend the rigid thinking that subject-matter jurisdiction cannot be waived because it is structural and constitutional. Sovereign immunity, even if an imperfect model, nonetheless provides relevant comparison points. Sovereign immunity has at least some structural aspects, even if the right to raise the defense is personal to the particular state involved in the litigation; sovereign immunity has some roots in the constitution, even if it is sometimes treated as extra-constitutional. In sum, sovereign immunity has some constitutional and structural aspects, and yet sovereign immunity is waivable.

### C. *Territorial Personal Jurisdiction as a Roadmap*

The third prototype for a new treatment of subject-matter jurisdiction is the territorial conception of personal jurisdiction. Territorial limitations on a federal court’s power are structural, rooted in sovereignty notions, and constitutional. Yet even when courts considered personal jurisdiction a territorial limitation, rather than a personal right, they relied on

---

195. *SCS Bus. & Tech. Inst.*, 173 F.3d at 893 (“sufficiently jurisdictional”).

defendants to raise objections, and those objections had to be raised early.<sup>196</sup> The previous treatment of personal jurisdiction as territorial provides yet another example of a structural, constitutional right that can be waived, either intentionally or by inaction.

The old conception of personal jurisdiction as structural, constitutional, and waivable is particularly powerful given personal jurisdiction's treatment as waivable by the slightest missteps of a defendant who appears in court without first raising his personal jurisdiction objection. If subject-matter jurisdiction receives such lauded treatment in our doctrine because of its structural and constitutional status, surely personal jurisdiction's treatment otherwise should give us pause.

The primary objection to this comparison to subject-matter jurisdiction is likely that personal jurisdiction is no longer considered a structural limitation, making the analogy historical at best.<sup>197</sup> Times change. Today, personal jurisdiction protects individuals, not sister states and, of course, individuals can waive their personal rights. A defendant may choose to raise the issue or not—entirely his choice.

Nonetheless, the fact that personal jurisdiction was once considered structural, constitutional, and still waivable shows that constitutional imperatives that are conceived of as structural limitations on the power of the courts can nonetheless be waived. Personal jurisdiction had to be raised at the earliest point in litigation in order to avoid waiver. If the defendant failed to raise the objection, the court, which had previously lacked the power to adjudicate the extraterritorial action, was vested with such power.<sup>198</sup> In fact, even when personal jurisdiction was boundary-based, courts themselves did not raise the issue. The fact that this structural doctrine was protectable only by the defendant shows just how flexible

---

196. 4 WRIGHT & MILLER, *supra* note 165, § 1064.

197. If you are concerned with history, consider this: subject-matter jurisdiction used to be waivable. And it could be “consented” to by the parties, merely by pleading its existence. *See* Berch, *supra* note 29, at 685–88 (recounting historical practice).

198. 4 WRIGHT & MILLER, *supra* note 165, § 1064.

the constitutional lexicon can be.

Another objection may be made to the timing with which personal jurisdiction defects must be raised. Defendants must raise the issue at the beginning of the litigation.<sup>199</sup> That is simply too early for subject-matter jurisdiction defects, an objector may say.

This objection has merit, but does not undermine the comparison. The territorial conception of personal jurisdiction helps us understand that structural constitutional rights are waivable. We do not need to accept the accelerated time frame that covers personal jurisdiction defects. There is no reason to require parties or the court to raise a subject-matter jurisdiction defect at the very outset of litigation.<sup>200</sup> That timeframe may not provide sufficient protection for the structural rights inherent in subject-matter jurisdiction (even though, clearly, that timeframe would be more efficient in terms of fewer sunk costs).<sup>201</sup>

\* \* \*

Personal jurisdiction thus also buttresses the position that constitutional doctrines that limit court power may nonetheless be waived (and indeed, may be waived early in the case).

#### D. *Overall Roadmap*

Mootness, sovereign immunity, and territorial personal jurisdiction provide insights into how our system should treat subject-matter jurisdiction. None of the three doctrines provides a perfect analogy. Mootness suffers from the defect that constitutional doctrine is subordinated too easily to policy-based rationales; sovereign immunity, from the defect that it may be characterized as personal to the state defendant; and

---

199. 5C WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1391 (3d ed. 2015).

200. *But see* Gao, *supra* note 84, at 2379–80; Buehler, *supra* note 58, at 657–58.

201. Here again, the Aristotelian mean is preferable. The timeframe proposed avoids the inefficiency of substantial sunk costs, while still respecting structural constitutional limitations.

personal jurisdiction, from the defect that, at least in modern times, it is, as its name has always suggested, personal rather than structural. But each doctrine also offers guidance for the treatment and potential waiver of subject-matter jurisdiction defects.

Sovereign immunity and personal jurisdiction are waivable; if not timely and appropriately objected to, the case proceeds. Mootness is ignorable for policy reasons; if raised, but overcome, the case proceeds. These constitutional doctrines provide roadmaps for how we should think about and treat subject-matter jurisdiction defects, even constitutional ones. In the ordinary course of events (that is, in cases not tainted by fraud or collusion), if the court and the parties do not uncover the subject-matter jurisdiction defect until the commencement of trial, that defect should be deemed waived because the costs to the parties and the judicial system are so great. Like sovereign immunity and personal jurisdiction, the issue is waived. But unlike those doctrines, the reason for waiver lies not in the fact that the right is partially personal to a party and that party must assert it. Like the mootness exceptions, the reason for waiver lies in the fact that there are tremendous costs to the system in abandoning a case in which the parties and the courts have so much invested. In sum, the system's structural interest should be outweighed by the sunk cost inherent in the failure to raise the issue in a timely fashion. Thus, the case for waiver of constitutional subject-matter jurisdiction defects pulls from our system's treatment of mootness, sovereign immunity, and personal jurisdiction.

#### IV. Emanations to Other Doctrines

The proposal in this Article, if adopted, would help resolve inefficiencies and alleviate the pressure in several hundred cases a year caused by the inflexible treatment of subject-matter jurisdiction as unwaivable. But that is not all. The solution posed in this Article has emanations beyond subject-matter jurisdiction to other justiciability doctrines that sometimes masquerade as jurisdictional. The new treatment would facilitate analysis in these areas in two ways: first, late-



raised defects of any variety would not necessarily cause cases to be dismissed; second, courts would not have to try to determine which defects relate to “subject-matter” and which do not. In sum, by working our way out of the quagmire of subject-matter jurisdiction, we can create a uniform way of treating some of our other troubled, and trouble-causing, doctrines as well.

#### A. *Justiciability Doctrines*

Standing and ripeness are prime examples of other defects that should be deemed waived if not raised by the time of trial or any disposition on the merits of the action.<sup>202</sup> Both are constitutional in origin, stemming from the “case or controversy” language of Article III (just like mootness).<sup>203</sup> Both are also structural, acting as limits on the federal courts’ power to entertain cases.<sup>204</sup> Currently, a suggestion that a case is unripe or that a plaintiff lacks standing can derail an action, even on appeal.<sup>205</sup> But if we accept that jurisdictional defects, even constitutional ones, must be raised by the time of trial or any disposition on the merits, then there is no strong reason for treating these other doctrines any differently.

---

202. Black’s Law Dictionary defines standing as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right” and ripeness as “[t]he state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.” *Standing & Ripeness*, BLACK’S LAW DICTIONARY (10th ed. 2014).

203. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (“We have noted that ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

204. *Reno*, 509 U.S. at 57 n.18 (discussing ripeness requirement); *United States v. Richardson*, 418 U.S. 166, 188 (1974) (“Relaxation of standing requirements is directly related to the expansion of judicial power.”).

205. *E.g.*, *Hodges v. Abraham*, 300 F.3d 432, 443 (4th Cir. 2002) (citation omitted) (“[S]tanding to sue is a jurisdictional issue of constitutional dimensions, and it may be raised and addressed for the first time on appeal.”); *In re Cool Fuel, Inc.*, 210 F.3d 999, 1006 (9th Cir. 2000) (same for ripeness).

If courts treat these doctrines as waivable, parties will have incentives to raise the issue earlier in the litigation. With respect to both standing and ripeness, each of which has constitutional and prudential components, courts will not have to determine whether a failing is one or the other and treat the outcomes differently depending on the label.<sup>206</sup> All defects will be deemed waived by the same cutoff: the beginning of trial or disposition on the merits. Courts will also have less need to draw a stark line between an unripe case (which admits of no exceptions) and a once-ripe-but-now-moot case (which may be subject to an exception) because both objections would be waived if first raised after trial has begun.

In sum, parties would have sufficient time and incentive to raise these defects. They would just need to raise them earlier in the litigation and not wait until trial or appeals.

#### B. *Exhaustion of Remedies*

Exhaustion of remedies may be another area that would benefit from the waiver analysis advocated in this Article. Some statutes require plaintiffs to take certain administrative steps before they may file suit.<sup>207</sup> When so required, plaintiffs must exhaust these administrative remedies and, if they fail to do so, they cannot seek redress in district court. Federal courts currently have trouble deciding whether or not the issue qualifies as jurisdictional. This presents problems in the current system because jurisdictional issues cannot be waived, while nonjurisdictional ones can be.<sup>208</sup> One manifestation of the problematic label is that some courts permit the *sua sponte* dismissal for failing to exhaust administrative remedies,<sup>209</sup>

---

206. *Reno*, 509 U.S. at 57 n.18 (noting constitutional and prudential components of ripeness); *Lujan*, 504 U.S. at 560 (noting constitutional and prudential components of standing).

207. *E.g.*, 42 U.S.C. § 2000e-5 (2012) (exhaustion of remedies in Title VII).

208. *See, e.g.*, *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 784–85 (10th Cir. 2013) (describing the circuit split regarding whether exhaustion is jurisdictional under the Individuals with Disabilities Education Act); 5B WRIGHT & MILLER, *supra* note 45, § 1350 (noting both characterizations of exhaustion).

209. *See, e.g.*, *Brown v. Lebanon Corr. Inst.*, No. 1:09-CV-513, 2009 WL

while other courts do not even entertain the objection if raised late by the parties.<sup>210</sup>

The difficulty of handling an issue like exhaustion of remedies may disappear if we create a less fraught way of handling jurisdictional defects. After all, if even core, constitutional jurisdictional matters can be deemed waived if not timely raised, so too could statutory exhaustion of remedies, unless the statute expressly provides otherwise. Courts would not have to label exhaustion as jurisdictional or nonjurisdictional because the jurisdictional label would not carry the harsh consequences that it currently does. Moreover, it makes sense for exhaustion to be raised early because it is about the steps a party took *before* instituting the federal action. These antecedent steps should be obviously present or obviously lacking—and courts and parties should waste no time litigating if they are lacking. The sunk costs for the system in handling a case where the plaintiff failed to exhaust her administrative remedies—and then dismissing that case in favor of exhaustion—are plain. It is better to determine that failing early, rather than allowing the defect to be raised late in the proceeding.

### C. *Statutory Procedural Prerequisites Other than Exhaustion*

Some statutes set forth certain minimum requirements for a suit other than exhaustion of administrative remedies. For example, Title VII requires that a defendant employ at least fifteen individuals.<sup>211</sup> Still other prerequisites to suit include

---

2913930, at \*2 (S.D. Ohio Sept. 9, 2009) (dismissing the action *sua sponte* because the plaintiff failed to exhaust administrative remedies); Clifford v. Louisiana, No. 07-955-C, 2008 WL 2754737, at \*3 (M.D. La. July 7, 2008) (same).

210. Under certain circumstances, the First Circuit has deemed the failure to exhaust a waivable objection. See *Elgin v. U.S. Dep't of Treasury*, 641 F.3d 6, 9 (1st Cir. 2011), *aff'd sub nom.* *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2140 (2012).

211. 42 U.S.C. § 2000e(b) (2012) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.”); see also *id.* § 12111(5)(A) (employee numerosity requirement for the Americans with Disabilities Act of 1990).

filing within the applicable statute of limitations and filing required notices of claim.<sup>212</sup> The question arises whether these requirements go to the district court's *power* to adjudicate the dispute (jurisdiction) or to the *merits* of the plaintiff's case (such that if the plaintiff does not plead or prove them, the plaintiff cannot prevail, although the court does have the power to determine that is the case).<sup>213</sup>

Different courts have resolved the jurisdiction question differently—and as long as we treat jurisdictional defects so differently from other defects, the different resolutions are concerning. Even more concerning, courts have been all too quick to label these prerequisites as jurisdictional without fully considering the ramifications of such a classification.<sup>214</sup> For example, in *Collins v. United Air Lines* and *Verzosa v. Merrill Lynch*, the Ninth Circuit held that failure to file within 180 days of an alleged discriminatory act deprives a district court of jurisdiction to hear a Title VII matter.<sup>215</sup> In *Verzosa*, however, the Ninth Circuit then determined that the district court had jurisdiction because the defendant had stipulated to jurisdiction.<sup>216</sup> If truly a matter of jurisdiction, that result makes no sense; under current doctrine, parties cannot confer jurisdiction by consent just as they cannot waive it by inaction. The Ninth Circuit explained the apparent inconsistency this

---

212. See *id.* § 2000e-5(e) (requiring charges to be filed with the Equal Employment Opportunity Commission within 180 days of the allegedly discriminatory act).

213. See RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e (AM. LAW INST. 1982) (noting that certain procedural prerequisites “can plausibly be characterized either as going to subject matter jurisdiction or as being one of merits or procedure”); see also Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 654–59 (2005) (noting that courts have blurred the line between power and merits).

214. See 5B WRIGHT & MILLER, *supra* note 45, § 1350 (citations omitted) (“Courts have recognized a variety of other defenses that one normally would not think of as raising subject-matter jurisdiction questions when considering a Rule 12(b)(1) motion, such as claims that the plaintiff's suit is barred by the governing statute of limitations, a matter that usually is thought of as a Rule 8(c) affirmative defense; the action is not ripe for judicial adjudication; the claim is moot; the action is not justiciable; or the subject matter is one over which the federal court should abstain from exercising jurisdiction.”).

215. *Verzosa v. Merrill Lynch et al.*, 589 F.2d 974, 976–77 (9th Cir. 1978); *Collins v. United Air Lines, Inc.* 514 F.2d 594, 596 n.1 (9th Cir. 1975).

216. *Verzosa*, 589 F.2d at 977.

way, stating, “Appellant’s stipulation to jurisdiction therefore must be construed as an admission that the alleged unlawful employment practices were continuing,” and thus the plaintiff-appellee had brought a timely EEOC charge and the federal courts did have subject-matter jurisdiction.<sup>217</sup> It is an uncomfortable resolution, and one that would not have been necessary had the court simply not called the defect “jurisdictional.”

In 2006, the United States Supreme Court seemed to signal a shift away from calling these sorts of procedural prerequisites “jurisdictional” when, in *Arbaugh v. Y & H Corp.*, the Court held that the fifteen-employee requirement of Title VII is an element of the plaintiff’s case, not a question of subject-matter jurisdiction.<sup>218</sup> The Court was “mindful of the consequences” of finding the employee-numerosity requirement jurisdictional rather than simply an element of the plaintiff’s case.<sup>219</sup> Most notably, of course, is the consequence that subject-matter jurisdiction may be raised at any time, even by the courts, and even on appeal.<sup>220</sup> The Supreme Court ultimately concluded that it would be unfair and a waste of judicial resources to retry the case, and labeled the fifteen-employee requirement a “merits” issue rather than a “jurisdictional” one, while leaving open the possibility that Congress may rank such a requirement as jurisdictional in the future.<sup>221</sup>

The United States Supreme Court’s resolution makes sense, particularly from the standpoint of waiver. Although a plaintiff should not be able to prevail if she fails to plead and

---

217. *Id.*

218. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006).

219. *Id.* at 513–14 (emphasis added) (“We resolve the question whether that fact [the requirement of fifteen or more employees] is ‘jurisdictional’ or relates to the ‘merits’ of a Title VII claim *mindful of the consequences* of typing the 15-employee threshold a determinant of subject-matter jurisdiction, rather than an element of *Arbaugh’s* claim for relief.”).

220. *Id.* at 506.

221. *Id.* at 502 (alterations in original) (internal quotation marks and citation omitted) (“Given the unfairness and waste of judicial resources entailed in tying the employee-numerosity requirement to subject-matter jurisdiction, we think it the sounder course to refrain from constricting § 1331 or [Title VII’s jurisdictional provision, 42 U.S.C.] § 2000e-5(f)(3), and to leave the ball in Congress’ court.”).

prove that the employer employed at least fifteen people (a requirement of the statute),<sup>222</sup> the failure does not seem so fundamental that the employer should be permitted to complain of it for the first time after an adverse verdict. An employer that does not bother to raise the defect before trial should not be heard to complain about its own failure after judgment is rendered in the plaintiff's favor.

The Supreme Court has maintained that course, usually finding statutory prerequisites to suit to be nonjurisdictional. In the 2014 Term, the Court had occasion to consider whether the time limits in the Federal Tort Claims Act were jurisdictional, and the Court held that they were not.<sup>223</sup> The Court reiterated its position that most statutory prerequisites to suit should be treated as nonjurisdictional:

Given [the] harsh consequences [attached to jurisdictional rules], the Government must clear a high bar to establish that a statute of limitations is jurisdictional. In recent years, we have repeatedly held that procedural rules, including time bars, cabin a court's power only if Congress has "clearly state[d]" as much. "[A]bsent such a clear statement, . . . 'courts should treat the restriction as nonjurisdictional.'"<sup>224</sup>

Part of the reason it currently matters so much whether a defect is jurisdictional or merits-based is that jurisdictional defects can cause a case to be dismissed even after trial. But if the treatment of jurisdictional defects came more into line with that of other defects, courts and scholars would not have to determine where the dividing line falls between jurisdictional and nonjurisdictional defects. Therefore, this Article's thesis has far-reaching benefits for the civil justice system.

---

222. *Id.* at 508 (The pretrial order "did not list among 'Contested Issues of Fact' or 'Contested Legal Issues' the question whether [the employer] had the requisite number of employees under 42 U.S.C. § 2000e(b). Nor was the issue raised at any other point pretrial or at trial.>").

223. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1629 (2015).

224. *Id.* at 1632 (alterations in original) (internal citations omitted).

### Conclusion

One important purpose of the rules governing civil lawsuits is to help cases move smoothly and efficiently through the system.<sup>225</sup> If our rules governing civil lawsuits become overly complex and riddled with exceptions, they fail to fulfill a basic need of our civil justice system. Cases should generally be decided on the merits, not on technicalities of procedure.

Our current framework for handling subject-matter jurisdiction objections does not serve the needs of our civil justice system. It is time to jettison our false and exception-riddled rhetoric regarding subject-matter jurisdiction's nonwaivability and embrace the view the ALI so presciently saw nearly fifty years ago: statutory subject-matter jurisdiction defects should be deemed waived if not raised prior to trial or disposition on the merits. That analysis should then be expanded from statutory subject-matter jurisdiction defects to constitutional defects. That is, constitutional subject-matter jurisdiction defects should be deemed waived if not raised within those same timeframes.

This proposal has significant consequences. Approximately 500 cases a year will clearly benefit from this new treatment. These cases will be allowed to proceed to resolution, thus avoiding unnecessary sunk costs, and will receive a more uniform and predictable disposition. And the analysis will be simplified in the thousands of other cases in which courts wrestled with subject-matter-based issues, but ultimately did not dismiss the cases. Nor should this proposal cause any significant heartburn. Indeed, treating subject-matter jurisdiction in this way will accord with how our system currently treats other alleged constitutional infirmities.

Jurisdictional waiver should be expanded to cover constitutional subject-matter jurisdiction defects that have not been raised by the time trial commences or there is a disposition on the merits. Waiver will enhance the smooth and

---

225. FED. R. CIV. P. 1 ("These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

efficient workings of our civil justice system, ensure that parties and courts do not become bogged down in categorizing subject-matter jurisdiction as constitutional versus statutory, bring our treatment of constitutional subject-matter jurisdiction in line with our treatment of several other constitutional doctrines, and serve as a roadmap for the treatment of other quasi-jurisdictional doctrines.