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Jurisdiction and Its Effects

Scott Dodson

UC Hastings College of the Law, dodsons@uchastings.edu

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Jurisdiction and Its Effects

SCOTT DODSON*

Jurisdiction is experiencing an identity crisis. The Supreme Court has given jurisdiction three different identities: jurisdiction as power, jurisdiction as defined effects, and jurisdiction as positive law. These identities are at war with each other, and each is unsustainable on its own. The result has been a breakdown in the application of the basic question of what is jurisdictional and what is not.

I aim to rehabilitate jurisdiction. Jurisdiction is none of the three identities above. Rather, jurisdiction determines forum in a multiform system. It seeks not to limit a particular court in isolation but instead to define boundaries and relationships among forums. Because it speaks to relationships generally, jurisdiction exhibits neither unique nor immutable effects. Instead, positive law can prescribe whatever effects—including waivability, forfeitability, and even equitable discretion—best fit a particular jurisdictional rule.

This identity for jurisdiction resolves tensions across a wide range of doctrines. For example, it reconciles personal jurisdiction and original subject-matter jurisdiction as jurisdictional kin, a pair long estranged because of personal jurisdiction’s waivability. Other categorizations are more surprising. For example, venue, abstention, and even the Federal Arbitration Act are all jurisdictional because they select among forums, whereas Article III standing is nonjurisdictional because it does not. These categorizations are unconventional, but they ultimately produce a more coherent, consistent, and useful jurisdictional identity.

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* Associate Dean for Research, Harry & Lillian Hastings Research Chair, and Professor of Law, UC Hastings College of the Law. © 2017, Scott Dodson. Thanks to Bill Dodge, Phil Pucillo, Aaron Rappaport, Stacie Strong, and others who read and commented on early drafts or who engaged me in preliminary conversations.

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INTRODUCTION

JURISDICTION. The term is bandied about in law school classrooms, courtroom chambers, congressional buildings, and law offices. But there is a problem: we do not know what jurisdiction means.

Lamenting that “[j]urisdiction . . . is a word of many, too many, meanings,”¹ the Supreme Court recently has pressed a deliberate agenda to bring sense to the

1. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

word by circumscribing its application and by calling for care and thoughtfulness in using the term jurisdiction.² In large measure, these efforts have paid off. Judges and commentators have attended more closely to jurisdictional issues.³ And, although the doctrine is far from clean, the Court has offered some guideposts for assisting the inquiry.⁴

In the process, the Court has imbued jurisdiction with multiple identities. Because subject-matter jurisdiction is the “power” of a court,⁵ it has a unique and immutable set of effects—unwaivable, unconsentable, able to be raised at any time, mandatory and not amenable to equitable discretion, and obliging judges to police its limits *sua sponte*—that are too costly to be imposed indiscriminately.⁶ And to avoid these costs, courts must presume a rule to be nonjurisdictional unless Congress makes its jurisdictional status clear.⁷ Thus, the current approach treats jurisdiction as (1) the power of a court, (2) a label for a defined set of effects, and (3) a creature of positive law.

This approach, which started as a productive effort to call attention to and reduce profligate and unthinking use of the term jurisdiction, has begun to stymie deeper interrogation of jurisdiction, causing difficulties in its application. As I explain in more detail below, the notion of jurisdiction as power cannot withstand scrutiny. If the term is just a proxy for a set of effects, then personal jurisdiction, which can be waived, and mootness, which carries judicially created exceptions, cannot be matters of jurisdiction. And a positivist conception of jurisdiction offers no useful meaning at all.

The cracks in jurisdictional theory and doctrine have begun to expose themselves. After a series of mostly unanimous decisions, the Court last term held the limitations period of the Federal Tort Claims Act to be nonjurisdictional in its opinion in *United States v. Wong*, which fractured the Court and revealed deep incoherence within the Court’s jurisdictional doctrine.⁸ In short, jurisdiction is exhibiting symptoms of an acute identity crisis.

I aim to rehabilitate jurisdiction’s identity by offering this definition: jurisdiction determines forum in a multiforum legal system. It is a structural concept that helps allocate cases, define boundaries, and maintain relationships among competing forums. Jurisdiction, then, has inherent definitional and functional

2. See, e.g., *United States v. Wong*, 135 S. Ct. 1625, 1630–33 (2015); *Kontrick v. Ryan*, 540 U.S. 443, 446–48 (2004).

3. See, e.g., *Musacchio v. United States*, 136 S. Ct. 709, 716–17 (2016). See generally Erin Morrow Hawley, *The Supreme Court’s Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027 (2015); Howard M. Wasserman, *The Demise of “Drive-by Jurisdictional Rulings,”* 105 NW. U. L. REV. 947 (2011).

4. See *Henderson v. Shinseki*, 562 U.S. 428, 434–36 (2011) (stating that a judicial limit is nonjurisdictional unless Congress clearly states otherwise and that context—including the Court’s interpretation of similar provisions in the past—is relevant to the determination).

5. See *Wong*, 135 S. Ct. at 1632–33.

6. See Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 4–5 (2008).

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

8. *Wong*, 135 S. Ct. at 1632.

meaning. Further, jurisdiction's effects are separate from its label; a jurisdictional limit—just like a nonjurisdictional limit—could have some, all, or none of the effects commonly tied to jurisdiction.⁹

The current approach thus has everything backwards. Jurisdiction is neither an abstract notion of power nor a creature of congressional whim. Rather, jurisdiction has an inchoate identity with functional significance that Congress cannot alter. Yet Congress and positivism do have roles to play. Because jurisdiction has neither unique nor immutable effects, Congress (or a court, if appropriate) can supply whatever attendant effects best implement the underlying goals of a particular jurisdictional limit.

Bestowing jurisdiction with an inherent identity divorced from its effects has a number of salutary benefits. It refocuses attention on the very nature of jurisdiction, enabling more precise—if unconventional—categorization of doctrines as jurisdictional or nonjurisdictional. As I will argue, jurisdictional doctrines include venue, forum non conveniens, exhaustion, and the Federal Arbitration Act, whereas nonjurisdictional doctrines include standing, ripeness, and mootness. Decoupling a doctrine's effects from its jurisdictional character also permits the jurisdictional label to finally fit doctrines like personal jurisdiction that have long seemed to be misnomers.

At the same time, jurisdiction's effects-less identity reconstitutes winnowed lines of precedent. The phrase “mandatory and jurisdictional,” once used regularly by courts, has been disparaged more recently as a “drive-by jurisdictional” phrase,¹⁰ but jurisdiction's restored identity gives independent and productive meaning to both the “mandatory” label (an effect) and the “jurisdictional” label (a concept).

Reclaiming jurisdiction also offers a practical approach for litigation. Although a limit's jurisdictional characterization is structurally and organizationally important, most litigation concerns the instrumental effects of the limit. Litigants care less about whether a particular rule fits the jurisdictional definition and much more about whether it is waivable or susceptible to equitable discretion. Thus, litigation about a particular rule should focus on its effects instead of its jurisdictional character, a focus that the Supreme Court has inverted in recent years.¹¹

The path to rehabilitating jurisdiction proceeds in three steps. Part I diagnoses jurisdiction's crisis as reflecting an unstable tripartite identity, as illustrated by the recent decision *United States v. Wong*. Part II then takes up the task of putting jurisdiction in its rightful place as a structural concept untethered to a set of effects. This Part also explores the implications of this identity restoration on various doctrines. Finally, Part III addresses major counterarguments and concerns.

9. See Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1457 (2011).

10. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90–91 (1998).

11. See *infra* text accompanying notes 83–88.

I. JURISDICTION'S IDENTITY CRISIS

In its current conception, jurisdiction is subject to congressional definition, and, because jurisdiction is power, a jurisdictional law has unique and immutable effects. But this conception is undermined by historical tensions, impoverished theorizing, and doctrinal inconsistencies that are coming to the fore. This Part diagnoses jurisdiction's identity crisis.

A. IDENTITY

Although jurisdiction was an elastic and primarily procedural concept for the nation's first century or so,¹² jurisdiction began to ossify in the latter half of the 1800s.¹³ In 1884, the Court described jurisdiction as the fundamental "power" of a federal court, elaborating: "[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception On every writ of error or appeal, the first and fundamental question is that of jurisdiction"¹⁴

The idea of jurisdiction as power, which continues today,¹⁵ leads inexorably to unique and immutable effects: the parties can neither consent to jurisdiction nor waive or forfeit jurisdictional defects; equitable doctrines and judicial discretion cannot excuse jurisdictional defects; a jurisdictional defect can be raised at any time, by any party, before final judgment; the court must verify jurisdiction *sua sponte*; and judgments entered without jurisdiction are void.¹⁶

Beginning in the early- and mid-1900s, courts routinely characterized judicial limits as jurisdictional.¹⁷ The courts of appeals, in particular, began calling

12. See *United States v. Cotton*, 535 U.S. 625, 630 (2002).

13. See Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1838–40 (2007) (documenting the early treatment of jurisdictional pleading); Dan B. Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C. L. REV. 49, 54–79 (1961) (same); see also Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1208–09, 1253–54 (2001) (explaining how English equity jurisdiction influenced the drafting of Article III).

14. *Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 379, 382 (1884); see also *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power."); *Fauntleroy v. Lum*, 210 U.S. 230, 235 (1908) (equating jurisdiction and power); cf. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) (stating that jurisdiction is an antecedent condition that, if lacking, requires dismissal).

15. See *Steel Co.*, 523 U.S. at 90; Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22 (1981) ("The concept of subject-matter jurisdiction in our legal system refers to the motive force of a court, the root power to adjudicate a specified set of controversies.")

16. See *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17–18 (1951) (no equity); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) (unwaivable); *Rooker v. Fidelity Tr. Co.*, 263 U.S. 413, 416 (1923) (voidness); *Swan*, 111 U.S. at 382 (*sua sponte* duty); *McNitt v. Turner*, 83 U.S. 352, 366 (1872) (voidness and subject to collateral attack).

17. Collins, *supra* note 13, at 1834; see generally EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958* (1992) (documenting the rise of diversity litigation since the late 1800s).

limits “mandatory and jurisdictional,”¹⁸ and the Supreme Court picked up on that tradition in the 1960 case of *United States v. Robinson*, when it similarly characterized the deadline for filing a notice of appeal in a criminal case.¹⁹ *Robinson*’s repetition of the phrase “mandatory and jurisdictional” encouraged profligate and indiscriminate employment of the jurisdictional label over the next three decades.²⁰

Beginning in the 1990s, the Court gradually became aware of its unreflective obsession with jurisdiction and the carelessness it had engendered. In *Carlisle v. United States*, the Court concluded that a district court could not grant a motion for judgment of acquittal that was untimely under the deadline specified in the Rules.²¹ Justice Ginsburg, concurring, elaborated on the deadline’s jurisdictional stature:

It is anomalous to classify time prescriptions, even rigid ones, under the heading “subject matter jurisdiction.” That most basic requirement relates to the subject matter of the case or controversy or the status of the parties to it. Federal Rule of Criminal Procedure 29(c) concerns a matter less basic. It is simply a time prescription. Rule 29(c)’s prescription is a tight one, to be sure[,] . . . [but] not utterly exceptionless.²²

And, in *Steel Co. v. Citizens for a Better Environment*, the Court explicitly recognized that overuse of the jurisdictional label had spawned “drive-by jurisdictional rulings” that should be accorded no precedential weight.²³

The 2004 case *Kontrick v. Ryan* was a pathmarking decision and the Court’s first real effort to bring meaningful doctrinal exposition to jurisdictionality.²⁴ There, a bankruptcy creditor untimely objected—outside the sixty-day deadline specified in Bankruptcy Rule 4004(a)—to a Chapter 7 debtor’s discharge.²⁵ The

18. Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 39 & n.102 (1994) (tracing the phrase’s development and noting “thousands of cases” that use it); Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399, 399 n.2, 406–07 (1986).

19. 361 U.S. 220, 224 (1960); see also Scott Dodson, *A Revolution in Jurisdiction*, in THE LEGACY OF RUTH BADER GINSBURG 137, 140 (Scott Dodson ed., 2015) (“Four times the Court characterized appellate deadlines as ‘mandatory and jurisdictional.’ To be fair, the Court itself did not endorse that characterization but rather noted how circuits had characterized it . . .”).

20. See, e.g., *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315–17 (1988); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam); *Browder v. Dir., Dep’t of Corr. of Ill.*, 434 U.S. 257, 264 (1978). The use even infected the Advisory Committee on Civil Rules. See FED. R. APP. P. 3 advisory committee’s note to 1967 adoption (characterizing as “mandatory and jurisdictional” Rules 3 and 4 of the Federal Rules of Appellate Procedure, which prescribe the form and timing of a notice of appeal in a civil case).

21. 517 U.S. 416, 421 (1996) (“There is simply no room in the text . . . for the granting of an untimely postverdict motion for judgment of acquittal . . .”).

22. *Id.* at 434–35 (Ginsburg, J., concurring) (citations omitted). Rule 29(c) provides the number of days a defendant has to file a motion for judgment of acquittal. FED. R. CRIM. P. 29(c).

23. 523 U.S. 83, 90–91 (1998).

24. 540 U.S. 443 (2004).

25. *Id.* at 446.

debtor did not raise the untimeliness of the objection until after the bankruptcy court had decided on the merits that the discharge should be refused.²⁶ On appeal, the debtor argued that the deadline was “jurisdictional,” and, therefore, its violation could be raised at any time.²⁷

The Court rejected that characterization and held that Rule 4004(a) could not be invoked after the bankruptcy court reached the merits.²⁸ According to the Court, the deadline in Rule 4004(a) was nonjurisdictional because it was a “claim-processing” rule that attached after jurisdiction had been established, as opposed to a rule that defined the kinds of cases the courts could hear and decide.²⁹ In a remarkable concession of past carelessness, with express reference to *Robinson*, the Court stated: “Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term ‘jurisdictional’ to describe emphatic time prescriptions in rules of court.”³⁰ Admonishing courts to be careful in future cases, the Court continued: “Clarity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”³¹

Two years and two successive *Kontrick*-like cases later,³² the Court held in *Arbaugh v. Y & H Corp.* that the employee-numerosity requirement of Title VII³³ is an element of the claim on the merits, not a matter of subject-matter jurisdiction.³⁴ The Court recognized that Congress could, if it chose, restrict federal jurisdiction through such a statutory requirement.³⁵ At the same time, the Court recognized the costs of delineating a limit as jurisdictional, including the ability of both parties to raise jurisdictional defects at any time, the inability of courts to excuse noncompliance, and the duty of courts to police jurisdictional limits *sua sponte*.³⁶ The Court therefore tracked the “sounder course” of adopting a presumption against jurisdictionality:

26. *Id.*

27. *Id.* at 446–47.

28. *Id.* at 447.

29. *Id.* at 454.

30. *Id.*

31. *Id.* at 455.

32. See *Eberhart v. United States*, 546 U.S. 12, 13 (2005) (per curiam) (citing *Kontrick* to support holding that the deadline for a motion for a new criminal trial is a nonjurisdictional claim-processing rule); *Scarborough v. Principi*, 541 U.S. 401, 413–14 (2004) (citing *Kontrick* to support finding that the thirty-day deadline for fee awards contained in the Equal Access to Justice Act is “not properly typed ‘jurisdictional’”).

33. 42 U.S.C. § 2000e(b) (2012).

34. 546 U.S. 500, 504 (2006) (holding “that the numerical threshold does not circumscribe federal-court subject-matter jurisdiction” but instead “relates to the substantive adequacy” of a Title VII claim).

35. *Id.* at 514–15 (“Of course, Congress could make the employee-numerosity requirement ‘jurisdictional,’ just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332.”).

36. *Id.* at 514–15.

If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.³⁷

Applying this presumption, the Court found no indication of jurisdictionality.³⁸ Nothing in the employee-numerosity provision spoke of jurisdiction, and it was lodged in a section apart from the jurisdictional grants. It was a matter of statutory coverage, not of jurisdictional authorization, to hear such claims.³⁹

Since *Arbaugh*, the Court has refined jurisdictional doctrine by adding an element of context, including past judicial treatment, as an index of congressional intent.⁴⁰ Thus, a federal court confronted with a question of jurisdictionality must consider, using textual and contextual cues, whether Congress has clearly stated that the limit at issue is jurisdictional. If not, then the limit is nonjurisdictional. If so, then a defined set of effects follow based on the idea of jurisdiction as the power of the court.⁴¹

Importantly, the first part of the analysis is positivist: Congress gets to affix the label as it wishes, and so the inquiry focuses on how Congress meant to characterize the rule. The second part of the analysis, by contrast, is logically deductive: because jurisdiction is the power of a court, its unique and immutable set of effects necessarily attach to Congress's choice of the jurisdictional label.

B. CRISIS

The Court's recent effort to bring thoughtfulness to jurisdictional characterizations is commendable, and the results of its effort can fairly be called revolutionary.⁴² But the Court's approach has begun to reveal infirmities.⁴³ Consistent with the recognition that jurisdiction "is a word of many, too many, meanings,"⁴⁴ the Court has given jurisdiction at least three identities: jurisdiction as

37. *Id.* at 515–16 (citation omitted).

38. *See id.* at 515.

39. *Id.* at 504, 515.

40. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010) ("[C]ontext, including th[e] Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional."); *Bowles v. Russell*, 551 U.S. 205, 209 & n.2 (2007) (relying on "a century's worth of precedent" in holding a civil appellate deadline jurisdictional).

41. *See, e.g., Bowles*, 551 U.S. at 214 (reasoning that, because a limit is jurisdictional, equitable exceptions cannot apply).

42. *Dodson*, *supra* note 19, at 148 ("One great virtue is [the Court's] effort to spark critical thought in the nature and role of jurisdiction The days of thoughtless, 'drive-by' jurisdictional rulings are largely over.").

43. *See id.* at 148–49 ("[T]he Court's focus on the jurisdictional-characterization question, while a marked improvement from the blasé approach to jurisdictionality reflected in cases like *Robinson* and its progeny, risks stagnation.").

44. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

basic power or authority, jurisdiction as a defined set of effects, and jurisdiction as positive law. These three identities are inconsistent with each other, and none is coherent on its own.

1. Jurisdiction as Basic Power or Authority

Since the late 1800s, the Court has often called jurisdiction something basic and fundamental that goes to the power of the court to hear and adjudicate a case.⁴⁵ But, as Evan Lee has demonstrated, this familiar refrain lacks foundation.⁴⁶ “Power” cannot mean “ability,” for nothing physically or intellectually prevents a court from adjudicating a dispute over which it lacks jurisdiction.⁴⁷ A jurisdictional barrier is not a force field. Nor can jurisdiction mean capacity to enter an enforceable judgment,⁴⁸ for even a judgment entered without jurisdiction can become binding, enforceable, and unassailable.⁴⁹

A more watered down definition might be legitimate authority to enter judgment,⁵⁰ but even that formulation has been undermined by the Court’s resequencing cases, which give a federal court the legal authority to enter a binding judgment on procedural grounds even while questioning its own jurisdiction.⁵¹

In addition, the formulation of jurisdiction as legitimate authority renders it conceptually indistinguishable from the many nonjurisdictional elements that also inform legitimate authority.⁵² Fraud on the court, suborned perjury, bribed judges or jurors, and the like affect the legitimacy of any adjudication in character and degree indistinguishable from whether, say, the amount in controversy exceeds a jurisdictional threshold. Even an error in procedure or on the merits—such as a judge who refuses to allow any discovery, always grants summary judgment, attempts to certify an unauthorized class action, or attempts to award a trillion dollars in punitive damages—affects the legitimacy of any

45. See *supra* note 14; cf. *Jurisdiction*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“a court’s power to decide a case or issue a decree”). For an extended exposition of this identity, see Dane, *supra* note 18, at 21–29.

46. Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1618–19 (2003).

47. See *id.* at 1616–17.

48. Cf. Dane, *supra* note 18, at 32 (“If a court does not have jurisdiction, its actions do not bind.”).

49. See, e.g., *Durfee v. Duke*, 375 U.S. 106, 111 (1963); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 289–95 (1947); *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940).

50. Cf. Wasserman, *supra* note 3, at 961 (calling jurisdiction “a court’s root structural constitutional and statutory authority to adjudicate”).

51. See *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 425, 431 (2007) (allowing dismissal for forum non conveniens without first resolving a motion to dismiss for lack of subject-matter jurisdiction); cf. Dane, *supra* note 18, at 31–32 (arguing that if jurisdiction is fundamental authority, then a court cannot resequence a nonjurisdictional basis for decision prior to establishing jurisdictional certainty).

52. See Lee, *supra* note 46, at 1620–21; cf. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 502 (2002) (exploring the idea of jurisdiction as legitimacy in the global context).

resulting judgment's authority.⁵³ Indeed, observers are quite likely to characterize each of these instances as an action that lacks authority.⁵⁴

Perhaps jurisdiction can be defined by its opposite. As discussed above, the Court recently has taken to contrasting jurisdiction with "claim-processing rules."⁵⁵ But this contrast with claim-processing rules proves unworkable in practice.⁵⁶ Consider, for example, claim preconditions,⁵⁷ certificates of appealability,⁵⁸ the deadline to file a notice of appeal,⁵⁹ and statutes of limitations.⁶⁰ Are these claim-processing rules? The Supreme Court has treated them inconsistently, and I have yet to see any conceptual feature that distinguishes claim-processing rules from jurisdictional limits. Justice Scalia was correct in his dissent in *Gonzalez v. Thaler*: the dichotomy is not between jurisdictional limits and claim-processing rules but between jurisdictional limits and nonjurisdictional limits.⁶¹

Further, the contrast between jurisdictional limits on power and nonjurisdictional claim-processing rules is destabilized by the Court's own positivist approach of deferring to Congress's characterizations of what is jurisdictional and what is not. As the Court has conceded, Congress can make otherwise claim-processing rules jurisdictional. In *Henderson v. Shinseki*, for example, the Court stated:

Among the types of rules that should not be described as jurisdictional are what we have called "claim-processing rules." These are rules that seek to promote the orderly progress of litigation by requiring that the parties take

53. See *Dodson*, *supra* note 9, at 1450–51; *Lee*, *supra* note 46, at 1614 ("[T]here is no hard conceptual difference between jurisdiction and the merits.").

54. See, e.g., *In re Courtright*, No. 05-21672REF, at 4 (Bankr. E.D. Pa. Sept. 27, 2006) (mem.) (noting the defendant's argument that the judge "lacked jurisdiction to award punitive damages").

55. See *supra* text accompanying notes 28–31.

56. See Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1467 (2006) (arguing that "the distinction is not sufficient to solve the problem" because "[a]ny rule can be read to describe the classes of cases courts can hear"); cf. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) ("While perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice.").

57. Compare *Matthews v. Eldridge*, 424 U.S. 319, 328–30 (1976) (characterizing the Social Security Act's presentation requirement as jurisdictional), with *Reed Elsevier, Inc.*, 559 U.S. at 157 (holding the registration precondition for a copyright claim to be nonjurisdictional).

58. See *Gonzalez v. Thaler*, 132 S. Ct. 641, 649 (2012) (holding one part of the habeas requirements for a certificate of appealability to be jurisdictional and a different part to be nonjurisdictional).

59. Compare *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam) (characterizing the deadline to file a criminal notice of appeal as nonjurisdictional), with *Bowles v. Russell*, 551 U.S. 205, 213 (2007) (holding the deadline to file a civil notice of appeal to be jurisdictional).

60. Compare *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990) (holding the deadline to file notice of appeal in Title VII to be nonjurisdictional), with *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134, 139 (2008) (affirming jurisdictional dismissal of a complaint filed outside the "more absolute" limitations period to file a claim with the Court of Federal Claims).

61. See 132 S. Ct. at 664–65 (Scalia, J., dissenting) ("We have said that the universe of rules placing limitations upon the courts is divided into (1) 'claims processing rules,' and (2) jurisdiction-removing rules. Unless our prior jurisprudence is to be repudiated, that is a false dichotomy The proper dichotomy is between claims processing rules that are jurisdictional, and those that are not.").

certain procedural steps at certain specified times. Filing deadlines, such as the 120-day filing deadline at issue here, are quintessential claim-processing rules [But] the question before us is not quite that simple because Congress is free to attach the conditions that go with the jurisdictional label to a rule that we would prefer to call a claim-processing rule. The question here, therefore, is whether Congress mandated that the 120-day deadline be “jurisdictional.”⁶²

Thus, the distinction between jurisdictional limits on power or authority and claim-processing rules—if a workable distinction even exists—cannot be key to jurisdiction’s identity.

2. Jurisdiction as Effects

A more radical view is that jurisdiction has no inherent identity but rather is a mere label that represents a defined set of effects: a jurisdictional requirement is neither consentable nor stipulable by the parties and must be policed by the court *sua sponte*; and the requirement’s noncompliance can be raised by any party any time before final judgment, is nonwaivable and nonforfeitable, and cannot be excused by judicial discretion or application of principles of equity.⁶³

Equating jurisdiction with its effects relies on the premises that jurisdiction’s effects are immutable and unique, that is, a jurisdictional characterization necessarily leads to all these effects and a nonjurisdictional characterization necessarily leads to none of them. These premises are oft-repeated by courts and commentators.⁶⁴ The Sixth Circuit, for example, recently stated: “[J]urisdictional rules are mandatory; therefore, their time limits cannot be waived. On the other hand, claim-processing rules are not jurisdictional—thus, their time limits *can* be waived.”⁶⁵ Both premises are mistaken.

I begin with the latter premise of uniqueness. The effects typically associated with jurisdiction are not unique to jurisdiction. Nonjurisdictional rules can have some or even all of the effects commonly associated with jurisdiction by being unsusceptible to equitable exceptions or discretion, nonconsentable or nonwaivable or nonforfeitable, or obligated to be policed by the court *sua*

62. 562 U.S. 428, 435 (2011); *see also Gonzalez*, 132 S. Ct. at 649; *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514–15 (2006) (“Of course, Congress could make the employee-numerosity requirement ‘jurisdictional,’ just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332.”).

63. *See Dodson*, *supra* note 6, at 3.

64. *See, e.g., Day v. McDonough*, 547 U.S. 198, 205 (2006) (“A statute of limitations defense . . . is not ‘jurisdictional,’ hence courts are under no *obligation* to raise the time bar *sua sponte*.”); *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) (“Characteristically, a court’s subject-matter jurisdiction cannot be expanded to account for the parties’ litigation conduct; a claim-processing rule, on the other hand, . . . can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.”); *Dane*, *supra* note 18, at 12 (stating that a jurisdictional characterization “always rests on an explicit contrast . . . [I]f a time limit is jurisdictional, the court will read it or treat it one way; if it is not jurisdictional, the court will read it or treat it another way”).

65. *Cook v. United States*, 246 F. App’x 990, 994 (6th Cir. 2007) (citing *Bowles v. Russell*, 551 U.S. 205, 209–13 (2007)).

sponte.⁶⁶ The habeas statute makes its nonjurisdictional exhaustion requirement nonforfeitable and subject to sua sponte consideration.⁶⁷ The nonjurisdictional criminal deadline to appeal resists application of equitable principles and judicial discretion.⁶⁸ Other examples abound. Jurisdiction's effects are not unique.

Nor are jurisdiction's effects immutable. Despite common intonations to the contrary,⁶⁹ jurisdictional rules can have fewer, even none, of the effects commonly associated with jurisdiction.⁷⁰ Take, for instance, the appellate-jurisdiction requirement of a civil notice of appeal, which the Court has held to be jurisdictional.⁷¹ The statute governing the requirement's deadline allows a court to extend the deadline for filing the notice for good cause and even allows a court to reopen the time period after expiration for certain equitable reasons.⁷² Further, the requirement that the notice be "filed"⁷³ is subject to a judicial exception for prisoners who "can file . . . only by delivering [the notices] to prison authorities for forwarding to the appropriate district court."⁷⁴ And even the requirement of a notice of appeal is excusable if the functional equivalent is provided.⁷⁵ The upshot is that, although the jurisdictional line requires the filing of a notice of appeal within a prescribed deadline, a litigant could successfully meet that jurisdictional requirement by *not* filing something *other* than the notice of appeal *outside* of the deadline.

The key, however, is that these equitable and discretionary effects do not necessarily render the appellate requirements nonjurisdictional. The notice-of-appeal requirement can still draw a jurisdictional line; that jurisdictional line would simply incorporate the contours created by certain principles of equity and discretion. A line need not be straight to be jurisdictional.⁷⁶

The same can be said for litigant waiver. Nothing inherently prevents a jurisdictional line from accommodating party conduct.⁷⁷ For example, a plaintiff's good-faith allegation suffices to establish the amount in controversy for diversity-jurisdiction purposes.⁷⁸ If the defendant challenges diversity jurisdiction based on the amount in controversy, then the plaintiff has the burden to

66. See Dodson, *supra* note 6, at 3, 6.

67. See 28 U.S.C. § 2254(b)(3) (2012); *Granberry v. Greer*, 481 U.S. 129, 133 (1987).

68. *Eberhart v. United States*, 546 U.S. 12, 19 (2005).

69. See, e.g., *United States v. Cotton*, 535 U.S. 625, 630 (2002) (setting out an immutable set of effects for jurisdiction).

70. Dodson, *supra* note 9, at 1457. For a different story of jurisdiction's flexibility, see generally Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971 (2009).

71. See *Bowles v. Russell*, 551 U.S. 205, 213 (2007).

72. See 28 U.S.C. § 2107(c) (2012).

73. *Id.* § 2107(a).

74. See *Houston v. Lack*, 487 U.S. 266, 268 (1988).

75. See *Smith v. Barry*, 502 U.S. 244, 245 (1992) (treating an appellate brief as a notice of appeal).

76. See Dodson, *supra* note 9, at 1458 ("This may result in jurisdictional boundaries that are more circuitous than straight, but they are no less jurisdictional.")

77. See, e.g., 28 U.S.C. § 2107(c) (2012) (allowing an extension of the time to appeal if, and only if, a party timely files a motion for an extension).

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

prove the threshold is met by a preponderance of the evidence.⁷⁹ But if the defendant does not lodge a challenge, the plaintiff's good-faith allegation controls, even if the amount in controversy does not, in fact, exceed the jurisdictional threshold.⁸⁰ The parties' pleading choices can thus establish jurisdiction even when the amount in controversy is, in fact, below the threshold. Jurisdiction's effects, then, are not immutable.

Equating jurisdiction with its effects also brings different jurisdictional doctrines into tension with each other. Subject-matter jurisdiction is, customarily, mandatory and nonwaivable. Yet mootness, a doctrine derived from Article III jurisdiction, is subject to the judicially-created "capable of repetition, yet evading review" exception.⁸¹ And personal jurisdiction is waivable, forfeitable, and consentable.⁸² If jurisdictional doctrines all exhibit uniform effects, someone is missing something.

3. Jurisdiction as Positive Law

The Court's modern approach relegates jurisdiction to little more than a positivist label to be affixed at Congress's whim: a limit is jurisdictional when Congress clearly denotes it as such.⁸³ I have no quarrel with Congress's constitutional prerogative to limit the authority of the federal courts.⁸⁴ My concern is in distinguishing between jurisdictional limits of authority and nonjurisdictional limits of authority. The positivist conception of jurisdiction presumes that the distinction itself is a matter of positive law: there is no inherent substance to jurisdiction other than the label that Congress affixes and the effects that flow from that label.⁸⁵

Such a conceptualization renders itself irrelevant except as a proxy for a defined set of effects. The jurisdictional label does no real definitional work and has no independent meaning other than to prescribe what effects flow from it.⁸⁶ And as explained above, the jurisdiction-as-effects identity is itself incoherent.

79. See *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942).

80. See *Dodson*, *supra* note 9, at 1467.

81. See *United States v. Juvenile Male*, 564 U.S. 932, 938 (2011).

82. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991).

83. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515–16 (2006) (establishing a clear-statement rule for jurisdiction); *Musacchio v. United States*, 136 S. Ct. 709, 717 (2016) (reaffirming *Arbaugh's* clear-statement rule).

84. See U.S. CONST. art. III, § 1 (granting Congress the power to "ordain and establish" inferior courts); *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts . . ."). Endowing Congress with primary control over the authority of the courts does not necessarily empower Congress to define what is jurisdictional. See *infra* text accompanying note 260.

85. Cf. *Lee*, *supra* note 46, at 1629 ("[W]e should recognize jurisdiction as a creation of positive law To put it crudely, if the legislature says there is such a thing as jurisdiction, then judges and lawyers are to act as if there is such a thing as jurisdiction.").

86. A positivist conception could serve as a trigger for effects prescribed elsewhere, such as in the removal/remand context. See *infra* text accompanying note 100. However, any prescribed effects are either redundant of the expected effects or are in tension with the expected effects. See, e.g., FED. R. CIV. P. 12(h) (allowing, consistent with typical jurisdictional effects, subject-matter jurisdiction to be

The positivist identity also suffers from its own infirmities. If Congress can deploy the jurisdictional label as it sees fit, the Supreme Court's imposition of a clear-statement rule disfavoring jurisdiction undermines congressional primacy.⁸⁷ Further, because Congress so rarely speaks directly to court jurisdiction, a positivist approach proves difficult in many instances, and the Court's own approach has spawned inconsistencies and complexities in its attempts to divine congressional intent that, in all likelihood, never existed.⁸⁸

Finally, the identity of jurisdiction as a positivist creation of Congress offers no explanation for nonstatutory doctrines, such as Article III standing, personal jurisdiction, forum non conveniens, court rules, abstention, sovereign immunity, the independent-and-adequate-state-grounds doctrine, and the like. One could reach these nonstatutory doctrines by extending the positivist identity of jurisdiction to other sources of law beyond acts of Congress, but then it is unclear how the Court's clear-statement rule would operate in these contexts and what would happen if various positivist sources affixed conflicting labels to the same doctrine.

4. *United States v. Wong*

Last term's opinion in *United States v. Wong*, consolidated with the substantially similar case *United States v. June*, illustrates jurisdiction's identity crisis.⁸⁹ There, the Supreme Court, in a 5–4 decision, held the limitations period of the Federal Tort Claims Act (FTCA) susceptible to equitable tolling. The FTCA waives the United States' sovereign immunity under certain conditions. One condition is the statutory time provision, making an FTCA claim "forever barred" if not timely asserted.⁹⁰ Both Kwai Fun Wong and Marlene June filed claims that were untimely under the FTCA, but the Ninth Circuit held that both could proceed as timely under the doctrine of equitable tolling.⁹¹

Although the sole issue before the Court was whether the limitations period in § 2401(b) was susceptible to equitable tolling, the Court framed the case as a question of whether the limitations period was jurisdictional.⁹² In the process,

raised any time, but requiring, in tension with typical jurisdictional effects, personal jurisdiction to be raised in the first responsive pleading).

87. See Hawley, *supra* note 3, at 2031.

88. See, e.g., *Gonzalez v. Thaler*, 132 S. Ct. 641, 649 (2012) (holding one provision jurisdictional and a different but closely related provision nonjurisdictional); *Henderson ex rel Henderson v. Shinseki*, 562 U.S. 428, 436 (2011) (disclaiming Congress's need to use magical words to type a limit as jurisdictional); *Bowles v. Russell*, 551 U.S. 205, 209–10, 212–13 (2007) (finding that Congress's limitation on judges' ability to extend the notice-of-appeal period suggests it intended the deadline to be jurisdictional rather than a claim-processing rule). For a different attack on the positivist theory of jurisdiction, see Lees, *supra* note 56, at 1476–77 (arguing that legislative intent often is too ambiguous to allow for positivist application of the jurisdiction label).

89. *United States v. Wong*, 135 S. Ct. 1625 (2015).

90. 28 U.S.C. § 2401(b) (2012) (rendering a tort claim against the United States "forever barred" unless presented to the appropriate federal agency within two years after the claim accrues and brought to federal court within six months after the agency acts on the claim).

91. *Wong*, 135 S. Ct. at 1629–30.

92. *Id.* at 1631–32.

the Court zigzagged through the entire gamut of errors discussed above. The Court characterized jurisdiction as power and as contrasted with claim-processing rules.⁹³ The Court also resorted to a positivist approach to jurisdiction, stating: “Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.”⁹⁴ And the Court equated a jurisdictional characterization with the typical effects of jurisdiction, stating that if Congress made the deadline jurisdictional, then “a litigant’s failure to comply with the bar deprives a court of all authority to hear a case.”⁹⁵

None of these heuristics advanced the Court’s analysis. The statutory limit at issue—making a claim “forever barred” by sovereign immunity if not timely asserted—is neither clearly a limit on judicial power nor clearly a mode of processing a claim. The unusual language “forever barred” was not helpful to the positivist approach either, for the majority and dissent each claimed textual support for its respective characterization.⁹⁶ Even while equating jurisdiction with its effects, the Court seemed to recognize that the time bar could resist equitable tolling even if characterized as nonjurisdictional.⁹⁷ The Court’s laser focus on the jurisdictional character of the FTCA’s limitations period obscured the entire issue at stake for the parties: whether equitable tolling is available to excuse noncompliance with the FTCA’s time bar.

Wong is symptomatic of the growing incoherence of the Court’s jurisdictional-ity jurisprudence, and its lesson is clear: it is time to set jurisdiction straight.

II. REHABILITATING JURISDICTION

So, what is jurisdiction? And how is it related to the effects commonly associated with jurisdiction? This Part answers those questions.

A. DETERMINING FORUM, DECOUPLING EFFECTS

I begin by affirming that jurisdiction has a legitimate place in our legal lexicon.⁹⁸ This affirmance is not based on the impracticality of eradicating the concept altogether, as some have considered.⁹⁹ Impracticality is, no doubt, a

93. *Id.* at 1632.

94. *Id.*

95. *Id.* at 1631.

96. *Id.* at 1632–33; *id.* at 1640–42 (Alito, J., dissenting).

97. *Wong*, 135 S. Ct. at 1631 n.2 (recognizing that Congress could insulate even a nonjurisdictional time bar from equitable tolling).

98. Others are skeptical that jurisdiction has any distinct inherent meaning. *See, e.g., Lee, supra* note 46, at 1614. *But see id.* at 1622 n.30 (conceding that jurisdiction “serves an important choice-of-forum function, and to that extent it is functionally distinguishable from the merits”).

99. Professor Wasserman has been at the forefront of the merits/jurisdiction dichotomy and is a strong proponent of moving most—if not all—merits issues out of the jurisdictional basket. *See Wasserman, supra* note 3, at 954. *See generally* Howard M. Wasserman, *Jurisdiction, Merits, and Non-Extant Rights*, 56 KAN. L. REV. 227 (2008); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005).

strong barrier to eradication, for jurisdiction already undergirds much jurisprudence, which is by now too far committed to the existence of something called jurisdiction. Indeed, the law often expressly depends upon jurisdictional characterizations. For example, the removal statute requires remand at any time a defect in subject-matter jurisdiction is found but conditions remand on a timely remand motion for any other defect.¹⁰⁰ For practical reasons, jurisdiction must continue to exist as a term.¹⁰¹

But I mean to press something more affirmative. Jurisdiction has value beyond the avoidance of impracticability. It is important for inherent reasons, and those inherent reasons cabin Congress's ability to affix the label at its whim.

Jurisdiction's identity is this: it determines forum in a multiforum system. Importantly, jurisdiction does not speak to the authority of a single court in isolation; it is not meant to answer the question of whether a particular court can adjudicate a dispute (though it often will answer that question). Rather, jurisdiction defines both where a dispute belongs and where it does not. It is inherently a *relational* concept, an organizing force that either resolves or encourages territorial disputes within a community of forums. Jurisdiction provides answers to the following questions: When can a case be filed in federal or state court? When does a case move from district to appellate court? Which states' courts can hear a case and which cannot? Which federal districts within a state can hear the case? When must dispute resolution take place before an arbitrator, an executive, or a legislative body instead of a court? Jurisdiction erects both the fences that separate forums and the gates that cases may pass through.¹⁰²

Crucially, jurisdictionality does not depend on the mere existence of alternate forums. Otherwise, every judicial limit would be jurisdictional. A plaintiff unable to seek judicial relief because of a statute of limitations in one court

100. See 28 U.S.C. § 1447(c) (2012). For a framework for resolving jurisdictional-characterization questions in the removal context, see generally Scott Dodson, *In Search of Removal Jurisdiction*, 102 N.W. U. L. REV. 55 (2008).

101. See Lee, *supra* note 46, at 1628 (“[B]anishing the term ‘jurisdiction’ from our legal lexicon is out of the question.”).

102. I am not the first to suggest that jurisdiction has meaning along these lines. Some years ago, Alex Lees proposed that jurisdiction should reflect rules that shift authority between law-speaking institutions in a manner similar to my definition. See Lees, *supra* note 56, at 1478. But whereas my definition is primarily descriptive, his is normative, relying on underlying explanatory policies implementing positivist choice-of-forum preferences. See *id.* This leads him to suggest that the employee-numerosity requirement in *Arbaugh* might be jurisdictional, *id.* at 1496 n.130, a result I disclaim. Lees is forced into this “important qualification” because he erroneously takes jurisdictional effects as given. Indeed, he argues that jurisdiction should settle boundaries between law-speaking institutions precisely *because* of the rigid effects that should accompany such boundary lines. *Id.* at 1460. He thus cannot explain how waivable boundaries like personal jurisdiction or venue can be jurisdictional and he makes no attempt to do so. Further, his commitment to effects leads him to conclude that standing is jurisdictional, *id.* at 1481–84, whereas my definition suggests the opposite. For related takes on jurisdiction in the international context, see Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003 (2006); S.I. Strong, *Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 342–48 (2013).

perhaps could seek relief in a different court that might apply a different limitations period.¹⁰³ If no court is available, perhaps the plaintiff can seek legislative or executive solutions. If those prospects fail, the plaintiff can seek extralegal recourse through self-help. The availability of alternative paths does not make all limitations on one forum jurisdictional. Rather, jurisdiction must group or divide the forum possibilities. This key feature distinguishes, for example, statutes of limitations (which limit one court's authority independent of the availability or unavailability of other forums) from the doctrine of forum non conveniens (which limits a court's authority because of the availability of more convenient forums).

Any law that determines forum in a multiforum system, then, is properly typed "jurisdictional." Some doctrines customarily considered jurisdictional, such as diversity and federal-question jurisdiction, easily fit this definition, but others customarily considered nonjurisdictional fit too. Exhaustion requirements, for example, determine forum by diverting a dispute from one forum into another. Thus, obtaining a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC) before suing under Title VII is a jurisdictional demarcation between an executive agency and a court. Similarly, the requirement that an appellant file a notice of appeal is a jurisdictional requirement because filing establishes a boundary dividing authority between the district and appellate courts. A nonexhaustive list of jurisdictional doctrines, some of which are conventionally jurisdictional and others of which are not, includes the following:

- Federal-question jurisdiction (including exclusive federal jurisdiction);
- Diversity jurisdiction;
- Supplemental jurisdiction;
- Removal and remand;
- Appellate jurisdiction (including certificates of appealability, the finality rule, and the deadline to file a notice of appeal in both criminal and civil cases);
- Personal jurisdiction;
- Venue;
- Forum non conveniens;
- Exhaustion;
- Abstention;
- State-court certification; and
- The Federal Arbitration Act.

Each of these is properly typed jurisdictional because it determines forum in a multiforum system.

103. *See, e.g.,* *Ferens v. John Deere Co.*, 494 U.S. 516, 519–20 (1990) (holding that a transferee court must apply the law of the transferor court, even if the claim was strategically brought in the transferor court to avoid a statute of limitations bar in the transferee court).

Any law that does not determine forum in a multiforum system cannot be called jurisdictional. Statutes of limitations, for example, do not determine forum in a multiforum system. These instead speak to the viability of recovery in a particular court. Likewise, issues of statutory coverage—like the employee-numerosity requirement of Title VII—are claim requirements, not forum determinants. These speak to whether a particular case can be heard but not to case allocation among forums. A nonexhaustive list of nonjurisdictional rules includes the following:

- Limits on remedies (such as caps on damages or injunctive relief, limitations periods, or requirements for fee shifting);
- Statutory-coverage issues, including extraterritoriality;
- Official immunity;
- Nonretroactivity;
- Service;
- Standards of review; and
- Standing, ripeness, and mootness.

These are nonjurisdictional because they address the competency of a court to adjudicate a particular dispute in isolation from that court's relationship with other adjudicative bodies.¹⁰⁴

These groupings make for some odd doctrinal bedfellows. Standing is akin to a limitations period. Venue is of the same ilk as diversity jurisdiction. But these pairings are odd primarily because we have tended to think of jurisdiction in terms of its effects rather than as a structural principle about organizing forums. Venue somehow seems less jurisdictional than diversity jurisdiction because venue can be forfeited,¹⁰⁵ and standing somehow seems more jurisdictional than a limitations period because it is a constitutional limit that cannot be satisfied by party consent.¹⁰⁶

But when freed from effects-based definitions, categorizing venue as jurisdictional and standing as nonjurisdictional makes great sense. As I explain in detail below, venue, like diversity jurisdiction, allocates cases among courts by determining which courts can hear the case and which cannot, and it helps draw

104. Domestic-official immunity in the United States is federal preemptive law, meaning that it applies equally in federal and state courts. Accordingly, it is not a jurisdictional, forum-selection doctrine but rather a nonjurisdictional, global immunity doctrine. Foreign-official immunity, by contrast, rests on the presumption that the foreign official is entitled to immunity in foreign courts because the official is subject to suit in her own country's courts. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, ¶ 61 (Feb. 14) (relying on the presumption that "such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law"). Thus, foreign-official immunity might appropriately be characterized as jurisdictional. I am grateful to Bill Dodge for pointing this nuance out to me.

105. *See* FED. R. CIV. P. 12(h)(1)(A) (a defendant's objection to improper venue is waived if not brought timely).

106. *See* *Allen v. Wright*, 468 U.S. 737, 750–51 (1984) (discussing standing's origins in Article III).

boundaries of authority among adjudicative forums. By contrast, standing does not determine forum in a multiform system because it speaks only to the limitations of the forum court to grant relief, just as a statute of limitations or a damages cap does. True, party preferences can influence venue but not standing. But that does not make venue any less, or standing any more, forum-determinative.

Jurisdiction, then, properly describes any boundary or bridge between forums. It is not a positivist term such that Congress can affix it as it wishes, nor a label for a certain set of effects, nor a normative term applied only when justified by certain systemic policies. Rather, jurisdiction is inherently descriptive of boundaries that separate or group forums. Neither Congress nor the courts can change this identity. Thus, it is not true, as the Supreme Court presumed, that Congress could make Title VII's employee-numerosity requirement jurisdictional simply by calling it so.¹⁰⁷ Nor could Congress make venue nonjurisdictional. Jurisdiction has its own definition.

Congress can, however, exert some control over the effects of a particular jurisdictional law, as can the courts under appropriate circumstances. Nothing inherent in jurisdiction's identity necessarily precludes consideration of party preference, judicial discretion, or the equities. These features ought to be considered part of the lawmaking authority's arsenal for maintaining workability and fairness in the legal landscape.¹⁰⁸ Congress can, for example, make the deadline to file a notice of appeal, or even the notice of appeal itself, subject to principles of equity or to the preferences of the parties.¹⁰⁹ By the same token, Congress could decide that a particular jurisdictional line is too important for systemic reasons to leave to the influence of the parties or the courts, and thus it might make the line nonwaivable, nondiscretionary, and even subject to *sua sponte* policing by the courts. Positive law, then, can prescribe whatever effects best fit a particular jurisdictional line.

B. REORIENTING DOCTRINE

The characterization groupings above warrant further explanation. This Section explores those groupings and shows that jurisdiction's rehabilitated identity offers new insights and resolves some of the most intransigent doctrinal conflicts.

107. *See* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514–16 (2006). If Congress had created a cause of action against employers who did not meet the employee-numerosity requirement but required that such a claim be lodged exclusively in state court, then the employee-numerosity requirement would have been jurisdictional.

108. Of course, in a hierarchical legal system, an institution with supremacy over another can set effects that the subordinate institution cannot alter. If, for example, the Constitution establishes a particular effect for a particular jurisdictional line, Congress cannot alter it. *Cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803) (holding that Congress cannot grant the Supreme Court original jurisdiction beyond what the Constitution allows).

109. Indeed, Congress has already seen fit to empower judicial discretion in consideration of the equities in the deadline to file a civil notice of appeal. *See* 28 U.S.C. § 2107(c) (2012) (providing for extensions based on "excusable neglect or good cause").

1. Original and Appellate Jurisdiction

Few will need convincing that the traditional doctrines of original district-court jurisdiction and appellate jurisdiction are, indeed, jurisdictional. Still, they contain tensions that can be alleviated by jurisdiction's new identity.

Federal-question jurisdiction (including exclusive federal jurisdiction), diversity jurisdiction, supplemental jurisdiction, and removal all determine forum in a multiforum federalist system comprising both federal and state courts.¹¹⁰ These doctrines help define when federal or state courts can, should, or must hear a case.

Most facets of these jurisdictional doctrines are easily typed jurisdictional, so I will focus discussion on the more controversial of the group: removal and remand procedure and declinations of supplemental jurisdiction. Many courts have held removal and remand to be nonjurisdictional¹¹¹ because they are primarily matters of procedure governing the movement of a case that already qualifies for original federal jurisdiction.¹¹² However, those rulings have not been without controversy.¹¹³

If jurisdiction is to describe both fences and gates, then it must describe removal and remand procedure as well. The deadline to remove is not a limit on a claim for relief like a statute of limitations. It is a limit on the eligibility of the case for a federal forum, just as surely as the amount-in-controversy requirement is a limit on the eligibility of the case for a federal forum under diversity jurisdiction.¹¹⁴

Importantly, the jurisdictional status of the mechanical features of removal and remand does not lead to an established set of effects. The label is descriptive, not prescriptive. Thus, it would be perfectly appropriate for Congress to provide that defects in the mechanics of removal or remand, even if they are descriptively jurisdictional, can still be forfeitable.¹¹⁵

In contrast with removal, supplemental jurisdiction is more firmly accepted as jurisdictional. The supplemental-jurisdiction statute, however, contains an odd provision that allows a federal court to decline to exercise supplemental jurisdiction under certain circumstances.¹¹⁶ This grant of discretion to district courts to dismiss or remand to allow state courts to hear the supplemental claims is

110. *See id.* §§ 1331, 1332, 1367, 1441.

111. *See* Scott Dodson, *The Failure of Bowles v. Russell*, 43 TULSA L. REV. 631, 640 (2008).

112. *See, e.g.*, 28 U.S.C. § 1441(a) (allowing removal of cases over which district courts have original jurisdiction). *But see* Dodson, *supra* note 100, at 62–63 (identifying independent jurisdictional grants in the removal statute).

113. Dodson, *supra* note 100, at 64–65.

114. *See* 28 U.S.C. § 1332(a).

115. Congress complicated matters by making nonforfeitable only “defect[s] . . . of subject matter jurisdiction.” *See id.* § 1447(c). One way out is to construe Congress’s use of the term “subject matter jurisdiction” to refer not to all jurisdictional matters but only to the description of “original jurisdiction” in the removal grant. *See id.* § 1441(a).

116. *See id.* § 1367(c).

similar to abstention¹¹⁷ and is typically thought of as nonjurisdictional, primarily because it involves the exercise of discretion.¹¹⁸ But its discretionary nature should make no difference. Both the statute and a district court's exercise of discretion help determine the forum (state or federal court) for adjudication. Thus, even the discretionary portion of the supplemental-jurisdiction statute is jurisdictional.

Appellate jurisdiction, too, is jurisdictional. Appellate jurisdiction contains a number of requirements, including a timely and complete notice of appeal,¹¹⁹ the existence of a final judgment from which to appeal,¹²⁰ and any statutory certificates of appealability that are required as a precondition to an appeal.¹²¹ Like removal, these details effectuate the transition of the case from one court to another and thus they all are properly typed jurisdictional.

Bowles v. Russell, therefore, was correct in describing as jurisdictional the deadline to file a civil notice of appeal.¹²² Contrary to the dissent's suggestion, the nature of the appellate deadline is not akin to a limitations period.¹²³ The appellate deadline implements the passage of a case across a boundary demarcating the authority of a district court and an appellate court. A limitations period, by contrast, sets a requirement for claim resolution in a particular court without regard to other courts. The former is jurisdictional; the latter, nonjurisdictional.

The same can be said for all other requirements at the boundary between district courts and courts of appeals: the finality requirement, the contents of the notice, the signature requirement, the identification of parties and issues, and a complete certificate of appealability if required.¹²⁴ In addition, the boundary between the courts of appeals and the Supreme Court is jurisdictional in both criminal and civil matters,¹²⁵ notwithstanding inconsistent precedent to the contrary.¹²⁶

117. See Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1421–22 (1999). For more on abstention, see *infra* notes 154–58 and accompanying text.

118. See *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 638–39 (2009).

119. See 28 U.S.C. § 2107.

120. See *id.* § 1291.

121. See, e.g., *id.* § 2253(c) (requiring a certificate of appealability in habeas corpus proceedings).

122. 551 U.S. 205, 212–13 (2007).

123. *Id.* at 218 (Souter, J., dissenting) (“A filing deadline is the paradigm of a claim-processing rule, not of a delineation of cases that federal courts may hear, and so it falls outside the class of limitations on subject-matter jurisdiction unless Congress says otherwise.”).

124. See, e.g., *Burton v. Stewart*, 549 U.S. 147, 153 (2007) (per curiam) (“[U]nder AEDPA, [petitioner] was required to receive authorization from the Court of Appeals before filing his second challenge. Because he did not do so, the District Court was without jurisdiction to entertain it.”).

125. See 28 U.S.C. § 2101(c) (civil certiorari); SUP. CT. R. 13.1 (criminal certiorari).

126. See, e.g., *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) (civil case); *Johnson v. Florida*, 391 U.S. 596, 598 n.* (1968) (criminal case); see also ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 278–80 (7th ed. 1993) (explaining that the Court has long held the civil certiorari deadline to be jurisdictional but the criminal certiorari deadline to be nonjurisdictional).

The effects of each of these requirements are separate matters. Defects in the mechanics of the appeal—even when those mechanics are jurisdictional—may well be excusable for equitable reasons or subject to waiver or forfeiture.¹²⁷ Precisely what effects attend to each requirement are the product of positive law, as devised by either Congress or the courts.

2. More Controversial Jurisdictional Examples

Original and appellate jurisdiction are uncontroversially characterized as jurisdictional because they historically have been characterized as jurisdictional and exhibit the effects that usually attend to jurisdictional doctrines. Other doctrines are more controversial. This Section addresses personal jurisdiction, venue, forum non conveniens, abstention, exhaustion, federal-state certification, and the Federal Arbitration Act, all of which are jurisdictional.

a. Personal Jurisdiction. Personal jurisdiction, despite its jurisdictional moniker,¹²⁸ imposes limits that can be waived or forfeited by the parties, or even overridden by principles of equitable estoppel,¹²⁹ and courts need not police its limits sua sponte.¹³⁰ As such, scholars have questioned its jurisdictional status.¹³¹

The tension between personal jurisdiction's jurisdictional character and its typically nonjurisdictional effects is alleviated, however, when jurisdiction is untangled from its effects. If personal jurisdiction helps determine forum in a multiform system, then it is jurisdictional, and its waivability, forfeitability, and susceptibility to equitable estoppel are entirely separate matters.

Though the Supreme Court's theory of personal jurisdiction is in some flux, the historical idea of personal jurisdiction contained important intersovereign features designed to manage competing state claims to adjudication. As the infamous case *Pennoyer v. Neff* stated: “[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory,” and “no State can exercise direct jurisdiction and authority over persons or property without its territory.”¹³²

127. See 28 U.S.C. § 2107(c) (allowing extensions or reopening of the deadline for equitable reasons); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (creating the “collateral order” exception to the finality requirement).

128. See *Henderson ex rel Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (calling personal jurisdiction jurisdictional); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (same).

129. See FED. R. CIV. P. 12(h); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 703–05 (1982).

130. See *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 394 (1998).

131. See, e.g., Aaron R. Petty, *Personal Jurisdiction as a Mandatory Rule*, 44 U. MEM. L. REV. 1, 1 (2013) (arguing that “personal jurisdiction is not ‘jurisdiction’ at all”).

132. 95 U.S. 714, 722 (1877); see also *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) (“[A]ny attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.”); cf. Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 1 (2010) (arguing that state sovereignty and interstate federalism justify the doctrine).

Since then, personal jurisdiction has moved away from notions of territorial, sovereign limits and toward notions of fairness and litigant rights,¹³³ though its endgame is currently unclear.¹³⁴ The evolution and uncertainty of the doctrine's justification, however, do not change its basic function, which is to help define when one forum can hear a dispute and when another cannot.

The Court's recent general-jurisdiction cases make personal jurisdiction's status as a doctrine of forum relationships clear. General or "all purpose" jurisdiction exists to "afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."¹³⁵ But the number of such forums is limited because other forums, such as the forum where the cause of action arose, will also be available.¹³⁶ Even on the world stage, personal jurisdiction is about forum relationships, helping define boundaries and reduce friction between the authority of American courts and the authority of international tribunals.¹³⁷ Personal jurisdiction is quintessentially about determining forum in a multiforum system, even when litigant rights inform or even dominate that analysis.

133. *Ins. Corp. of Ir.*, 456 U.S. at 702 ("The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest."); *id.* at 702 (calling personal jurisdiction "a restriction on judicial power . . . as a matter of individual liberty"); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (allowing personal jurisdiction on grounds consistent with "traditional notions of fair play and substantial justice" (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))); *see also* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 *Nw. U. L. REV.* 1112, 1115–20 (1981) (finding the Due Process Clause to be the source for personal jurisdiction). *But see* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (couching personal jurisdiction "as an instrument of interstate federalism"); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (affirming that personal jurisdiction is "a consequence of territorial limitations on the power of the respective States" in addition to "a guarantee of immunity from inconvenient or distant litigation").

134. *Cf.* Bloom, *supra* note 70, at 982 ("No Court before *Penmoyer* had so knotted personal jurisdiction's focus on federalist imperatives with a concern for individual fairness—and no Court has untangled the two since." (footnotes omitted)). *Compare* *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879–80 (2011) (plurality opinion) (characterizing personal jurisdiction as a limit on state sovereignty), *and* *Daimler AG v. Bauman*, 134 S. Ct. 746, 757–58 (2014) (moving general jurisdiction toward the more rigid, *Penmoyer*-type limits, while distancing general jurisdiction from abstract notions of fairness), *with Nicastro*, 564 U.S. at 899–903 (Ginsburg, J., dissenting) (characterizing specific jurisdiction as a doctrine of fairness and reasonableness).

135. *Daimler*, 134 S. Ct. at 760.

136. *See id.* at 757–58 (interrelating specific and general jurisdiction); *see also* Mary Twitchell, *The Myth of General Jurisdiction*, 101 *HARV. L. REV.* 610, 676 (1988) (agreeing that general jurisdiction need not be expansive when specific jurisdiction identifies an appropriate forum). Things get trickier when *no* other forum exists. I address that scenario in Part III.

137. *Daimler*, 134 S. Ct. at 762–63 (discussing the friction with international tribunals that broad general jurisdiction would create). Things would be different if personal jurisdiction were uninformed by the existence of alternate forum. Such a boundary would be indistinguishable from, say, standing requirements, which I show to be nonjurisdictional below.

b. Venue. Venue is no different, which is no surprise given that personal jurisdiction and venue serve overlapping purposes.¹³⁸ Venue prescribes which courts within a given judicial system can or should hear a case.¹³⁹ It disclaims any limit on sovereign authority, but it still sifts forums based on connections that the parties and events have with the available forums.¹⁴⁰ The federal venue statute allocates cases across various federal districts within the federal judicial system¹⁴¹ and thus is the very depiction of a jurisdictional rule.

Even the nature of the phrasing of venue provisions (typically stating that a civil action “may be brought,” “shall not be brought,” or “may only be brought” in a particular district and that, if venue is improper, the district court “shall dismiss”) sounds similar to authorizations typically characterized as jurisdictional.¹⁴² I do not mean to contend that, as a matter of statutory interpretation, Congress meant to make venue jurisdictional as it did for, say, appellate jurisdiction.¹⁴³ I merely suggest that the statutory phrasing indicates that venue is meant to accomplish the same type of forum determination that would meet my definition of jurisdiction.¹⁴⁴

Venue limitations are waivable and forfeitable, and venue can be consentable,¹⁴⁵ but a court may transfer the case to a more convenient forum sua

138. See Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 432 (1981).

139. See Scott Dodson, *Atlantic Marine and the Future of Party Preference*, 66 HASTINGS L.J. 675, 676 (2015).

140. See *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651–52 (1992).

141. See 28 U.S.C. §§ 1391, 1404 (2012).

142. Compare, e.g., *id.* § 1398(a) (stating that a certain civil action “shall be brought only in a judicial district” specified in the statute), and Judiciary Act of 1789, ch. 20, § 11(b), 1 Stat. 73, 79 (“[N]o civil suit shall be brought . . . in any other district than that whereof [the defendant] is an inhabitant, or in which he shall be found at the time of serving the writ . . .”), with, e.g., 28 U.S.C. § 2107(a) (providing that “no appeal shall bring any judgment . . . before a court of appeals for review unless notice of appeal is filed”).

143. Still, a jurisdictional characterization of venue is not inconsistent with the venue provisions. In many specialized venue statutes, Congress actually uses the term “jurisdiction.” See, e.g., Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408(b), 115 Stat. 230, 241 (2001) (providing for the Southern District of New York as the “exclusive jurisdiction” to bring certain claims related to the 9/11 attacks). In the general venue statute, Congress specifically stated that “[n]othing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue,” 28 U.S.C. § 1406(b), suggesting that a district court has jurisdiction in an improper venue if a party forfeits his or her venue objections. That provision confirms the forfeitability of venue objections, but because jurisdictional limits can be waivable, the provision does not make venue nonjurisdictional. If anything, the use of the term “jurisdiction” in the provision is consistent with the jurisdictional character of venue described here.

144. Perhaps this helps explain why many courts have characterized various venue provisions as jurisdictional. See, e.g., *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 108 (1895) (characterizing a local action rule as jurisdictional); George Neff Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 310–23 (1951) (finding rampant conflation of venue and jurisdiction).

145. See 28 U.S.C. § 1404(a) (2012) (allowing venue to be transferred to any forum to which all parties have consented); FED. R. CIV. P. 12(h) (providing that objections to improper venue must be made in the first responsive pleading or are waived); *Olberding v. Ill. Cent. R.R.*, 346 U.S. 338, 340 (1953) (confirming that parties can consent or waive objections to venue).

sponte.¹⁴⁶ Much like personal jurisdiction, these effects matter not to the essential character of venue, which is jurisdictional because it determines forum in a multiforum system. Congress simply has chosen, perhaps because of the link between venue's normative purpose and the parties' interests,¹⁴⁷ to give the jurisdictional doctrine of venue its particular constellation of effects.

c. Forum Non Conveniens. Forum non conveniens is, in large part, venue across systems.¹⁴⁸ In the federal system, it typically is a matter of federal common law and inherent judicial power rather than statute¹⁴⁹ and enables a federal court to dismiss the case so that a more convenient and appropriate foreign forum can hear the case instead.¹⁵⁰ The Court has made clear that forum non conveniens is appropriate only "when an alternative forum has jurisdiction to hear [a] case."¹⁵¹ The Court assumes that forum non conveniens is not jurisdictional, in that its opinions often repeat that the doctrine is one of discretion for a court that already has jurisdiction.¹⁵² But the doctrine itself fits comfortably into the identity of jurisdiction as the determination of forum in a (global) multiforum system.¹⁵³ This fit remains comfortable even if, in a certain case, a forum non conveniens dismissal presents a plaintiff with only impractical or legally burdensome alternative forums—a jurisdictional line may determine forum in a system of unequal forums. In addition, the discretionary character of the doctrine is of no matter to its jurisdictional character. As long as forum non conveniens sorts cases among forums, it is jurisdictional.

146. See 28 U.S.C. § 1404(a).

147. See *id.* (prescribing venue transfer "[f]or the convenience of the parties and witnesses"); *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 580–81 (2013) (characterizing § 1404(a) as a codified, intrasystem forum non conveniens).

148. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) (calling forum non conveniens "[a]t bottom, . . . nothing more or less than a supervening venue provision"). *But see* Simona Grossi, *Forum Non Conveniens as a Jurisdictional Doctrine*, 75 U. PITT. L. REV. 1, 3–4, 9 (2013) (noting significant differences between a forum non conveniens dismissal and a venue transfer and typing forum non conveniens as akin to personal jurisdiction as opposed to venue).

149. See Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 743 (2001).

150. See *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). *But see* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. (forthcoming 2017) (calling for its abolition).

151. *Miller*, 510 U.S. at 447–48 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981)); *see also* *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947); *Williams v. Green Bay & W.R.R.*, 326 U.S. 549, 554–55 (1946) (explaining that a case might land "in one court when in fairness it should be tried in another"); Grossi, *supra* note 148, at 16 (stating that the Court's cases have presumed the "availability of a suitable alternate forum").

152. See, e.g., *Miller*, 510 U.S. at 447–48. Some courts have characterized a forum non conveniens dismissal, somewhat confusingly, as "a deliberate abstention from the exercise of jurisdiction." See *Sinochem Int'l Co.*, 549 U.S. at 430 (parenthetically quoting the phrase from *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998)).

153. *Cf.* Grossi, *supra* note 148 (making the case for forum non conveniens as a species of jurisdiction). In addition, the doctrine is not normally thought of as waivable or consentable, and it can be raised sua sponte by the court. See, e.g., *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 656 n.1 (9th Cir. 1996).

d. Abstention, Exhaustion, and Federal-State Certification. Abstention—a doctrine that allows a federal court to stay or dismiss a case so that a state or administrative forum can hear it first—is much like forum non conveniens in character (if not in justification).¹⁵⁴ A number of species of abstention exist, including the following: Pullman, when an intervening state-court determination on an issue of state law might avoid the need for the federal court to decide an issue of federal constitutional law;¹⁵⁵ Burford, to avoid federal-court interference with an intricate, sensitive, and important state regulatory regime when competent state-court proceedings are available;¹⁵⁶ Younger, prohibiting federal-court interference with state criminal, civil-enforcement, or court-enforcement proceedings;¹⁵⁷ and Colorado River, to avoid duplicating concurrent parallel state litigation.¹⁵⁸ Each represents the permission or compulsion of a court to decline to proceed with its case so that some other forum can adjudicate one or more of the same issues presented.

Exhaustion is abstention's younger sibling. It is a statutory or common-law doctrine that forces a litigant to a different adjudicative tribunal—such as a state court, a state agency, or a federal agency—before the litigant may be eligible for federal court.¹⁵⁹ Whether exhaustion is required depends upon the rigidity of any statutory requirement and the presence of discretionary factors, including the likely delay, the adequacy of the other forum, and the potential futility of relief in the other forum.¹⁶⁰

Federal-state certification can be considered a kind of issue-based abstention. Its availability and specifics depend upon state law,¹⁶¹ but the mechanism generally gives a federal court the discretion to stay its proceedings while asking the highest court of a state to resolve an uncertain issue of state law at

154. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996); see also Bloom, *supra* note 70, at 991 (recognizing that “abstention is much like forum non conveniens”). Their justifications are quite different: forum non conveniens is grounded in party and court convenience, while abstention typically sounds in structural notions of federalism and administrative expertise. These differences may support differences in attendant effects, but they do not support a difference in jurisdictional character.

155. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498, 501 (1941).

156. *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361 (1989); *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943).

157. *Younger v. Harris*, 401 U.S. 37, 53 (1971). For the Court's most recent pronouncement, see *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013) (declining to apply *Younger* “simply because a pending state-court proceeding involves the same subject matter”).

158. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–20 (1976). For criticism, see Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 101–09 (1986).

159. See, e.g., 28 U.S.C. § 2254 (2012) (habeas corpus exhaustion in state court); 42 U.S.C. § 2000e-5(b) (2012) (Title VII exhaustion before the EEOC); *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 230 (1908) (judicially-required exhaustion rule).

160. 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4233, Westlaw (database updated Apr. 2016).

161. Almost all states have enacted certification statutes. See Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN. ST. L. REV. 377, 384–85 (2010) (reporting that all but North Carolina have certification statutes).

issue in the federal proceeding.¹⁶²

Abstention, exhaustion, and federal-state certification have never been seen as jurisdictional doctrines, perhaps because of their strong connections to judicial discretion.¹⁶³ Yet because abstention, exhaustion, and federal-state certification determine when a federal forum is appropriate in light of available alternative state or administrative forums, each is properly typed jurisdictional.

e. The Federal Arbitration Act. The Federal Arbitration Act requires federal courts to, upon party request, stay judicial proceedings and order the parties to arbitrate issues according to a preexisting, enforceable arbitration agreement between the parties.¹⁶⁴ Upon conclusion of the arbitration, a party can seek judicial review or confirmation of the arbitration award.¹⁶⁵ These mechanisms for enforcing arbitration and for allowing judicial review are jurisdictional because they select between the arbitral forum and the court.

* * * * *

These doctrines all share a common feature: they determine forum in a multiform system. They therefore are properly described as jurisdictional.

It is true that the doctrines discussed in this Section further varied goals. Abstention, exhaustion, and federal-state certification typically further systemic goals like federalism, judicial competence, and docket control. Personal jurisdiction and venue feature, at least in part, litigant goals of economy and convenience. Forum non conveniens is a hybrid of public and private factors. The Federal Arbitration Act implements a party-oriented goal and a judicial commitment to the efficacy of arbitration. These justification differences perhaps suggest that the doctrines should have varied effects.

Happily, the decoupling of effects from the jurisdictional label allows each doctrine to correctly be typed jurisdictional while still exhibiting a tailored constellation of effects that best suits it. Perhaps the system-centric abstention or exhaustion doctrines, for example, should be less amenable to party waiver than should the more litigant-centric doctrines of personal jurisdiction and

162. See *Lehman Bros. v. Schein*, 416 U.S. 386, 390–92 (1974). Certification has strong support in the literature. See, e.g., Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1465 (1997).

163. See *Jones v. Bock*, 549 U.S. 199, 202–03 (2007) (holding exhaustion to be nonjurisdictional); *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358–59 (1989) (characterizing abstention as nonjurisdictional); *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986) (stating that *Younger* is not jurisdictional). The nonjurisdictional and discretionary status of abstention, in particular, has led to rich debates about its constitutionality and propriety. For prominent positions, see generally Richard H. Fallon, Jr., *Why Abstention is Not Illegitimate: An Essay on the Distinction Between "Legitimate" and "Illegitimate" Statutory Interpretation and Judicial Lawmaking*, 107 NW. U. L. REV. 847 (2013); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

164. 9 U.S.C. §§ 3–4 (2012).

165. *Id.* §§ 9–12.

venue or the Federal Arbitration Act. Likewise, some doctrines might be subject to equitable exceptions or discretion while others might not.

I do not mean to try to attach the right set of effects to each doctrine here. I leave that to Congress and, when appropriate, the courts. Rather, my point is that factors other than the doctrine's jurisdictional status should dictate the appropriate effects attendant to each doctrine. The result is that these doctrines are all jurisdictional, even if they have different sets of effects.

3. A Nonjurisdictional Example: Standing

I would be remiss not to address a prominent nonjurisdictional doctrine to contrast with the jurisdictional doctrines. The easy questions—statutes of limitations, caps on damages, qualified immunity, service, and the like—need little explanation. But I think it appropriate to address the tougher sell of a doctrine typically considered to be jurisdictional: standing.

Stemming from the Constitution's grant to the courts of adjudicatory authority over "cases" and "controversies,"¹⁶⁶ standing reinforces the need for federal courts to act as courts, both to avoid appearing to be an oversight or advisory board¹⁶⁷ and to guard against deciding a case without reliable adversity between the parties.¹⁶⁸ Standing, then, simply ensures that the court act like a court.¹⁶⁹ And it secures the separation of powers by preventing the judiciary from encroaching into legislative or executive prerogatives.¹⁷⁰

In the context of a dispute, the standing requirements are focused on the parties and their claims. Standing requires that the plaintiff have suffered a real, concrete, and particularized injury that is fairly traceable to the defendant's conduct and that may be judicially redressed.¹⁷¹ Revealingly, these requirements approximate merits questions.¹⁷² They speak only to the court at hand and ask whether the court can offer relief to this particular plaintiff for this

166. U.S. CONST. art III, § 2, cl. 1; *see also* *Allen v. Wright*, 468 U.S. 737, 750 (1984).

167. *See Allen*, 468 U.S. at 759–60 (fearing having "the federal courts as virtually continuing monitors of the wisdom and soundness of Executive Action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury" (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972))); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 411 (1792) (declining to provide an advisory opinion to Congress because it is "not of a judicial nature").

168. *See Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (stating that the injury component of standing is a "rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome").

169. *See Allen*, 468 U.S. at 750 (stating that standing respects "the proper—and properly limited—role of the courts" (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975))).

170. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (stating that transgressing standing would "distort the role of the Judiciary in its relationship to the Executive and the Legislature").

171. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

172. *See William A. Fletcher, The Structure of Standing*, 98 YALE L.J. 221, 238 (1988) (providing two examples where the courts were able to decide standing issues by resolving whether, on the merits, legal protections were available).

particular claim. Much like limitations periods and damages caps, the standing factors simply impose limitations on the particular court's ability to grant relief. They do not define boundaries between adjudicative forums or help allocate the case among forums.¹⁷³

Counterarguments that standing is about allocating disputes¹⁷⁴ are supported by language from some Supreme Court cases¹⁷⁵ and have some force in the public-interest/generalized-grievance context, in which legislative relief is possible.¹⁷⁶ But legislative relief is not adjudicative relief, and it cannot be said that the possibility that Congress might repeal a law, or that an agency might regulate differently, makes the political process an alternative forum to a lawsuit asking a court to declare a law unconstitutional or an agency action unlawful. The issues are not the same. Congress and the Executive consider policies and political expediencies, not (usually) unconstitutionality or legality. By contrast, it is the duty of the courts to adjudicate questions of constitutionality and legality and to avoid questions of policy and politics.¹⁷⁷ Congress and the courts are not different forums for the same dispute; rather, they are different branches resolving different kinds of disputes.¹⁷⁸ Were jurisdiction so broad, it would apply equally to issues of statutory coverage, statutes of limitations, and the like, because those all restrict court relief but leave open the possibility of statutory reform by Congress. Jurisdiction is not so expansive. Accordingly, standing is a limit on the authority of a federal court *as a court*. It is about inter-branch friction and the proper role of the federal courts, but it is not about jurisdiction.¹⁷⁹

The Court has characterized Article III standing as jurisdictional under the traditional power-based and effects-tied understanding of the term.¹⁸⁰ But char-

173. Many standing cases recognize the possibility that standing limits may deprive a case of any forum. *See, e.g.*, *United States v. Richardson*, 418 U.S. 166, 179 (1974) (“It can be argued that if respondent is not permitted to litigate this issue, no one can do so.”). For critiques of this outcome, see Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 297–306 (1988); Scott Michelman, *Who Can Sue Over Government Surveillance?*, 57 UCLA L. REV. 71 (2009).

174. *See* Lees, *supra* note 56, at 1482 (“[T]he entire concept [of separation of powers] revolves around deciding what legal issues are appropriate for which branch of government to decide.”).

175. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (“‘[A]bstract questions of wide public significance’ which amount to ‘generalized grievances,’ pervasively shared . . . [are] most appropriately addressed in the representative branches.” (quoting *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975))).

176. *See, e.g.*, *Lujan*, 504 U.S. at 576 (“Vindicating the public interest . . . is the function of Congress and the Chief Executive.”). *See generally* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

177. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

178. A doctrine that does determine whether a dispute should be heard by Congress or the courts would be jurisdictional. Some features of the political-question doctrine are possibilities. *See infra* text accompanying notes 210–23.

179. *But see* Lees, *supra* note 56, at 1481–82 (typing standing as jurisdictional because it structurally separates the courts from the political branches).

180. *See* *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998); *United States v. Hays*, 515 U.S. 737, 742 (1995). Standing defects can be raised at any time, and the courts have a *sua sponte*

acterizing standing as jurisdictional causes tensions with sister doctrines derived from Article III, including “prudential” standing (which some deem a nonjurisdictional creation of the courts),¹⁸¹ ripeness (which can, at times, be waived by the parties),¹⁸² and mootness (which contains judicially created exceptions).¹⁸³

These tensions have created divisions within the Court and among commentators about the jurisdictional status of standing and its related doctrines. The Court has, for example, attempted to distinguish mootness from standing largely on the grounds that, if there is an exception to mootness, then it cannot be jurisdictional as standing is.¹⁸⁴ Commentators are split, with some contending that mootness is entirely prudential¹⁸⁵ and others arguing that the jurisdictional stature depends upon the particular mooted event.¹⁸⁶

A jurisdictional identity that focuses on forum determination disconnected from effects resolves these tensions. All of these standing doctrines do the same thing: limit the authority and role of the court without regard to any other forum’s availability to hear the dispute.¹⁸⁷ They are all, therefore, nonjurisdictional. But they need not all have the same set of effects. Therefore, Article III standing can have all the typical jurisdictional effects (despite being nonjurisdictional), mootness can admit judicial exceptions, and ripeness can be waivable. Viewed through the refocused lens of jurisdiction, existing standing doctrine is more coherent than it otherwise would seem.

4. Sovereign Immunity and Political Questions

Two important doctrines remain: sovereign immunity and the political-question doctrine. These doctrines cannot be fairly characterized at present. The

obligation to ensure standing requirements are met. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000).

181. *See, e.g., Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 184–85 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (noting a circuit split); *cf. Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88 (2014) (recharacterizing some components of prudential standing as merits questions).

182. *See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 670 n.2 (2010). Ripeness can, however, be raised by the court sua sponte. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993).

183. *See, e.g., Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (reaffirming the “capable of repetition but evading review” exception); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 288 (2000) (reaffirming the “voluntary cessation” exception).

184. *See Friends of the Earth, Inc.*, 528 U.S. at 190 (“[I]f mootness were simply ‘standing set in a time frame,’ the exception to mootness that arises when the defendant’s allegedly unlawful activity is ‘capable of repetition, yet evading review,’ could not exist.”); *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) (contending that, because it has its exceptions, mootness must be prudential rather than jurisdictional or constitutional).

185. *See, e.g., Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 609 (1992).

186. *See Matthew I. Hall, The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 565 (2009).

187. *See, e.g., Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (finding that ripeness derives from Article III); *Warth v. Seldin*, 422 U.S. 490, 498–500 (1975) (aligning Article III and prudential standing); *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam) (stating that mootness derives from Article III).

reason is that each doctrine acts jurisdictional at times and nonjurisdictional at other times.

a. Sovereign Immunity. Sovereign immunity is based on the longstanding principle that sovereigns cannot be sued without their consent.¹⁸⁸ The principle, as applied to the states, has been constitutionalized by the Eleventh Amendment, which states that “[t]he Judicial power of the United States shall not be construed to extend” to certain suits against states.¹⁸⁹ The Court has been unclear whether the doctrine is jurisdictional,¹⁹⁰ especially in light of the well-settled feature of waivability,¹⁹¹ the judicially created exception of *Ex parte Young*,¹⁹² and the option, but not obligation, of a court to raise immunity *sua sponte*.¹⁹³

Some historical roots of sovereign immunity seem to make it nonjurisdictional. If the sovereign can do no wrong because everything the sovereign does

188. See, e.g., THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.”); William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. (forthcoming 2017) (“Sovereign immunity is a government’s right not to be haled into court without its consent.”). For some of the many important contributions to the sovereign-immunity literature, see, for example, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989).

189. U.S. CONST. amend. XI.

190. Compare *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 398 (2015) (“OBB has [foreign] sovereign immunity under the Act, and accordingly the courts of the United States lack jurisdiction over the suit.”), *Edelman v. Jordan*, 415 U.S. 651, 677–78 (1974) (stating that state sovereign immunity “sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court”), *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 513–15 (1940) (finding that, absent consent, “attempted exercise of judicial power [over a sovereign] is void”), and *Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) (stating that state sovereign immunity is a restriction on jurisdiction), with *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 391–92 (1998) (stating that whether Eleventh Amendment immunity is a matter of subject-matter jurisdiction is “a question we have not decided”), and *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) (calling the Eleventh Amendment an “immunity from suit, rather than a nonwaivable limit on the Federal Judiciary’s subject-matter jurisdiction”).

191. *Lapides v. Bd. of Regents of Univ. Sys. Of Ga.*, 535 U.S. 613, 624 (2002) (implied waiver); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Spending Clause waiver); *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883) (consent). For a comprehensive treatment, see generally Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167 (2003).

192. 209 U.S. 123, 161–62 (1908); see also *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 260 (2011) (calling *Ex parte Young* an “exception” to state sovereign immunity).

193. See *Schacht*, 524 U.S. at 394 (Kennedy, J., concurring) (stating that “courts need not raise the issue *sua sponte*”).

is by definition lawful,¹⁹⁴ or because a sovereign's subject who acts unlawfully no longer represents the sovereign,¹⁹⁵ then suits against the sovereign should be dismissed on merits grounds. The issue is not one of court jurisdiction but one of lawful conduct.

The modern justification of the doctrine of sovereign immunity, at least in the context of state sovereign immunity, is to protect a state from the indignity of compelled appearance in certain suits and under certain conditions, irrespective of forum.¹⁹⁶ This justification makes state sovereign immunity akin to official immunity or even a statutory-coverage issue that makes the plaintiff unable to sue this particular defendant. Under either the historical conceptualization or the modern justification, immunity is nonjurisdictional because it is about the parties and the claim rather than the forum.¹⁹⁷

If, however, sovereign immunity is about forum selection, then a jurisdictional characterization is appropriate. Justice Brennan famously adopted the position that the Eleventh Amendment was meant to restrict the grant of diversity jurisdiction in Article III.¹⁹⁸ If that is the case, then sovereign immunity restricts the jurisdiction of federal courts alone, leaving state courts open to hear the suit. Such a conceptualization turns sovereign immunity into a limit much like the forum-defendant rule of removal¹⁹⁹ or even personal jurisdiction.²⁰⁰

The Court's development of state sovereign immunity has rejected the sovereign-can-do-no-wrong theory and Justice Brennan's diversity-restricting theory but has embraced the immunity-conferring theory²⁰¹ such that state sovereign immunity applies regardless of forum. But there is one forum in which the Court has held immunity not to apply: that of sister state courts.²⁰² It would be an odd result that state sovereign immunity determines forum by selecting sister

194. See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.").

195. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 (1984).

196. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760, 769 (2002) (applying state sovereign immunity to an administrative proceeding); *Alden v. Maine*, 527 U.S. 706, 748–49, 754 (1999) (applying the Eleventh Amendment's principle of state sovereign immunity in state court).

197. Diversity jurisdiction and federal-question jurisdiction are also about the parties and the claim, respectively. Cases barred by sovereign immunity, however, cannot be brought in any forum, whereas cases that fail diversity or federal-question jurisdiction can still be brought in state court. Diversity and federal-question jurisdiction, then, use the identity of the parties and the claim to determine forum, whereas sovereign immunity uses them to end the lawsuit regardless of forum.

198. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 260–61 (1985) (Brennan, J., dissenting).

199. See 28 U.S.C. § 1441(b) (2012) (barring an in-state defendant from removing a case based on diversity jurisdiction).

200. For the argument that components of state sovereign immunity are doctrines of personal jurisdiction, see Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1574–75 (2002).

201. See *supra* note 196; *Clinton v. Jones*, 520 U.S. 681, 697 n.24 (1997) ("Although we have adopted the related doctrine of sovereign immunity, the common law fiction that [the sovereign can do no wrong] was rejected at the birth of the Republic."); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55–57 (1996).

202. *Nevada v. Hall*, 440 U.S. 410, 428–29 (1979) (Blackmun, J. dissenting).

state courts as the sole forum among other plausible forums for a particular lawsuit. But as long as *Nevada v. Hall* remains viable, state sovereign immunity could be thought of as a jurisdictional doctrine that isolates sister state courts as the proper forum among other state courts and federal adjudicative bodies. *Hall* faces a dubious future, however, and if the Court overrules it, then the Court will solidify state sovereign immunity's status as a nonjurisdictional doctrine that applies regardless of forum.²⁰³

Federal sovereign immunity, because of the Supremacy Clause, applies equally in both state and federal courts and thus is generally a nonjurisdictional immunity doctrine because it limits the viability of a claim rather than determines the forum.²⁰⁴ Thus, for example, the Court in *Scarborough v. Principi* was correct to characterize as nonjurisdictional a requirement of a petition for attorney's fees in a successful suit against the United States.²⁰⁵

But some federal sovereign-immunity waivers can operate to determine forum among federal courts, much like venue rules do. Congress has waived sovereign immunity by authorizing certain suits against the United States in, for example, the FTCA.²⁰⁶ Although the substantive waiver of immunity is not a jurisdictional event, the allocation of cases authorized to various forums is jurisdictional. Thus, the exhaustion requirement of the FTCA is jurisdictional because it forces a dispute to a particular forum in a multiform system.²⁰⁷ So too is the amount-in-controversy limit for exclusive jurisdiction in the Court of Federal Claims (as opposed to concurrent jurisdiction with the federal district courts).²⁰⁸

State sovereign immunity and federal sovereign immunity thus are ambivalent doctrines. State sovereign immunity appears to be in the midst of its own identity crisis that continues to defy resolution.²⁰⁹ Federal sovereign immunity, meanwhile, is basically a nonjurisdictional doctrine whose mechanics can be jurisdictional in a venue-like selection of forum. At this time, however, neither doctrine is capable of firm and holistic characterization.

b. Political-Question Doctrine. The political-question doctrine requires a federal court that otherwise has jurisdiction to dismiss the case based on a number

203. See *Cal. Franchise Tax Bd. v. Hyatt*, 135 S. Ct. 2940 (2015) (mem.) (granting certiorari on the question of whether *Hall* should be overruled); see also Baude, *supra* note 188 (“[A]t oral argument the Justices seemed prepared to overrule *Hall*.”). For a critique of *Hall*, see generally Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 SUP. CT. REV. 249.

204. This characterization of federal sovereign immunity is contrary to some precedent. See *supra* note 190. For a history of federal sovereign immunity, see Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 443–56 (2005).

205. See 541 U.S. 401, 413–15 (2004).

206. See 28 U.S.C. § 1346 (2012).

207. See *id.* § 2675.

208. *Id.* § 1346.

209. See *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277, 1280–81 (2016) (dividing 4–4 on whether *Hall* should be overruled).

of factors.²¹⁰ The Court has repeatedly typed the doctrine as nonjurisdictional,²¹¹ but the doctrine is actually a jurisdictional hybrid because it vacillates between two core strands: an abstention strand that allocates dispute authority between the courts and coordinate branches and a kind of standing strand that sequesters the courts within their judicial functions. Which strand takes priority depends upon the case.²¹²

In *Nixon v. United States*, for example, the Court confronted an impeached federal judge's challenge to a Senate rule that allowed a Senate committee to hear evidence against an impeached official.²¹³ The judge argued that the delegation of the evidentiary process to a committee violated the Constitution's commitment of the "sole Power to try all Impeachments"²¹⁴ to the Senate as a whole.²¹⁵

The Court held the matter to be a nonjusticiable political question for three main reasons. First, the Constitution appeared to commit the question of how to "try" an impeachment to the Senate (and, by implication, to deny the question to the courts).²¹⁶ This political-question factor—a textual commitment to a coordinate branch—seems to describe constitutional divisions of adjudicative authority that could properly be called jurisdictional.²¹⁷

But the Court also found nonjusticiability on the grounds that the meaning of the word "try" in the impeachment setting "lacks sufficient precision to afford any judicially manageable standard of review,"²¹⁸ that the Senate's impeachment proceedings demanded a compelling need for finality, and that fashioning judicial relief was too difficult.²¹⁹ These political-question factors—the lack of judicially manageable standards, the overriding need for finality to a coordinate branch's action, and the difficulty of affording judicial relief—do not describe a

210. Although the doctrine is much older, see *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), for the classic treatment of the doctrine, see *Baker v. Carr*, 369 U.S. 186 (1962).

211. See *Baker*, 369 U.S. at 198–99.

212. The doctrine's duality has spawned great debates about the nature of the doctrine and its legitimacy. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 125–26 (1962) (favoring the judicial-functions factors); HERBERT WECHSLER, *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 11–14 (1961) (favoring the textual-commitment factor); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 *Nw. U. L. REV.* 1031, 1058–59 (1984) (concluding that neither is legitimate); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 *DUKE L.J.* 1457, 1523 (2005) (suggesting alternate criteria); see also RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 142–43 (2001) (arguing for a reverse-Bickelian view that prudential considerations in momentous political cases justify judicial intervention).

213. 506 U.S. 224, 228 (1993).

214. U.S. CONST. art. I, § 3, cl. 6.

215. *Nixon*, 506 U.S. at 228.

216. *Id.* at 229–36.

217. See *Zivotofsky ex rel Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring in part and concurring in the judgment) (stating that, when the textual-commitment factor is implicated, "abstention is warranted because the court lacks authority to resolve that issue").

218. *Nixon*, 506 U.S. at 230. For exposition of this factor, see generally Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 *HARV. L. REV.* 1275 (2006).

219. *Nixon*, 506 U.S. at 236.

division of adjudicative authority but instead, like standing elements, attempt to keep the courts within their core competence of exercising a judicial function.²²⁰ They are nonjurisdictional.

These two sets of justifications for the political-question doctrine—one that sounds in jurisdiction and one that does not—mean that jurisdiction’s identity cannot conclusively resolve the political-question doctrine’s jurisdictional characterization. Perhaps the doctrine’s ambivalence counsels in favor of parsing the doctrine more carefully in a given case. If, in a certain case, the application of the political-question doctrine depends upon the “textual commitment” factor, then it is jurisdictional.²²¹ If, instead, the applicability of the doctrine hinges on the “judicial functions” factors, it is nonjurisdictional.²²²

I suppose there could be a case in which both sets of factors are necessary for the doctrine to apply, in which case the different justifications would become too blurred to resolve the jurisdiction-characterization question even in the context of a specific case. Perhaps such a case would involve a true “quasi-jurisdictional” hybrid. But the Court’s recent narrowing of the political-question doctrine²²³ suggests that, should such cases exist, they would be rare indeed. In any event, as I explain more fully in Section II.D below, the parties, at least, could take comfort that the effects of the doctrine, which are far more important in an individual case, should be unaffected by the inability to classify the political-question doctrine as jurisdictional or nonjurisdictional.

C. REVISITING JURISDICTIONALITY PRECEDENT

The realignment of jurisdictional doctrines resuscitates some lines of precedent and requires reconsideration of others.

One surprising resuscitation is of the now-discredited phrase “mandatory and jurisdictional,” so often reiterated in the time of *United States v. Robinson* in appellate-requirement cases.²²⁴ Recent cases have derided *Robinson*’s and its progeny’s uses of the term as “drive-by” jurisdictional rulings because the “jurisdictional” characterizations are unnecessary.²²⁵ Commentary has also shown that, under a conception of jurisdiction as tied to a fixed set of effects, the term “mandatory” is redundant because a jurisdictional characterization necessarily

220. See *Zivotofsky*, 132 S. Ct. at 1432–33 (Sotomayor, J., concurring in part and concurring in the judgment).

221. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 519–22 (1969) (holding that a challenge to congressional action as unconstitutional under the Qualifications Clause was justiciable because the Constitution did not commit the question to Congress).

222. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (holding political-affiliation gerrymandering to be a political question because of the lack of judicially manageable standards).

223. See *Zivotofsky*, 132 S. Ct. at 1427 (calling the political-question doctrine “a narrow exception” to the duty to adjudicate).

224. See 361 U.S. 220 (1960); *supra* notes 17–20 and accompanying text.

225. See *Eberhart v. United States*, 546 U.S. 12, 16 (2005) (per curiam); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90–91 (1998).

implies a mandatory characterization.²²⁶ In either event, both terms are not needed.

But my proposal gives independent meaning to both terms. “Jurisdictional” is descriptively accurate because the appellate requirements define whether a case is in district court or appellate court. Meanwhile, “mandatory” speaks to the particular effect of the limit at issue in the cases.²²⁷ A statement of the mandatory effect is independently necessary because the descriptive term “jurisdictional” does not inexorably have mandatory effect on the parties and the court. Thus, the phrase “mandatory and jurisdictional” addresses both the narrow effect of the appellate requirement in a way that resolves the case (“mandatory”) and the significance of the appellate requirement to the structural relationship between the district and appellate courts (“jurisdictional”).

In reality, *Robinson* and its progeny did perpetuate profligate and unthinking use of the jurisdictional label, and those cases can be maligned for that reason. But there is no need to now discredit them and thereby perpetuate the secondary error of jurisdiction’s identity crisis. Instead, those cases can be reformed to support a more coherent jurisdictional theory. Viewed through the lens of jurisdiction’s descriptive identity decoupled from its effects, the cases’ use of both “mandatory” and “jurisdictional” is accurate and appropriate.

At the same time, the Court’s newer jurisdictionality precedents—the cases discussed above in Part I that have developed a jurisdiction-characterization doctrine²²⁸—warrant reconsideration because the line of cases they form is beholden to an identity of jurisdiction that cannot withstand scrutiny. These cases are wrong to look to Congress to determine if a limit is jurisdictional, wrong to distinguish between claims-processing and jurisdictional-power rules, and wrong to tie a set of effects to the jurisdictional label.

Some of the decisions, nevertheless, reach the correct result. *Kontrick*, *Eberhart*, *Scarborough*, *Arbaugh*, and *Reed Elsevier*, for example, are all correct in their nonjurisdictional characterizations because the laws at issue in those cases did not attempt to draw boundary lines between institutions but rather imposed limitations on the court’s authorization to grant relief.²²⁹

226. See *Dane*, *supra* note 18, at 37 (“Jurisdictional requirements are—as must already be apparent—mandatory.”); *id.* at 57 (concluding that in phrases such as “mandatory and jurisdictional,” jurisdiction “enters as a label, but is not itself the object of analysis”); *Hall*, *supra* note 18, at 409 (suggesting that the term “jurisdictional” merely emphasizes the rigidity of the “mandatory” label).

227. See *Dodson*, *supra* note 111, at 646–48.

228. See *supra* notes 24–41 and accompanying text.

229. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010) (holding nonjurisdictional the Copyright Act’s registration precondition to filing a claim); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513–14 (2006) (holding the employee-numerosity requirement of Title VII to be nonjurisdictional); *Eberhart*, 546 U.S. at 13 (characterizing as nonjurisdictional the deadline in Federal Rule of Criminal Procedure 33 for filing a motion for a new trial in a criminal case); *Kontrick v. Ryan*, 540 U.S. 443, 452–54 (2004) (holding nonjurisdictional the deadline in Bankruptcy Rule 4004 for filing objections to a debtor’s discharge); *Scarborough v. Principi*, 541 U.S. 401, 413–14 (2004) (holding nonjurisdictional a requirement for eligibility for attorney’s fees against the federal government). Two other correctly decided cases are *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 253–54 (2010) (holding

Others, however, reach the wrong result. *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen*, for example, is incorrect in holding that the settlement-conference precondition to labor-dispute arbitration is nonjurisdictional.²³⁰ Instead, the requirement is jurisdictional because it defines when the dispute must be negotiated in a settlement conference and when it may go to arbitration. Similarly, *Henderson v. Shinseki*, which held nonjurisdictional the deadline to appeal the denial of veterans' benefits to the U.S. Court of Appeals for Veterans Claims,²³¹ was incorrect because the deadline marks the transition of the case from the Veterans' Board to the Veterans' Court.

Still others correctly label the law but fail to appreciate the disconnect between the law's label and its effects. *Bowles v. Russell*, for example, is correct in its jurisdictional characterization of the deadline to file a civil notice of appeal but not in its reasoning that the jurisdictional status necessarily precludes equitable exceptions.²³² Whether the appellate deadline allows equitable exceptions is a question of positive law—a routine question of statutory interpretation—not a product of its jurisdictional character, as *Bowles* suggested.²³³

Still others are correct in both characterization and effect but offer unwise dictum. In *Day v. McDonough*, for example, the Court correctly concluded that the habeas limitations defense is not jurisdictional and reasonably concluded that, nevertheless, a district court could raise the defense sua sponte.²³⁴ But the Court also stated that *because* the defense was nonjurisdictional, courts had no *obligation* to raise the defense sua sponte.²³⁵ *Day*'s dictum thus perpetuates the erroneous stereotype that nonjurisdictional rules lack certain effects, whereas jurisdictional rules have them.

D. LITIGATION PRACTICE

Jurisdictional lines are important for systemic reasons of identifying where the boundaries between forums are and how the various forums relate to each other in the context of a particular case. The parties and the courts need to know, for example, when a case is in the district court and when it has moved into the appellate court. But the legal characterization of that boundary as jurisdictional often will not matter to the individual parties in any given litigation. That is because the parties are likely to be far more concerned about

nonjurisdictional a statute's limits in extraterritorial application), and *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding nonjurisdictional the deadline to file a Title VII charge with the EEOC). The EEOC's right-to-sue letter, however, is a jurisdictional requirement because it signals the movement of the case from the authority of the EEOC to the authority of the district court. See 42 U.S.C. §§ 2000e-5(f)(1)–(3) (2012).

230. See 556 U.S. 67, 83 (2009).

231. 562 U.S. 428, 441 (2011).

232. See 551 U.S. 205, 212–14 (2007).

233. See *id.* at 214.

234. 547 U.S. 198, 205 (2006).

235. *Id.*

the particular instrumental effects of a limit, such as whether and when noncompliance with the limit can be raised, and whether exceptions can be argued. Were those effects tied to the jurisdictional character of the limit, then the characterization question would be important. But because those effects are disconnected from the jurisdictional character of the limit, the more important issues for the parties will usually center just on the effects.

The identity for jurisdiction I offer here presents a practical approach for litigation. Litigation over a judicial limit should focus far less on its jurisdictional character and far more closely on the limit's effects. Currently, the litigation approach is the opposite: the Court routinely focuses primarily on the jurisdictional character and only secondarily—and sometimes not at all—on the effects.²³⁶ Inverting that approach so that the focus is on the limit's effects allows for more careful attention to more relevant questions of constitutional interpretation, statutory interpretation, or underlying policies, depending upon the positive-law source of the limit.

Take *Bowles v. Russell*, for example. The entire issue in the case was whether the deadline to file a notice of appeal was susceptible to an equitable exception based on the unique circumstance of a district court order purporting to extend the deadline for the appellant.²³⁷ The Court's approach was to inquire whether the deadline was jurisdictional, an approach that the Court used as a conditional proxy for the question presented.²³⁸ The Court should have taken the more direct effects-based approach of inquiring whether such an equitable exception could apply.

It is not enough, then, for a court simply to declare a limit to be imposed by Article III and thereby conclude that the rote effects of jurisdiction necessarily follow. Nor may a court declare a rule nonjurisdictional and thereby conclude that the parties have control over the rule's application. Instead, the parties and court must focus on the specific effect at issue, thereby reserving their time and effort to adjudicate broader questions of jurisdictionality and avoiding unnecessary adjudications of other effects not presented by the case at hand.

III. COUNTERARGUMENTS

This Part anticipates and considers some counterarguments to my rehabilitation of jurisdiction's identity.

236. See, e.g., *Henderson*, 562 U.S. at 442 n.4 (refusing, after holding the deadline at issue to be nonjurisdictional, to decide the actual issue in the case: whether the deadline was subject to equitable tolling).

237. *Bowles*, 551 U.S. at 207–08.

238. *Id.* at 213–14. The Court held formalistically that, because the deadline was jurisdictional, no equitable exceptions could apply. *Id.* at 214. That is, of course, logically fallacious under my rehabilitated identity of jurisdiction, which lacks such a defined set of effects. But even under the conventional understanding of jurisdiction, had the Court instead found the deadline to be nonjurisdictional, it might still have had to reach the effects question anyway. See, e.g., *Stern v. Marshall*, 564 U.S. 462, 480–82, 503 (2011) (holding first that a limit was nonjurisdictional and then resolving whether it was waivable).

A. SIMPLICITY

One objection might be that a jurisdictional identity decoupled from effects causes too much disruption in doctrine and complication in litigation. If the jurisdiction label leads to a defined set of effects, then a jurisdictional characterization becomes the primary inquiry and, having resolved the inquiry in favor of jurisdiction, obviates the need to consider the myriad effects a particular limit might exhibit. Staying the current course might be far simpler.

But nothing about jurisdiction—including the current approach—is simple.²³⁹ As shown above, jurisdiction is showing signs of becoming unstable, and it is unclear in light of *United States v. Wong* how the Court will maintain consistency going forward.²⁴⁰ The Court has no solution if Congress tries to mark as jurisdictional a rule that is squarely a claim-processing rule. Nor does the Court's approach accommodate a jurisdictional statute that attempts to impose fewer than all the expected effects of the jurisdictional label. Sometimes, Congress uses the jurisdictional label in a "drive-by" fashion,²⁴¹ and sometimes Congress means to make something jurisdictional but fails to use the magic word.²⁴² Indeed, that the Court has seen fit to take at least one jurisdictional-characterization case per year for the last decade suggests that, at the least, the lower courts are struggling.²⁴³ It is a mistake to conclude that the current approach is simple.²⁴⁴

Current jurisdictional doctrine also exacerbates the doctrinal tensions I exposed above. Current doctrine cannot explain how personal jurisdiction and federal sovereign immunity can be both jurisdictional and waivable.²⁴⁵ It cannot explain the judicial exceptions to mootness.²⁴⁶ It has inconsistently characterized state sovereign immunity.²⁴⁷ These rifts demonstrate that the current approach to jurisdiction has its own deep complexities.

At the same time, it is hard to see why my proposal is any more complicated or disruptive. In many cases, the court and the parties can bypass the jurisdictional-characterization question altogether and instead focus entirely on the particular effect at issue. If a rule is nonjurisdictional, then my approach is even simpler than the Court's because my approach has only one inquiry (the effect), whereas the Court's must pass through the (perhaps complicated) jurisdictional-

239. See Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 3 (2011) ("[T]he reality is that jurisdictional clarity is largely a chimera, done in by its own inherent complexities.").

240. See 135 S. Ct. 1625 (2015); see also *supra* Section I.B.4.

241. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998).

242. See, e.g., *Bowles*, 551 U.S. at 209–11.

243. See *supra* notes 24–41 and accompanying text.

244. For focused discussion of the complexities that the Court's jurisdictional-characterization doctrine produces, see Dodson, *supra* note 239, at 37–38.

245. For an attempt, see Dodson, *supra* note 9, at 1457–58.

246. See, e.g., Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 490 (1996) (calling mootness "incomprehensible").

247. See *supra* note 190 and accompanying text.

characterization question just to reach the effects question.²⁴⁸

It is true that holding a rule to be jurisdictional under current doctrine does obviate the need to consider effects.²⁴⁹ But the effects inquiry ought not be unduly complicated. Discerning the effects of a statutory or rule-based limit is a routine matter of statutory interpretation,²⁵⁰ perhaps no less complicated than the parsing of “text, context, and historical treatment” necessary to find a rule to be jurisdictional.²⁵¹ One need only compare the Court’s struggle with the current approach in *United States v. Wong*²⁵² to the relative ease the Court had with its effects-only approach in its unanimous *Menominee Indian Tribe of Wisconsin v. United States*²⁵³ decision to determine which is the simpler inquiry.

It also is true that my proposal would drastically reorient doctrine and call many cases into question. But the real question in most cases hinges on effects. Changing the character of venue, for example, from nonjurisdictional to jurisdictional does not change the effects that already attach to venue. Thus, although jurisdiction’s new identity would move away from language in cases calling venue nonjurisdictional, it would not change the real-world litigation effects that venue currently exhibits. At the same time, the doctrinal reorientation would drastically improve simplicity, clarity, coherence, and consistency going forward.

Finally, my proposal is by far the more accurate. Perhaps in some circumstances it is “more important that the applicable rule of law be settled than that it be settled right.”²⁵⁴ But not here. Indeed, the Court itself conceded the necessity of disrupting precedent to pursue accuracy when it began distancing itself from *United States v. Robinson*²⁵⁵ and the thousands of decisions that used the jurisdictional label in a “drive-by jurisdictional” ruling.²⁵⁶ The Court is right. Accuracy is important in the jurisdictional field, even at the expense of some clarity and simplicity.²⁵⁷ And my rehabilitation of jurisdiction offers the best way forward.

248. Compare *United States v. Wong*, 135 S. Ct. 1625, 1638 (2015) (resolving a complicated jurisdictional-characterization issue in favor of nonjurisdictionality), with *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 31 (1989) (holding a statutory limit to be mandatory without reaching the jurisdictional question).

249. See *Bowles v. Russell*, 551 U.S. 205, 213–14 (2007).

250. See, e.g., *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016) (using federal common law to determine if equitable tolling applies); *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 829 (2013) (Sotomayor, J., concurring) (“The Court quite properly observes that the question whether equitable tolling is available turns on congressional intent.”).

251. The Court’s clear-statement presumption against jurisdiction, see *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515–16 (2006), is hardly simplifying, but, even were it simplifying, nothing prevents the Court from developing exactly the same presumptions for effects, see, e.g., *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95–96 (1990) (developing a presumption of equitable tolling).

252. 135 S. Ct. at 1632–38; *id.* at 1640–43 (Alito, J., dissenting).

253. 136 S. Ct. 750.

254. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

255. 361 U.S. 220 (1960).

256. See *supra* note 18.

257. See *Dodson*, *supra* note 239.

B. POSITIVIST JURISDICTION

A second objection might concede that my proposal for jurisdiction is all fine and well but note that it runs up against the numerous references to “jurisdiction” in the Constitution, statutes, and elsewhere. If those references are inconsistent with the identity of jurisdiction proposed here, they could make practical rehabilitation of jurisdiction insurmountably difficult. In other words, the vestiges of a positivist identity of jurisdiction lingering in both the Constitution and in statutes could stymie my attempt to move away from that identity.

As for statutes, there are likely to be few uses of the term inconsistent with jurisdiction’s identity. Congress rarely uses the term jurisdiction, but, when it does, Congress seems to use it in a way that is consistent with my proposal. For uses with questionable consistency, charitable interpretations are usually possible.²⁵⁸ For the few remaining instances of true conflict, courts can disregard the term on the ground that Congress itself used the term in the same unthinking, “drive-by” way that the Court has used it in the past²⁵⁹ and invite amendment to restore consistency with jurisdiction’s identity. And because the net effect of disregarding Congress’s use of the term is merely to recharacterize the statute descriptively rather than alter any of its effects, the litigation implications should be minimal.

The Constitution presents a more difficult situation because amendment is an unrealistic solution. Fortunately, no constitutional reference creates an inconsistency. Article III’s reference to the “judicial Power” need not mean “jurisdiction.”²⁶⁰ The Constitution does distinguish between “original Jurisdiction” and “appellate Jurisdiction,”²⁶¹ but this usage is consistent with the idea of jurisdiction as determining forum in a multiforum system. Article III, then, is consistent with jurisdiction’s descriptive identity.

The word jurisdiction also appears in Article IV, which states:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.²⁶²

This use of the term jurisdiction is also consistent because, much like personal jurisdiction, it determines forum for the dispute among the multiforum system of state authorities.

258. The removal statute presents this opportunity. *See supra* note 115 and accompanying text.

259. The Court has used this tactic even under its current approach. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90–91 (1998). For commentary, see Wasserman, *supra* note 3, at 960–61.

260. U.S. CONST. art. III. For a contrary view, see Clark, *supra* note 188, at 1833 (stating that a limit on “the Judicial power” . . . limits all forms of jurisdiction recognized by Article III”).

261. *Id.* art. III, § 2.

262. *Id.* art. IV, § 2.

The only other mention of the term jurisdiction in the Constitution is the most peculiar. Article IV goes on to state:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.²⁶³

This use of the term reflects the more colloquial meaning of sovereign territory rather than the legal meaning pertaining to forum adjudication that I have focused on. The quite distinct circumstances of this provision ought to lessen any confusion caused by the dual usage. In addition, I note that even this provision uses the term as a relational term, speaking not just to one state but rather anticipating and accommodating the equality that should attend all states of the Union. For all these reasons, the Constitution's use of the term does not undermine the theory I advance here.

CONCLUSION

The time has come, once again, to focus on jurisdiction. I offer a conceptualization of jurisdiction that is descriptive and functional, that determines forum in a multiforum system by drawing boundaries between and around different forums, and that is decoupled from any unique or immutable set of effects. This conceptualization leads to a more coherent categorization of various doctrines, resolves many doctrinal inconsistencies, and enables tailored application of effects.

The challenge will be in implementation, but small steps forward are immediately attainable and can lead to greater change over time. Courts, Congress, commentators, and even litigants should reserve use of the term for those occasions when the law makes determinations among multiple forums and not use the term when the law speaks to a single forum in isolation. They should stop treating jurisdiction as something sacred, as "power," or as tied to immutable effects, and instead focus on what the effects of a particular law are or should be. With thoughtfulness and attention, we might finally discover what jurisdiction means.

263. *Id.* art. IV, § 3.