Jurisdiction as Power

Ryan C. Williams†

For centuries, courts and legal commentators defined "jurisdiction" by reference to a court's "power." A court that lacked jurisdiction, under this conception, simply lacked the ability to bind the parties, and its resulting rulings could therefore be regarded by both litigants and later courts as void and of no legal effect. But in the middle decades of the twentieth century, the Supreme Court and other U.S. courts strongly embraced the so-called bootstrap doctrine—a distinctive branch of preclusion law that severely limits the ability to collaterally attack a judgment based on a claimed lack of jurisdiction. Because the bootstrap doctrine effectively allows courts to establish their own jurisdiction simply by concluding that they possess it, critics of the power-based conception contend that the definition no longer provides a descriptively plausible or conceptually coherent account of jurisdiction's identity.

This Article defends the traditional power-based conception of jurisdiction's identity as both conceptually coherent and normatively desirable. The key to reconciling jurisdiction-as-power with the bootstrap doctrine is to recognize that different criteria may be appropriate for different decision makers at different stages of the adjudicatory process. From the perspective of the rendering court, the applicable jurisdictional rules supply the sole criteria of legal validity. A conscientious judge seeking to work within the confines of her own authority has no discretion to ignore jurisdictional limits or to proceed to a final judgment unless she determines that jurisdiction actually exists. But from the perspective of a later court called upon to recognize an earlier court's judgment, the criteria of validity are supplied instead by the bootstrap doctrine. That doctrine would sometimes require a later court to act as if jurisdiction were present in the original proceeding even if it was not. But such "as if" exceptions are a familiar part of our law and are not generally understood to supplant or displace the underlying legal rules.

The power-based conception of jurisdiction is not only descriptively plausible and conceptually coherent; it also facilitates jurisdiction's distinctive role in structuring and allocating decision-making authority between different actors and institutions. Understanding jurisdiction as power can also lead to a deeper understanding of jurisdiction's necessary effects and illustrate why several of the effects often associated with jurisdiction—such as nonwaivability and insusceptibility to equitable exceptions—are not, in fact, essential to jurisdiction's identity. Finally, a clearer understanding of jurisdiction's identity as the "power" of a rendering court

† Assistant Professor, Boston College Law School. My thanks to William Baude, Kevin Clermont, Scott Dodson, Benjamin Eidelson, and Evan Tsen Lee, and to participants at workshops at Boston College Law School and the Seventh Annual Civil Procedure Workshop for helpful comments on earlier drafts.

can also help inform and clarify various jurisdictional doctrines and lead to a better understanding of the federal judiciary's role in the constitutional structure.

INTRODUCTION

Jurisdiction is a concept that only a lawyer could love—and only a particular kind of lawyer at that. The fascination that jurisdiction inspires in this particular kind of lawyer does not stem solely from the intricate puzzles that tend to characterize jurisdictional doctrines[1] nor from jurisdiction's important structural role in defining and circumscribing the authority of courts within

[1] *See, e.g.*, Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1142 (1988) (observing that the "law of judicial federalism . . . is wracked by internal contradictions"). *See also generally* Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. Rev. 251 (2005) (describing one such puzzle).

our constitutional system.[2] The lawyerly fascination with jurisdiction derives as well from the intriguing, and sometimes jarring, juxtaposition between jurisdiction as an abstract, conceptual ideal and the on-the-ground reality of jurisdiction as a practical legal doctrine guiding the workaday business of the state and federal courts.

As an ideal, jurisdiction reflects the "power," or basic authority, of the court.[3] A court without jurisdiction on this view is like an unplugged appliance: it simply will not function for its intended purpose.[4] In reality, however, even a court that clearly lacks jurisdiction can fully establish the legal rights and obligations of the parties before it by entering a binding judgment.[5]

As an ideal, jurisdiction imposes upon courts a "virtually unflagging obligation . . . to exercise the jurisdiction given them,"[6] an obligation claimed to be "inflexible and without exception."[7] But in reality, jurisdiction "involves intermittent deviations and occasional bends" that "releas[e] courts from the duties that jurisdiction would seem to impose."[8]

As an ideal, "jurisdiction is something separate, special, and unique"—an autonomous conceptual domain that is not merely distinct from the domain of nonjurisdictional rules but is rather "a rigid antipode to nonjurisdictional law, such as procedural rules and substantive elements."[9] In reality, rules classified as

---

2 *See, e.g.*, Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 59 (2008) (observing that jurisdiction "embodies societal values, such as federalism, separation of powers, and a limited national government") [hereinafter *In Search of Jurisdiction*].

3 *See, e.g.*, Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 89 (1998) (describing subject matter jurisdiction as "the courts' statutory or constitutional *power* to adjudicate the case" (emphasis in original)); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

4 *See* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1616–17 (2003) (analogizing the power conception of jurisdiction "to an unplugged electrical appliance").

5 *See, e.g.*, Durfee v. Duke, 375 U.S. 106, 111 (1963); United States v. United Mine Workers, 330 U.S. 258, 293–94 (1952); Chicot Cnty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940).

6 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

7 *Steel Co.*, 523 U.S. at 95 (quoting Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884)).

8 Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 992 (2009).

9 Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1440–41 (2011) [hereinafter *Hybridizing Jurisdiction*].

"jurisdictional" blend so subtly and imperceptibly into nonjurisdictional rules that courts and commentators struggle to identify (and, in some cases, to draw) the lines that separate the two.[10]

In view of these tensions that run throughout jurisdictional doctrines, it has become increasingly common to observe, along with the Supreme Court, that "[j]urisdiction . . . is a word of many, too many, meanings."[11] The concept of jurisdiction has been put to so many diverse uses, and has been subjected to so many seemingly ad hoc exceptions, that scholars have begun to question whether any meaningful content inheres in the concept at all. These scholars have characterized the idealized conception of jurisdiction as a "dubious concept,"[12] a rhetorical "trope,"[13] and even a "lie" (albeit, a "noble" one).[14] Some have gone so far as to argue that jurisdiction lacks *any* coherent conceptual identity, requiring either a complete reconceptualization and redefinition or an acknowledgment that the term lacks any intrinsic substance whatsoever.[15]

To an earlier generation of lawyers, the notion that jurisdiction lacks a coherent conceptual identity would have seemed peculiar. For centuries, the established and generally accepted meaning of jurisdiction among lawyers in the common law tradition focused centrally on the *power* of a court to bind the parties before it.[16] This power-based view of jurisdiction continues to provide the most widely accepted definition of the concept.[17] But

---

10 *See infra* Part V.A.

11 *Steel Co.*, 523 U.S. at 90 (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

12 *See generally* Lee, *supra* note 4.

13 Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1458 (2006).

14 Bloom, *supra* note 8, at 974–75.

15 *Compare* Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 634 (2017) (proposing to redefine jurisdiction as any rule that "determines forum in a multiforum system") [hereinafter *Jurisdiction and Its Effects*], *with* Lee, *supra* note 4, at 1631 (urging judges and lawyers to "stop making appeals to the 'essential concept of jurisdiction' or 'the nature of jurisdiction'").

16 *See supra* note 3; *see also, e.g.*, Gen. Inv. Co. v. N.Y. Cent. R.R. Co., 271 U.S. 228, 230 (1926) ("By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon."); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 718 (1838) ("Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them. . . . If the law confers the power to render a judgment or decree, then the court has jurisdiction."); United States v. Arredondo, 31 U.S. (6 Pet.) 691, 708 (1832) ("The power to hear and determine a cause is jurisdiction.").

17 *See, e.g.*, *Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "jurisdiction" as a "court's power to decide a case or issue a decree"); *see also, e.g.*,

critics contend that this power-based conception, if it ever accurately characterized judicial practice, no longer functions as a tenable description of what "jurisdiction" means.[18]

Nearly all criticisms of the power-based conception of jurisdiction stem from the effects of the so-called bootstrap doctrine—a doctrine recognizing that courts possess "jurisdiction to determine jurisdiction" and that such jurisdictional rulings are thus entitled, in nearly all cases, to preclusive effect.[19] The bootstrap doctrine immunizes a judgment from collateral attack in subsequent proceedings, even if it becomes clear that the rendering court lacked jurisdiction over the original proceeding.[20] And because the bootstrap doctrine effectively validates judgments that would be regarded as void under the traditional view, critics contend that power-based definitions cannot meaningfully serve to distinguish "jurisdictional" rules from "nonjurisdictional" rules.[21]

Lightfoot v. Cendant Mortg. Corp., 137 S.Ct. 553, 560 (2017) ("A court of competent jurisdiction is a court with the power to adjudicate the case before it."); *Steel Co.*, 523 U.S. at 94 ("'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" (quoting *McCardle*, 74 U.S. (7 Wall.) at 514)); Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) ("[*J*]*urisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case." (emphasis in original)); Lumen N. Mulligan, *Federal Courts, Not Federal Tribunals*, 104 NW. L. REV. 175, 189 n.95 (2010) ("The [Supreme] Court and commentators define jurisdiction in terms of power with great regularity. Indeed, it is the black letter view.").

[18] *See, e.g.*, *Jurisdiction and Its Effects*, *supra* note 15, at 621 ("[T]he notion of jurisdiction as power cannot withstand scrutiny."); Lee, *supra* note 4, at 1620 (contending that "jurisdiction cannot truly be a matter of power"); Lees, *supra* note 13, at 1471 ("Since no legal rule actually deprives a court of its ability to adjudicate . . . saying a rule is jurisdictional only when it goes to the court's power is to say close to nothing.").

[19] The term was first used in a student note. *See* Note, *Res Judicata and Jurisdiction: The Bootstrap Doctrine*, 53 HARV. L. REV. 652 (1946); *see also* Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 69 n.208 (1994). The term was later popularized by Professor Dan Dobbs in a series of articles defending the doctrine. *See, e.g.*, Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 494 (1967). For a more recent examination of the doctrine in its present form, see Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 317–18 (2011).

[20] Durfee v. Duke, 375 U.S. 106, 111 (1963).

[21] *See, e.g.*, *Jurisdiction and Its Effects*, *supra* note 15, at 627 ("Nor can jurisdiction mean capacity to enter an enforceable judgment, for even a judgment entered without jurisdiction can become binding, enforceable, and unassailable." (citing Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 32 (1994))); Lee, *supra* note 4, at 1619–20 ("If jurisdiction is power, does [the bootstrap] doctrine not permit a court to create its own power by simply finding—erroneously—that it already possesses the power? . . . So, jurisdiction cannot truly be a matter of power."); *cf.* Dane, *supra* note 19, at 113–14 (identifying "the expansion of jurisdiction to determine jurisdiction" as "the most important symptom of th[e] erosion" of the idea of jurisdiction).

This Article defends the traditional, power-based conception of jurisdiction as both theoretically coherent and normatively desirable. The equation of "jurisdiction" with a court's power or basic authority is deeply engrained in our legal history and culture and continues to provide a familiar starting point for most discussions of the concept. And though the expansion of the bootstrap doctrine has complicated the picture significantly, a proper understanding of that doctrine's force and effect reveals that it does not, in fact, render the power-based definition descriptively implausible in the manner that critics maintain. Moreover, the power-based conception of jurisdiction plays an important functional role by enabling "jurisdictional" rules to allocate decision-making authority between and among various actors and institutions. Such rules defining the outer boundaries of courts' adjudicatory authority are a necessary feature of the adjudicative process. And "jurisdiction" provides a convenient and widely accepted designation for describing this category of rules.

Part I begins by examining what the equation of jurisdiction with power actually means. Although various formulations of the jurisdiction-as-power concept have been proposed, the most useful and descriptively plausible definition equates "jurisdiction" with a court's distinctively legal authority to change the legal rights and responsibilities of affected individuals. Understood in this way, "jurisdiction" connotes the distinctively legal power of the court to effectively make new law—embodied in the court's final judgment—that will govern the rights and obligations of the parties who appear before it with respect to the particular subject matter in dispute.

Part II examines the complications introduced by the bootstrap doctrine. Though the recognition of "jurisdiction to determine jurisdiction" complicates the power-based conception, it does not render the definition either incoherent or descriptively implausible. The bootstrap doctrine specifies a framework for *later* courts to use in determining whether the conditions necessary to the existence of a rendering court's adjudicative power actually existed. And though this framework will sometimes validate exercises of jurisdiction where those conditions were not, in fact, satisfied, it does not change the nature or significance of the power-conferring rules themselves. Most significantly, knowledge of how a later court is likely to view the validity of a judgment brought before it collaterally need not and should not affect the decision of the rendering court regarding the existence of its own jurisdiction.

Part III considers how the power-based conception allows jurisdictional rules to serve their core function of allocating decision-making authority among different institutions and actors. In addition to allocating power between different adjudicative institutions within a particular legal system, jurisdictional rules also help to allocate decision-making authority in various other ways, including allocating authority between *different* legal systems, allocating authority across time, and allocating authority between courts and other types of institutions, such as legislative and executive bodies. Although other types of rules can serve similar allocative functions, the distinctive qualities and characteristics of jurisdictional rules (conceived of as rules defining the scope and limits of a court's power) constrain and limit judicial actors in ways that other types of legal rules might not.

Part IV turns to jurisdiction's effects. Jurisdictional rules are closely associated with a particular set of legal effects, including a strong presumption that such rules are mandatory, nonwaivable, nonforfeitable, and not excusable as a matter of judicial discretion or equity.[22] But a closer look at what jurisdiction-as-power actually means reveals that many of these effects are not necessarily essential features of jurisdiction and that many rules widely recognized as "jurisdictional" in nature do not share all such characteristics.

At the same time, the power-based understanding of jurisdiction suggests that there are at least some essential features of jurisdictional rules that cannot be avoided.[23] First, a court that lacks jurisdiction necessarily lacks the power to bind the parties to a final, claim-preclusive judgment that will determine the full extent of their legal rights and responsibilities in subsequent proceedings. Second, a conclusion that a particular condition or limitation is jurisdictional necessarily implies that a court must—at least implicitly—answer the question of whether that condition or limitation is satisfied, *before* purporting to conclusively settle the rights and responsibilities of the parties who appear before it. Finally, and relatedly, a conclusion that particular rules are jurisdictional in character necessarily implies that a court *must* conclude—either in fact or by operation of law—that such rules were complied with before recognizing the legitimacy of a final judgment entered by the court that purported to exercise jurisdiction.

---

[22] *See Jurisdiction and Its Effects*, *supra* note 15, at 629.

[23] *See infra* Part IV.B.

Part V turns to the implications of the power-based conception of jurisdiction for judicial practice. First, a clearer understanding of what jurisdiction actually is should help to guide interpreters seeking to classify particular doctrines or rules as either "jurisdictional" or "nonjurisdictional" in nature. The federal judiciary has struggled with this classificatory question in recent decades, proposing various definitions and frameworks to distinguish between the two types of rules. A persisting tension running through this line of doctrine has been the tension between an "idealized" conception of jurisdiction, which posits an immutable core of defining features that render a rule jurisdictional versus a "positive" conception, which views "jurisdiction" as simply a label that lawmakers may attach to any rule or limitation they choose.[24] This Article sides with the idealists by urging an understanding of jurisdiction that exists independently of the prescriptions and labels any particular set of lawmakers chooses to adopt. But the particular conception of jurisdiction defended in this Article is comparatively thin, leaving lawmakers and courts free to attach a broad range of consequences to "jurisdictional" rules so long as those effects do not interfere with jurisdiction's core power-allocating function.[25]

Equating jurisdiction with power also has implications for the doctrine surrounding the sequencing of jurisdictional decision-making. The Supreme Court has insisted that subject matter jurisdiction constitutes a threshold issue that federal courts must resolve before proceeding to adjudicate other, nonjurisdictional, issues.[26] But subsequent decisions have complicated this doctrine by suggesting that cases may be resolved on at least *some* nonjurisdictional grounds even when questions going to the court's subject matter jurisdiction remain unresolved.[27] Understanding the connection between jurisdiction and power helps to illuminate

---

[24] *See* John F. Preis, *Jurisdictional Idealism and Positivism*, 59 WM. & MARY L. REV. 1416, 1426–37 (2018).

[25] *Cf. Hybridizing Jurisdiction*, *supra* note 9, at 1457–72 (introducing the idea of "hybridized" rules that bear some characteristics of both jurisdictional and nonjurisdictional rules).

[26] *See Steel Co.*, 523 U.S. at 94–95 ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" (alterations in original) (quoting *Mansfield*, 111 U.S. at 382)).

[27] *See* Sinochem Int'l Co. v. Malay Int'l Shipping Corp., 549 U.S. 422, 435–36 (2007) (allowing the federal court to dismiss the case on the basis of *forum non conveniens* without first resolving questions regarding the court's subject matter jurisdiction); *cf.* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 587–88 (1999) (allowing dismissal on the basis of personal jurisdiction without reaching the issue of subject matter jurisdiction).

this line of doctrine and to identify the line separating permissible nonjurisdictional bases for dismissal from those that should require a court to first determine that it actually possesses jurisdiction.

Finally, understanding jurisdiction as power has potential implications for separation-of-powers doctrines, including questions regarding the judiciary's power to legitimately bind decision makers in the political branches.

I. JURISDICTION AS (HOHFELDIAN) POWER

The first step toward a clearer understanding of the relationship between jurisdiction and power is to determine what it actually means to describe jurisdiction as "power." A particularly memorable and concise encapsulation of the idea was provided by Justice Oliver Wendell Holmes, who declared that "[t]he foundation of jurisdiction is physical power."[28] But, as with many of Holmes' pithy aphorisms, his equation of "jurisdiction" with "physical power" obscures as much as it illuminates.[29] Holmes himself acknowledged that "in civilized times," it was no longer "necessary to maintain that [physical] power throughout proceedings properly begun."[30] And modern doctrine recognizes the power of courts to bind parties who have never placed themselves within those courts' physical custody or control.[31]

Another possible sense of "power" equates power with "legitimate authority."[32] This account of "power" transcends the brute fact of physical ability to coerce or control and asks instead whether a particular exercise of authority would be regarded as legitimate. For example, a police officer may have the physical power to arrest an individual without any reasonable ground for suspicion of lawbreaking. But such an arrest would not be regarded as a legitimate exercise of the officer's authority, and it is

---

28 McDonald v. Mabee, 243 U.S. 90, 91 (1917).

29 *Cf.* Carlton F.W. Larson, *"Shouting 'Fire' in a Theater:" The Life and Times of Constitutional Law's Most Enduring Analogy*, 24 WM. & MARY BILL RTS. J. 181, 183–84 (2015) (discussing criticisms of Holmes's much more famous aphorism in *Schenck v. United States*, 249 U.S. 47 (1919), which analogized a false shout of "fire in a crowded theater" to other forms of constitutionally unprotected speech).

30 *McDonald*, 243 U.S. at 91.

31 *See, e.g.*, Morris v. Jones, 329 U.S. 545, 550–51 (1947) ("A judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata*, in the absence of fraud or collusion, even if obtained upon a default." (quoting Riehle v. Margolies, 279 U.S. 218, 225 (1929))).

32 *See, e.g.*, Lee, *supra* note 4, at 1620 (exploring the idea of "something like legitimate authority"); *see also Jurisdiction and Its Effects*, *supra* note 15, at 627 (same).

thus possible to speak colloquially of the officer as lacking the "power" to make such arrests.[33]

Equating jurisdiction with legitimate authority seems somewhat more descriptively plausible than Holmes's association of the concept with physical power. But as multiple scholars have observed, this definition fails to meaningfully distinguish "jurisdictional" rules from other types of rules that courts are obligated to obey.[34] A court that openly flouts rules designed to limit its jurisdiction may well be seen to transgress the bounds of its legitimate authority. But so may a court that openly flouts nonjurisdictional rules of substantive or procedural law. It is not difficult to imagine scenarios in which the flouting of nonjurisdictional rules—for example, flipping a coin to decide a criminal defendant's guilt or innocence—might be seen as far more serious from a legitimacy perspective than would the disregard of a technical jurisdictional limitation.[35]

But there is another, distinctively legal sense of the term "power" that seems closer to the traditional understanding of what the equation of jurisdiction with power was originally designed to capture. This sense of power is illuminated by the well-known scheme of jural relations developed by legal philosopher Wesley Newcomb Hohfeld.[36] Hohfeld famously sought to disambiguate the concept of "rights" by breaking rights claims down into four paired sets of correlative jural relations: (1) claim-right/duty relations, (2) privilege/no-right relations, (3) power/liability relations, and (4) disability/immunity relations.[37] "Rules about power" in Hohfeld's schema "determine how individuals may make changes in other rules . . . ."[38] The possession of power signifies that one possesses the legal authority to create, change, or annul some other set of legal relations involving either himself

---

33 Lee, *supra* note 4, at 1616–17.

34 *See, e.g.*, *Jurisdiction and Its Effects*, *supra* note 15, at 627 ("[T]he formulation of jurisdiction as legitimate authority renders it conceptually indistinguishable from the many nonjurisdictional elements that also inform legitimate authority."); Lee, *supra* note 4, at 1620–21 (arguing that both jurisdiction and merits are relevant to legitimacy).

35 *See* Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 27 (2009) (observing that flipping a coin to resolve a case is widely regarded as a serious form of judicial misconduct).

36 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

37 *Id.* at 30.

38 John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 340 (1998).

or one or more third parties through volitional conduct.[39] For example, a landowner typically possesses "power," in the Hohfeldian sense, to transform the cluster of entitlements associated with ownership by selling the property to another person, thereby extinguishing myriad powers, claim-rights, immunities, and privileges formerly possessed by the seller with respect to the property and creating new entitlements in the purchaser.[40]

To describe jurisdiction as "power" in the Hohfeldian sense signifies that jurisdiction gives a court the legal ability to transform the jural relations of other individuals—their claim-rights, duties, privileges, powers, disabilities, etc.[41] Persons subject to the court's jurisdiction, in turn, are subject to a corresponding Hohfeldian "liability" to have their legal rights determined by the court's judgment. Once a judgment has been rendered by a court possessing jurisdiction, the legal rights and responsibilities of the party against whom the judgment was entered are no longer what they had been before the judgment. Rather, the judgment itself supplies a new source of legal rights and obligations that governs the parties' respective entitlements with respect to the subject matter of the litigation going forward.[42]

This Hohfeldian account of jurisdiction as power seems plausible as a description of how jurisdiction actually functions in our legal system. Consider, for example, a standard tort suit arising

---

39 Hohfeld, *supra* note 36, at 44.

40 *See* Harrison, *supra* note 38, at 340 ("For private law, classic examples of rules about power are those that determine how property interests may be transferred and how contracts may be formed.").

41 *See, e.g.*, Ori Herstein, *How Tort Law Empowers*, 65 U. TORONTO L.J. 99, 107–08 (2015) (discussing the power that courts possess as an example of Hohfeldian power); Robert G. Johnston, *The Fallacy of Physical Power*, 1 J. MARSHALL J. PRAC. & PROC. 37, 38 (1967) ("Jurisdiction, within Hohfeld's terminology, describes a power.").

42 This distinctively legal sense of the term "power" also helps to clarify the connection between jurisdiction and legitimacy discussed above. *See supra* notes 32–35 and accompanying text. As Professor Richard Fallon has observed, "legitimacy" is a multifaceted concept that can be measured against multiple sets of criteria, including legal, sociological, and moral standards. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794 (2005). Jurisdiction is most relevant to assessing the distinctively legal legitimacy of a court's decision—i.e., whether the decision was lawful or legally authorized. *See id.* at 1794–95. As Fallon notes, not every legal error calls the legal legitimacy of a judicial decision into question. *See id.* at 1817–18 ("Virtually no one would characterize every judicial ruling reversed on appeal as legally illegitimate."). But because jurisdictional errors bear on the legal power of the court, such errors may provide a per se basis for challenging the legal legitimacy of the court's rulings. *See id.* at 1819 ("[A] claim of judicial legitimacy characteristically suggests that a court," among other things, "had lawful power to decide the case or issue before it."). The possession of jurisdiction may thus be a necessary (though not necessarily sufficient) condition for a judicial judgment to be regarded as legally legitimate.

from an automobile accident caused by the alleged negligence of one of the drivers. Immediately after the accident, a driver who was actually negligent may have a moral obligation to make recompense for any injuries caused by his negligence but has no immediate legal duty to compensate the injured party.[43] Establishing such a legal duty would typically require the intervention of a court possessing jurisdiction.[44] The effect of a court's judgment in favor of the plaintiff would be to create a new set of legal relationships between the plaintiff and the defendant, establishing a legal debt owed by the defendant and empowering the plaintiff to take measures to recover the amounts owed.[45] Under the doctrine of claim preclusion, the plaintiff's legal entitlement to relief would be merged into the resulting judgment, while the judgment would serve as a bar to any effort to relitigate the same claim in a later proceeding.[46]

Even if the driver was not in fact negligent or if his negligence did not in fact cause the plaintiff's injuries, a contrary determination by the court embodied in a final judgment would nonetheless transform the parties' legal rights and responsibilities.[47] A person whose rights or responsibilities were erroneously determined by a court possessing jurisdiction may have an opportunity to appeal to a hierarchically superior court; but once the judgment becomes final, the affected parties would typically not be allowed to relitigate the issue in a subsequent proceeding.[48] In this sense, jurisdiction can be seen to embody a limited "right to be wrong."[49] By contrast, if the court determines that it lacks jurisdiction, the

---

43 *See* Nathan B. Oman, *Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law*, 39 FLA. ST. L. REV. 137, 148 (2011) ("Upon the commission of a tort or the breach of a contract, there is no duty to tender damages.").

44 For a fuller discussion of the ways in which tort law empowers plaintiffs, see Herstein, *supra* note 41, at 108–22.

45 Even after a judgment is rendered in a plaintiff's favor, the defendant is typically under no legal duty to pay damages; rather, the plaintiff is empowered to proceed against the defendant's property as a means of enforcement. *See* Oman, *supra* note 43, at 152–53.

46 *See infra* notes 255–271 and accompanying text (discussing the doctrine of claim preclusion).

47 *See, e.g.*, Herstein, *supra* note 41, at 112 ("[C]ourts hold the power to change the legal rights and relations of litigants even in contradiction to the law and to the litigants' valid and controlling rights, which the courts are obligated to apply." (citing JOSEPH RAZ, PRACTICAL REASONS AND NORMS 137–38 (2d ed. 1990))).

48 *See infra* notes 255–271 and accompanying text.

49 *See* Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 709 n.36 (1995) ("Jurisdiction is the right to decide—*either* way—and thus, in effect, the right to be 'wrong.'" (emphasis in original)); *see also, e.g.*, Signal Oil & Gas Co. v. Ashland Oil & Refining Co., 49 Cal. 2d 764, 778 (1958) ("Jurisdiction, being the power to hear and determine, implies power to decide a question wrong as well as right.").

widely accepted view is that it may not proceed to adjudicate the merits of the underlying dispute at all.[50]

Understanding jurisdiction as Hohfeldian power also helps to distinguish jurisdictional rules from other types of legal rules that regulate judicial behavior. Though courts undoubtedly have a duty to decide cases in accordance with applicable rules of substantive and procedural law, such rules do not purport to limit courts' authority in the way that jurisdictional rules do. Substantive and procedural rules provide criteria for courts to use in resolving contested questions affecting the parties' rights and responsibilities. Jurisdictional rules, on the other hand, "specify whether a given tribunal has the authority to decide those" contested issues at all "and to bind the rest of the world to its decision."[51]

This connection between jurisdiction and legal power is deeply rooted in the Anglo-American legal tradition. The relationship is encapsulated by the common law's preferred Latinate expression for proceedings in which jurisdiction is lacking, *coram non judice*—literally, before a person who is not a judge.[52] Under this conception, which was "ubiquitous in English practice"[53] prior to the adoption of the U.S. Constitution[54] and persisted in U.S. courts for more than a century thereafter,[55] a judgment entered by a court that lacked jurisdiction was regarded as a complete legal nullity with no binding force or effect.[56] Under this tradi-

---

50 *See supra* note 3.

51 Dane, *supra* note 19, at 22.

52 *Coram non judice*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also, e.g.*, Rose v. Himely, 8 U.S. (4 Cranch) 241, 276 (1808) ("If the court . . . had jurisdiction of the case, its sentence is conclusive. If it had no jurisdiction, the proceedings are *coram non judice*, and must be disregarded.").

53 William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1828 (2008) (citing Case of the Marshalsea (1613), 77 Eng. Rep. 1027 (K.B.)).

54 *Id.* at 1826–28; *see also* Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 165–67 (1977) (discussing the background of the common law voidness doctrine).

55 *See Filling the Void*, *supra* note 54, at 166–71 (describing the ascendance of the voidness doctrine in American courts and its trajectory over the nineteenth century).

56 *See, e.g.*, Voorhees v. Jackson *ex dem.* Bank of the United States, 35 U.S. (10 Pet.) 449, 474 (1836):

> If not warranted by the constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under colour of law, which can properly be deemed to have been done *coram non judice*; that is, by persons assuming the judicial function in the given case without lawful authority.

See also Yates v. Lansing, 9 Johns. 395, 436 (N.Y. 1811) ("[W]here jurisdiction ends, the judge also ceases to be a judge . . . .").

tional idea of jurisdiction, "th[e] judge or court" without jurisdiction is "in essence . . . no different from any person on the street . . . She might wear a robe and wield a gavel. . . . But absent jurisdiction . . . [t]he judge without jurisdiction might as well be an imposter."[57]

Of course, this somewhat idealized conception of jurisdiction no longer fully describes the complexities of jurisdiction's role in our present legal system. As discussed above, the bootstrap doctrine and the idea of "jurisdiction to decide jurisdiction" have significantly complicated the ability of even this more limited conception of "power" to account for our actual institutional practices.[58] Any effort to restore power to its central role as a defining feature of jurisdiction must therefore account for the bootstrap doctrine and the significant inroads that doctrine has made upon the traditional understanding of jurisdiction.

II. UNRAVELING THE "BOOTSTRAP" CONUNDRUM

The widespread acceptance of the bootstrap doctrine presents the most significant challenge to the power-based conception of jurisdiction. If a court can effectively create its own jurisdiction by erroneously declaring that such jurisdiction exists, how is it possible to meaningfully describe jurisdiction as a necessary precondition to the court's exercise of power? This Part seeks to unravel this apparent conundrum. Part II.A begins with a brief overview of the bootstrap doctrine's intellectual origins and historical development.

Part II.B seeks to reconcile the bootstrap doctrine with the power-based conception of jurisdiction by examining the distinctive roles the two concepts play in the adjudicative process. Briefly, jurisdictional limits prescribe rules for courts to use in determining whether they themselves possess the legal authority to bind the parties to their judgments. But once a judgment has been rendered, the bootstrap doctrine prescribes a different jurisdictional test for later courts to use in assessing the validity of the earlier judgment. The notion that different jurisdictional standards apply to these two distinct stages of a litigation process might seem jarring at first. But our law routinely requires particular institutional actors to accept as valid determinations made by other actors without allowing any direct inquiry into the veracity of the earlier determinations.

---

57 Dane, *supra* note 19, at 23–24.

58 *See supra* notes 19–21 and accompanying text.

Part II.C briefly considers the value of distinguishing between power-conferring rules of the type to which the jurisdictional label is typically attached and other types of legal rules; it then suggests reasons for believing that there is value in retaining the traditional distinction between jurisdictional and nonjurisdictional rules.

A. The Bootstrap Doctrine in Historical Context

The expansion of the bootstrap doctrine in the middle decades of the twentieth century marked a significant innovation in thinking about jurisdiction.[59] But the intellectual origins of the doctrine stretch back much further to a set of doctrines originating in English law that distinguished courts of general jurisdiction from those of more limited jurisdiction.[60] In the English legal system, the principle that a judgment entered by a court lacking jurisdiction was void and of no effect was used primarily to constrain the power of courts of "inferior" jurisdiction.[61] The factual bases for the exercise of such courts' jurisdiction would not be presumed by later courts but rather had to be demonstrated on the face of the record.[62] Judgments entered by courts of general jurisdiction, by contrast, enjoyed a presumption of validity and would not be set aside based on a mere technical defect in the record.[63]

In the early decades after the Federal Constitution's adoption, the Supreme Court confronted the implications of this English practice for determining the effects due to judgments rendered by the "inferior" federal courts established by

---

59 *See Filling the Void*, *supra* note 54, at 174 (describing how a "series of [Supreme Court] decisions between 1931 and 1963 . . . fundamentally altered the relationship between finality and judicial power in the United States").

60 *See id.* at 165–66; *see also* Anthony J. Bellia, Jr., *The Origins of "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 273–76 (2007) (discussing the division of authority between courts of general and limited jurisdiction).

61 *See Filling the Void*, *supra* note 54, at 166 (noting that "there seems to be no case in which the judgment of one of the superior courts was held to be void").

62 *See, e.g.*, Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173, 179 (1809) ("If the jurisdiction [of an inferior tribunal] does not appear upon the face of the proceedings, the presumption of law is, that the court had not jurisdiction, and so the cause *coram non judice*. In which case no valid judgment could be rendered."); Bridge v. Ford, 4 Mass. 641, 643 (1808) ("[W]e cannot presume any thing in favour of the jurisdiction of an inferior magistrate, as it is not general, but given and limited by particular statutes.").

63 *See, e.g.*, Byrd v. State, 2 Miss. (1 Howard) 163, 173–74 (1834):

> The only difference between the judgment of a court of general jurisdiction, and one of special and limited jurisdiction, is this: in the one case the jurisdiction of the court is presumed, until the contrary appear; in the other, a party claiming a right under it must know affirmatively that the court had jurisdiction.

Article III.[64] Despite the constitutional designation of such courts as "inferior," the Court held them to be courts of general jurisdiction whose judgments enjoyed the presumption of validity.[65] While it was incumbent on the parties to establish the factual and legal requisites necessary to invoke jurisdiction,[66] the Court would not allow a final judgment to be attacked collaterally based on an alleged deficiency or ambiguity in the record.[67] Some modern scholars have viewed these early decisions as an early appearance of the bootstrap principle in U.S. law.[68] But as Professor William Baude has observed, "[t]his may be reading [such] cases for slightly more than they are worth," since the Court did not confront in the early cases any clear evidence that the rendering court actually lacked jurisdiction.[69] Rather, such decisions involved mere allegations that the factual bases supporting jurisdiction were not sufficiently disclosed by the record.[70]

In other doctrinal contexts, the Supreme Court endorsed the traditional view that judgments rendered by courts that lacked

---

64 *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

65 *See, e.g.*, Turner v. Bank of N. Am., 4 U.S. (Dall.) 8, 11 (1799) ("A Circuit Court, though an *inferior* Court, in the language of the constitution, is not so in the language of the common law . . . [and its proceedings] are entitled to as liberal intendments, or presumptions, in favour of their regularity, as those of any Supreme Court." (emphasis in original)).

66 *See id.* at 11:

> A Circuit Court, however, is of *limited* jurisdiction; and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases, which an unlimited jurisdiction would embrace. And the fair presumption is . . . that a cause is without its jurisdiction till the contrary appears.

67 *See, e.g.*, M'Cormick v. Sullivant, 23 U.S. (10 Wheat.) 192, 199–200 (1825) (noting that a federal judgment could not be collaterally attacked even when the record was silent on the question of jurisdiction).

68 *See, e.g.*, *Hybridizing Jurisdiction*, *supra* note 9, at 1454 n.89 (describing *M'Cormick* as "[p]erhaps the first case articulating [the bootstrap] principle"); Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1859 (2007) (citing *M'Cormick*, 23 U.S. at 199, and *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 207 (1830), as support for the proposition that "[j]urisdictionally defective [federal] judgments could be reversed on appeal; but . . . were 'not absolute nullities' that might be disregarded on collateral attack.").

69 Baude, *supra* note 53, at 1830.

70 *Id.* State courts were often more explicit in recognizing the rebuttable nature of the presumption in favor of jurisdiction. *See, e.g.*, Nulton v. Isaacs, 71 Va. (30 Gratt.) 726, 738–43 (1878) (holding a federal judgment void and of no effect after a state court concluded that the federal court lacked jurisdiction); Bloom v. Burdick, 1 Hill 130, 139 (N.Y. 1841) ("The distinction between superior and inferior courts is not of much importance in this particular case, for whenever it *appears* that there was a want of jurisdiction, the judgment will be void, in whatever court it was rendered." (emphasis in original)).

jurisdiction could be regarded by later courts as void and of no legal effect. For example, although the legislation Congress adopted to implement the Constitution's Full Faith and Credit Clause was construed to make state-court judgments conclusive in the courts of other states to the same extent they would be in the courts of the rendering state,[71] this principle did not limit the ability of later courts to inquire into the rendering court's jurisdiction.[72] The Court explained this exception by reference to "the international law as it existed among the States" at the time of the federal statute's adoption, which deemed "a judgment rendered in one State, assuming to bind the person of a citizen of another," to be "void within the foreign State, when the defendant had not been served with process" within the rendering state or voluntarily appeared to defend.[73] The Court adopted a similar view regarding the voidness of judgments entered by jurisdictionless courts in cases involving recognition of judgments rendered by foreign courts[74] and recognition of state court judgments by federal courts.[75]

The first tentative moves toward the strong modern version of the bootstrap doctrine began in the late nineteenth century.[76] In *Des Moines Navigation & R.R. Co. v. Iowa Homestead Co.*,[77] the Supreme Court extended its earlier precedents supporting a presumption in favor of a federal court's jurisdiction by adopting something close to a conclusive presumption, at least with respect to certain matters.[78] *Des Moines Navigation* involved a collateral

---

71 Mills v. Duryee, 11 U.S. (7 Cranch) 481, 485 (1813).

72 *See* D'arcy v. Ketchum, 52 U.S. (11 How.) 165, 176 (1851).

73 *Id.*

74 *See* Rose v. Himely, 8 U.S. (4 Cranch) 241, 276 (1808) (refusing to recognize a French in rem judgment where the condemned property was not properly seized and thus not brought within the French court's jurisdiction); *see also, e.g.*, Bischoff v. Wethered, 76 U.S. (9 Wall.) 812, 814 (1869) (holding that the judgment of an English court that "was wholly without jurisdiction of the person" had "no validity [in the United States], even of a *primâ facie* character [and] is simply null").

75 *See, e.g.*, Elliott v. Lessee of Peirsol, 26 U.S. (1 Pet.) 328, 340 (1828):

> [W]e cannot yield an assent to the proposition, that the jurisdiction of the [state court] could not be questioned, when its proceedings were brought, collaterally, before the [federal] Circuit Court. We know nothing in the organization of the Circuit Courts of the Union, which can contradistinguish them from other Courts, in this respect.

76 *See* Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle (pt. I)*, 53 VA. L. REV. 1003, 1005 (1967) (describing the bootstrap principle as having been "discovered almost accidentally in the 19th century" but noting that there remained "considerable doubt as to its validity" for some time).

77 123 U.S. 552 (1887).

78 *Id.* at 558–59.

attack on an earlier federal judgment in which jurisdiction had been premised on alleged diversity of state citizenship.[79] Unlike the Court's early nineteenth-century decisions, which had involved circumstances "where the record simply fail[ed] to show jurisdiction," the *Des Moines Navigation* case involved a charge that the record itself demonstrated that "there could be no jurisdiction, because . . . one of the defendants, was a citizen of the same State with the plaintiff."[80] Emphasizing that all of the parties had appeared during the initial proceeding and litigated voluntarily and that no objection had then been raised to the federal court's jurisdiction, the Court held that the prior judgment could not "be deemed a nullity" but was rather "a valid and subsisting prior adjudication of the matters in controversy, binding on the[] parties."[81] The doctrinal significance of this holding was blunted to some extent by later cases suggesting that this conclusive presumption attached only to certain types of "quasi-jurisdictional" facts—such as allegations of diverse citizenship—leaving a potential role for the voidness doctrine in cases involving other types of jurisdictional challenges.[82]

In the 1930s and 1940s, the Court expanded the bootstrap doctrine dramatically. In *Baldwin v. Iowa State Traveling Men's Association*,[83] the Court held that a defendant who had appeared in a federal court action to litigate the question of personal jurisdiction could not collaterally attack the court's jurisdictional determination in a later proceeding.[84] The Court explained its decision by reference to the broad public interest in finality of judicial proceedings:

> Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case, and is fully heard, and why he should not, in the absence of fraud, be thereafter

---

79 *Id.* at 553–56.

80 *Id.* at 558.

81 *Id.* at 559.

82 *See, e.g.*, Noble v. Union Logging Co., 147 U.S. 165, 173–74 (1893) (distinguishing "quasi-jurisdictional" facts, such as the existence of diverse citizenship, from the types of facts essential to give a court's judgment validity, such as "the service of process within the State upon the defendant in a common law action" or "the seizure and possession of the *res* within the bailiwick in a proceeding in rem").

83 283 U.S. 522 (1931).

84 *Id.* at 525–26.

> concluded by the judgment of the tribunal to which he has submitted his cause.[85]

Baldwin was amenable to a narrow interpretation given personal jurisdiction's status as a waivable defense and the Court's prior case law establishing that a special appearance to contest jurisdiction could permissibly be deemed to waive jurisdictional objections.[86] Over the next decade, however, the Court extended *Baldwin*'s finality rationale to bar most collateral challenges alleging defects in subject matter jurisdiction as well.[87] This line of doctrine culminated in the Court's 1963 decision in *Durfee v. Duke*,[88] which laid down the general rule that a prior judgment is ordinarily entitled to full preclusive effect "even as to questions of jurisdiction," when "the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."[89]

The expansion of the bootstrap doctrine greatly reduced the practical significance of the earlier developed doctrine treating jurisdictionless judgments as void and of no legal effect. But it did not supplant the voidness principle entirely. In discrete legal areas, the Supreme Court has continued to allow judgments to be collaterally attacked based on an asserted lack of jurisdiction by the rendering court, including in cases brought against the United States or federal Indian tribes[90] and cases decided by state courts in contravention of a federal statutory bar on jurisdiction.[91]

The Court's doctrinal innovations have coalesced into the somewhat "peculiar" doctrine of "jurisdiction-to-determine-jurisdiction," which bears some resemblance to more traditional preclusion doctrines—such as claim preclusion and issue preclusion—without perfectly mirroring either.[92] In most cases, the doctrine treats the judicial interest in finality as more important than the countervailing interest in judgment validity, prohibiting collateral attacks on the large majority of judgments issued by

---

85 *Id.*

86 *See* York v. Texas, 137 U.S. 15, 20–21 (1890).

87 *See, e.g.*, Chicot Cnty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 377 (1940); Treinies v. Sunshine Mining Co., 308 U.S. 66, 74–78 (1939); Stoll v. Gottlieb, 305 U.S. 165, 172–77 (1938).

88 375 U.S. 106 (1963).

89 *Id.* at 111.

90 United States v. U.S. Fidelity & Guar. Co., 309 U.S. 506, 514–15 (1940).

91 Kalb v. Feuerstein, 308 U.S. 433, 438–40 (1940).

92 Clermont, *supra* note 19, at 318 (describing jurisdiction as "constitut[ing] a third body of res judicata law distinguishable from claim and issue preclusion, or perhaps a body of law standing separate from res judicata").

state or federal courts.[93] But the doctrine leaves open the possibility for challenges in truly egregious cases, such as where the rendering court "plainly" lacked subject matter jurisdiction or where the judgment "substantially" infringed on the authority of another decision maker.[94]

The bootstrap doctrine has thus largely, though not quite entirely, supplanted the earlier doctrine allowing judgments rendered without jurisdiction to be collaterally attacked. Whereas the presumptive invalidity of such judgments constituted the general rule from our nation's founding through the early decades of the twentieth century, the bootstrap principle has now entrenched itself as the general rule governing judgment recognition with the traditional common law voidness doctrine reduced to a vestigial exception applicable to only a narrow subset of cases.

B. Jurisdiction as Power and the Bootstrap Doctrine

Can the traditional conception of jurisdiction as power be reconciled with the bootstrap doctrine's preeminence in our current law governing judgment recognition? Critics of power-based theories of jurisdiction think not. These critics argue that the undeniable reality that judgments rendered by jurisdictionless courts will be recognized as valid by later decision makers renders power-based definitions descriptively implausible.[95]

From a certain perspective, this criticism makes sense. If one conceives of "law" as merely a set of predictions about how officials are likely to respond to particular events,[96] it might seem reasonable to conclude that a judge who lacks jurisdiction nonetheless possesses the "power" to bind the parties so long as we are reasonably confident that her judgment will be treated as valid

---

93 *See* ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 264 (2001) (explaining that, where a jurisdictional determination is challenged collaterally, "the desire for finality generally outweighs the concern for validity, giving the determination preclusive effect" in later litigation).

94 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 12 (acknowledging limited grounds for a collateral attack on a court's determination of its own subject matter jurisdiction in a contested action, including situations where "[t]he subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority" or where "[a]llowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government").

95 *See supra* note 21 and accompanying text.

96 *See, e.g.*, Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."); *see also* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE, 128–32 (1995) (describing the role of prediction in legal realist thought).

by later courts.[97] But this is hardly the only perspective from which to view the problem. As decades of legal scholarship has recognized, it is also possible to view law and legal obligation from the point of view of officials who conscientiously seek to follow applicable legal rules.[98] Unlike "external" perspectives, which focus on observable regularities of behavior produced by or associated with legal rules, this "internal" point of view focuses on the normative force that legal rules exert on the decision-making of those who accept them as a standard of conduct.[99]

Understanding how the bootstrap doctrine can be reconciled with the traditional power-based conception of jurisdiction from this "internal" perspective starts with the Hohfeldian conception of jurisdiction as power sketched above in Part I. As discussed above, equating jurisdiction with Hohfeldian power means that jurisdiction constitutes a court's lawful authority to change the legal relationships of the parties who appear before it with respect to the specific subject matter of the lawsuit.[100] In effect, the court's judgment establishes a new source of law that determines the applicability of more general legal directives to the specific circumstances of the parties' dispute.[101] Of course, this case-specific judgment does not alter the more general legal principles that the court applies any more than an umpire's erroneous conclusion that a particular runner was "safe" rather than "out" alters the rules of baseball.[102] Such a judgment does, however, conclusively bind the parties and thus, with respect to those parties and the

---

97 *See, e.g.*, Lee, *supra* note 4, at 1619 (arguing that the bootstrap doctrine "permit[s] a court to create its own power by simply finding—erroneously—that it already possesses the power").

98 *See* Charles L. Barzun, *Inside/Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203, 1207–09 (2015) (tracing the origin of the distinction between "internal" and "external" perspectives on law to the work of H.L.A. Hart in the 1960s); *see also* H.L.A. HART, THE CONCEPT OF LAW 88–91 (3d ed. 2012) (articulating the distinction).

99 HART, *supra* note 98, at 88–89; *see also, e.g.*, Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1159 (2006) ("As Hart used the term, the internal point of view refers to the practical attitude of rule acceptance. Someone takes this attitude towards a social rule when he accepts or endorses a convergent pattern of behavior as a standard of conduct.").

100 *See supra* note 42 and accompanying text.

101 *See* Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527, 562 (2019) ("A judgment is certainly a source of law in a particular *case*." (emphasis in original)); Herstein, *supra* note 41, at 111–12 (discussing the lawmaking effect of judgments).

102 *Cf.* HART, *supra* note 98, at 142 (emphasis in original):

> [T]he scorer's determinations . . . are unchallengeable. In *this* sense it is true that for the purposes of the game 'the score is what the scorer says it is.' But it is important to see that the scoring *rule* remains . . . and it is the scorer's duty to apply it as best he can.

subject matter in dispute, displaces any more generally applicable legal standards.[103]

When conceived of in this way, jurisdictional rules can be seen as an example of what Professors Matthew Adler and Michael Dorf have described as "existence conditions"—i.e., the necessary pre-conditions that must be satisfied in order for some claimed source of law to be recognized as an actual instance of the type of law it is claimed to be.[104] As an example of an existence condition, Adler and Dorf point to Section 7 of Article I in the Federal Constitution, which sets forth the procedures for enacting federal statutes.[105] A proposed enactment that fails to comply with those procedures—for example, by not being presented to the President for signature or by failing to be passed by both Houses of Congress—simply fails to become law. A federal court would be entitled (and likely obligated) to disregard such a putative "law," notwithstanding its general obligation to apply all validly enacted federal statutes.[106]

Jurisdiction performs a similar function. Jurisdictional rules identify the conditions that must be satisfied in order for a particular type of claimed "law"—namely, a judicial judgment—to be recognized as the type of law it claims to be. Under the traditional view, a judgment rendered by a court that lacked jurisdiction could be regarded as "mere waste paper, an absolute nullity" that could be "said to be in law no judgment at all, having no force or effect, conferring no rights, and binding nobody."[107]

But not all actors or institutions need to use the same method or apply the same criteria to determine whether a particular existence condition has been satisfied. Rather, as Adler and Dorf

---

[103] Herstein, *supra* note 41, at 112:

> When [ ] judicial misapplication or deviation from the law occurs, the legal system comes to contain two contradictory legal norms, and until such erroneous rulings are overruled or their applicability is suspended by the court, the litigants are bound to the specific judicially created norm that is individually directed at them.

[104] *See* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1119 (2003).

[105] U.S. CONST. art. I, § 7, cl. 2.

[106] Adler & Dorf, *supra* note 104, at 1122 (contending that "[a] judicial duty to take account of some type of law, in adjudicating cases, entails a duty to enforce constitutional provisions that state existence conditions for that type of law" (emphasis omitted)).

[107] Commander v. Bryan, 123 S.W.2d 1008, 1013 (Tex. Civ. App., Fort Worth, 1938) (quoting 25 TEX. JUR. § 254, at 693); *see also, e.g.*, Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 475 (1836) (describing a jurisdictionless judgment as "waste paper").

observe, "existence conditions can be institution-specific, or *perspectival*," in that the test for whether the condition has been satisfied may be different for different actors or institutions.[108]

Consider, for example, the "enrolled bill doctrine," which supplies the test that federal courts use to determine whether the constitutionally specified requirements for congressional lawmaking have been satisfied.[109] In the leading case establishing this doctrine, the Supreme Court held that the "signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill," should "be deemed complete and unimpeachable" once the enrolled bill is "deposited in the public archives."[110]

The criteria that federal courts must look to under the enrolled-bill doctrine (i.e., whether an enrolled bill was signed by the President and the leaders of both Houses of Congress and deposited in the public archives) differ from those prescribed by Section 7 of Article I (i.e., whether a particular bill was actually assented to by majorities in both Houses and either signed by the President or reenacted by supermajorities in both Houses following a veto).[111] But the enrolled-bill doctrine does not purport to replace or supplant the constitutional criteria or to empower officials to enact a bill through procedures other than those specified by Section 7.[112] Rather, the doctrine merely reflects an evidentiary presumption that a bill attested to in the manner identified by the Court has, in fact, been approved through the constitutionally required methods.[113] Thus, Section 7 continues to supply the criteria that other institutional actors—including congressional leaders and the President—must use in determining whether a bill was validly enacted into law, even though federal courts will

---

[108] Adler & Dorf, *supra* note 104, at 1127 (emphasis in original).

[109] *See* Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the "Enrolled Bill" Doctrine*, 97 GEO. L.J. 323, 328–31 (2009) (describing the origins and justifications for the enrolled-bill doctrine as well as its present significance).

[110] Field v. Clark, 143 U.S. 649, 672 (1892).

[111] *See* Adler & Dorf, *supra* note 104, at 1173 (observing that the Court in *Field* "did not gainsay" § 7's requirement of actual majority approval by both Houses of Congress).

[112] *See Field*, 143 U.S. at 669:

> There is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, not in the President to approve, nor in the Secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress.

[113] *Id.* at 673 (describing the effect of the required attestations on a bill and its enrollment in the public archives as "conclusive evidence that it was passed by Congress, according to the forms of the Constitution").

look only to the particular assurances of enactment prescribed by the enrolled-bill doctrine.[114]

Likewise, the bootstrap doctrine does not purport to displace ordinary jurisdictional rules that constrain the rendering courts' authority or to empower such courts to bind parties without jurisdiction. Rather, the bootstrap doctrine reflects a set of criteria for *later* courts to use in determining whether the relevant jurisdictional conditions were actually satisfied. As with the enrolled-bill doctrine, the selection of these criteria is driven by a set of pragmatic concerns regarding efficiency, finality, and respect for coordinate decision makers.[115]

The bootstrap doctrine may sometimes require later courts to act as if a judgment that failed to satisfy the actual conditions necessary for validity is in fact valid, just as the enrolled-bill doctrine might sometimes require courts to act as if a bill that failed to satisfy the requisite constitutional criteria was duly enacted.[116] But such "as if" exceptions are a familiar part of our law. [117] Doctrines such as claim and issue preclusion, horizontal and vertical stare decisis, and the political-question doctrine routinely require courts to accept determinations made by some other authoritative decision maker as conclusive.[118] But the application of such doctrines is not generally understood as altering or displacing the underlying legal rules to which they apply.[119]

---

[114] *Id.* at 672 (declaring that an enrolled act that "ha[s] the official attestations of" congressional leaders and the president "carries, on its face, a solemn assurance by the legislative and executive departments . . . that it was passed by Congress" in the constitutionally prescribed manner and that the "judicial department" must "act upon that assurance, and [ ] accept, as having passed Congress, all bills authenticated in the manner stated").

[115] *See* Bar-Siman-Tov, *supra* note 109, at 330–31 (discussing justifications for the enrolled-bill doctrine, including respect for the authority of coordinate branches and the promotion of judicial efficiency).

[116] *See id.* at 331–33 (discussing an example of such binding effect being given to a purported statute).

[117] *See* Sachs, *supra* note 101, at 561–63 (discussing the prevalence of such "as if" legal exceptions).

[118] *See id.* at 561–62 (discussing preclusion and stare decisis as examples of "as if" rules); *see also* Nixon v. United States, 506 US 224, 240 (1993) (White, J., concurring) ("[T]he issue in the political question doctrine is *not* whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches" but rather "whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power." (emphasis in original)).

[119] For example, a court may be required to conclude that a particular plaintiff is barred from relief under a particular law based on the preclusive effect of a prior judgment even if an identically circumstanced litigant who was not a party to the earlier case could

Putting the pieces together, we can see that the bootstrap doctrine does not render jurisdiction-as-power incoherent or descriptively implausible in the manner that critics suggest. Rather, jurisdiction-as-power and the bootstrap doctrine supply different criteria for different decision makers at different stages of the adjudicatory process. From the perspective of the rendering court, the applicable jurisdictional rules supply the criteria of legal validity. If a judge on such a court were to conclude that not all applicable jurisdictional conditions had been satisfied, she would lack any authority to bind the parties. All that would be left to do would be to dismiss the case.[120] But from the perspective of a later court called upon to recognize an earlier court's putative judgment, the criteria of validity would be supplied instead by the bootstrap doctrine. That doctrine requires the recognizing court to defer, in nearly all circumstances, to the rendering court's determination regarding its own jurisdiction, even if that determination were erroneous.

C. Why It Matters

Knowing that it is possible to conceptualize jurisdiction as power notwithstanding the bootstrap doctrine's preeminence is not the end of the story. Even if such a conceptualization is possible, one might reasonably ask whether we *should* continue to equate jurisdiction with power or whether some alternative conceptualization might be preferable. For example, Professor Scott Dodson has suggested that existing definitions of jurisdiction

---

recover under the exact same law. *See* Taylor v. Sturgell, 553 U.S. 880, 892 (2008). Likewise, a district judge adjudicating a case in the U.S. District Court for the District of Maryland may be obligated to interpret the Fourth Amendment in accordance with the precedent established by the U.S. Court of Appeals for the Fourth Circuit; but that same judge, if sitting by designation on a panel of the U.S. Circuit Court of Appeals for the Third Circuit, would be free to reach a contrary conclusion. *Cf.* 28 U.S. Code § 292(d) (authorizing the Chief Justice to temporarily assign district judges to a court of appeals in another circuit). And though lower courts are strictly bound by Supreme Court precedent, the Court has also acknowledged that its own decisions may sometimes reflect an incorrect view of the underlying law. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (instructing that lower courts should not attempt to anticipate an overruling of Supreme Court precedent, while acknowledging that the Court itself may overrule an earlier decision in order "to correct a seriously erroneous interpretation of statutory language"); *cf.* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (describing *Korematsu v. United States*, 323 U.S. 214 (1944), as "gravely wrong the day it was decided").

[120] Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869))).

should be replaced with a new definition that would limit the "jurisdictional" label to rules that "determine[ ] forum in a multiforum system."[121] Dodson argues that this new definition would avoid the confusion that has grown up around the "jurisdictional" label while allowing the concept to still play a meaningful role in "help[ing] [to] allocate cases, define boundaries, and maintain relationships among competing forums."[122] The possibility of alternative definitions, such as Dodson's, requires some consideration of the power-based definition's continued usefulness.

One argument in favor of the power-based definition is grounded in longstanding historical practice and usage. As already noted, the equation of jurisdiction with a court's power or basic authority has predominated in Anglo-American law for centuries and continues to function as the most prominent definition in current use.[123] In view of this longstanding and widely accepted usage, it seems reasonable to place the burden of justification upon those seeking a redefinition. One way to meet that burden might be to show that existing definitions are conceptually incoherent or descriptively implausible.[124] But if, as argued above, jurisdiction-as-power is not rendered incoherent or implausible by the widespread acceptance of the bootstrap doctrine, this particular argument no longer suffices as a justification for redefinition.

A second reason for continuing to conceive of jurisdiction as power might be grounded in considerations of convenience. If jurisdictional rules are conceived of as existence conditions in the manner described above,[125] then such rules are practically unavoidable. In order for courts to fulfill their institutional function, there must be *some* rules to define those courts' power and authority. At a minimum, we need some criteria to distinguish a judge clothed with the lawful authority of the state from a bathrobe-clad eccentric wielding a croquet mallet as a gavel.[126] But

---

121 *Jurisdiction and Its Effects*, *supra* note 15, at 634.

122 *Id.*

123 *See supra* notes 16–17 and accompanying text; *see also, e.g.*, Lee, *supra* note 4, at 1615 ("Our legal culture insists that there does exist an essential quality making jurisdiction unique—power.").

124 This is the tack taken by most leading skeptics of the power-based definition of jurisdiction. *See supra* note 21.

125 *See supra* Part II.

126 *Cf.* John Harrison, *Power, Duty, and Facial Invalidity*, 16 U. PA. J. CONST. L. 501, 523–24 (2013) ("Legal rules identify individuals as judges, constitute courts out of judges, and establish the jurisdiction of courts. . . . In order to perform their function, the United States Marshalls must be able to distinguish judges from imposters, and legal rules make that distinction.").

even after we know which individuals are judges and which institutions are courts, we still need some criteria for determining which questions such courts are entitled to answer, which individuals' rights and responsibilities may be altered or determined by such courts, and how different courts and legal systems relate to one another and to other official decision makers. The "jurisdictional" label has traditionally been attached to rules that address the latter issue. And maintaining that label seems far more convenient than coming up with a new, alternative nomenclature.

Of course, arguments of this sort assume the continuing utility of distinguishing rules that purport to limit courts' power from other types of rules that courts are obliged to follow. Under the traditional view, the utility of this distinction was obvious, as only judgments rendered by courts that lacked jurisdiction would be vulnerable to collateral attack. The bootstrap doctrine has complicated this picture by allowing for the validation of most jurisdictionless judgments. But the prospect that judgments properly deemed void under the applicable jurisdictional rules are likely—even very likely—to be treated as valid by later decision makers does not necessarily render the distinction between "jurisdictional" and "nonjurisdictional" rules irrelevant.

The continuing utility of jurisdiction in the face of a validating rule like the bootstrap doctrine would be most obvious in a system of "acoustic separation" in which courts rendering judgments acted in complete ignorance of the standard that recognizing courts would use to determine whether those judgments were valid.[127] In such a hypothetical world, those responsible for designing the rules that govern the power and authority of the courts might plausibly see value in designing two different sets of criteria for determining judgment validity. For courts responsible for adjudicating cases and rendering judgments in the first instance, rule makers might well have an interest in encouraging the belief that any decision taken in the absence of—or in excess of—their legally specified jurisdiction will be void and of no legal effect. Such a rule might encourage courts to scrupulously adhere to the limits placed on their decisional authority, thereby facilitating the allocation of decisional responsibilities preferred by the lawmakers. The traditional voidness doctrine largely tracked this design choice.

---

[127] *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626 (1984).

But when considering the criteria to be used by later courts called upon to recognize or enforce those earlier courts' judgments, the lawmakers might well prefer a different balance. Once the issue of jurisdiction has been fully considered and determined by a person authorized to serve as a judge, the lawmakers might plausibly conclude that the interests in certainty, finality, and judicial efficiency would be better served by a rule that validates all but the most egregious or exceptional jurisdictional errors, resulting in something like the current bootstrap doctrine.[128]

In the real world, no such acoustic separation is possible. Courts are called upon both to render judgments and to recognize prior judgments, and no clean institutional separation of these functions seems practicable or desirable. Judges will thus always have knowledge of the validation criteria prescribed to both rendering courts and recognizing courts. But such knowledge need not be fatal to the practical division of validation criteria sketched above. Despite the significant inroads made by the bootstrap doctrine, "the judicial attitude to jurisdiction retains both the rhetoric and the psychology of power and powerlessness."[129] It is thus possible that courts continue to perceive jurisdiction as a genuine limit on their decisional authority, notwithstanding their knowledge that later courts will apply a different test of judgment validity.

This is more than just possible; anyone who has followed the workings of the federal courts with any degree of attentiveness has seen it done repeatedly.[130] More than three-quarters of a century after the bootstrap doctrine's ascendance in U.S. law, federal courts remain scrupulously attentive to the jurisdictional limits placed on their own authority, at least when a jurisdictional obstacle is revealed on direct review rather than presented in a collateral attack.[131]

---

[128] *See supra* note 93 and accompanying text (discussing policy rationales for the bootstrap principle).

[129] Dane, *supra* note 19, at 120.

[130] *Cf.* TOM QUIRK, MARK TWAIN AND HUMAN NATURE 1 (2013) (describing the possibly apocryphal quote attributed to Mark Twain in response to a question about his belief in infant baptism: "Believe in it? Hell, I've seen it done!").

[131] *See, e.g.*, *Steel Co.*, 523 U.S. at 94–95 ("The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception." (alteration in original) (quotation marks omitted) (quoting Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884))); Foster v. Chatman, 578 U.S. 488, 496 (2016) ("Neither party contests our jurisdiction to review [the plaintiff's] claims, but we 'have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party.'" (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006))).

Moreover, there may be a practical benefit to encouraging courts to focus on issues of power and powerlessness in the way that the traditional conception of jurisdiction prescribes. In some respects, a court's duty to adhere to the rules that limit and regulate its jurisdiction are similar to those that regulate the parties' substantive rights and relationships with one another and the procedures that courts should use in processing claims. A court that makes a mistake about substantive or procedural law—as all courts at least sometimes will—may erroneously deprive the parties of entitlements they would have expected in a world where perfectly accurate decision-making were possible.

The same is true of a court that makes an error regarding its jurisdiction. But a court that purports to adjudicate a claim over which it lacks jurisdiction has done something more. Such a court has claimed an authority that does not belong to it and usurped an authority that belongs somewhere else.[132] Even a court that reaches an accurate determination of every substantive and procedural issue in the case before it has still behaved wrongfully.[133] Far from possessing the "right to be wrong" that characterizes jurisdiction, such courts do "not even have the right to be right."[134]

This emphasis on power and powerlessness, on authority and usurpation, has particular significance for one of jurisdiction's principal institutional functions—namely, the allocation of decision-making authority across different actors and institutions.[135] As the following Part will show, defining jurisdiction as power helps to reinforce jurisdiction's allocative functions by encouraging courts to be attentive to, and to work within, the legally prescribed boundaries of their authorized decision-making authority.

---

[132] The connection between "jurisdiction" and "usurpation" is nearly as deeply rooted in judicial rhetoric as the connection between jurisdiction and power. *See, e.g.*, Commonwealth of Kentucky v. Powers, 201 U.S. 1, 35 (1906) ("This court, while sustaining the subordinate courts of the United States in the exercise of such jurisdiction as has been lawfully conferred upon them, must see to it that they do not usurp authority not affirmatively given to them by acts of Congress."); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351–52 (1871) ("Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority."); Hickey's Lessee v. Stewart, 44 U.S. (3 How.) 750, 762 (1845) ("[N]o power having been conferred by Congress, on that court, to take or exercise jurisdiction . . . the exercise of jurisdiction was a mere usurpation of judicial power.").

[133] *See, e.g.*, Maxfield's Lessee v. Levy, 4 U.S. (4 Dall.) 330, 334 (C.C.D. Pa. 1797) (opinion of Iredell, J.) ("A jurisdiction assumed without authority, would be equally an usurpation, whether exercised wisely, or unwisely.").

[134] Dane, *supra* note 19, at 23.

[135] *See, e.g.*, Lees, *supra* note 13, at 1488 ("For the most part, jurisdictional rules embody a deeply seated political principle of governance, namely that law-speaking authority is divided and distributed to multiple law-speaking institutions and that those institutions ought to be kept separate from one another.").

III. THE ALLOCATIVE FUNCTIONS OF JURISDICTION

The idea that jurisdiction is closely related to the allocation of decision-making authority is hardly novel. Contests over the allocation of decision-making authority informed the development of the voidness principle in early English law and contributed to its vitality in early U.S. jurisprudence.[136] And multiple modern commenters have suggested that allocation can serve as a useful guiding principle for distinguishing jurisdictional rules from other types of legal rules.[137] Missing from these accounts, however, is a full appreciation of the distinctive ways in which jurisdiction's connection to judicial power helps to facilitate jurisdiction's allocative functions. This Part aims to examine the connection between the power-based conception of jurisdiction's identity and the allocation of decision-making authority by examining four distinct ways in which jurisdictional rules allocate power across decision-making institutions: (1) allocations among forums within a particular legal system, (2) allocations between forums in different legal systems (particularly across national boundaries), (3) allocations across time, and (4) allocations between courts and other types of decision-making institutions, such as legislatures and executive officials.

A. Allocations Among Forums Within a Legal System

One important function of jurisdictional rules is to allocate decision-making authority among different forums within a particular legal system. This function is so central to jurisdiction's practical significance that Professor Dodson suggests that it should replace the power-centered conception as *the* defining feature of jurisdiction as a legal concept.[138] Dodson's proposed redefinition is both overinclusive and underinclusive when measured against currently accepted usage of the "jurisdictional"

---

[136] *See Filling the Void*, *supra* note 54, at 165–68 (discussing royal courts' competition with local and ecclesiastical courts in England and jurisdictional conflicts between early U.S. state courts as influences in the development and continued vitality of the voidness doctrine).

[137] *See, e.g.*, *Jurisdiction and Its Effects*, *supra* note 15, at 634 (suggesting that "jurisdiction" be redefined to mean any rule that "determines forum in a multiforum system"); Lees, *supra* note 13, at 1478 (proposing that the jurisdictional label should be applied to the "rules and requirements play a role in shaping th[e] boundaries" of "an institution's authority with respect to other institutions").

[138] *Jurisdiction and Its Effects*, *supra* note 15, at 634.

label.[139] But it does signal the importance of jurisdictional rules and limitations as at least one important device through which power is channeled within a given legal system.

Consider the various ways in which jurisdictional rules divide decision-making authority within the U.S. legal system. The U.S. Constitution limits the jurisdiction of the federal courts to nine specifically enumerated heads of jurisdiction.[140] The jurisdiction of the federal courts is further constrained by Congress, which possesses and has exercised the power to prescribe jurisdictional limits on the federal courts beyond those specified by the Constitution.[141]

An important function of the limited scope of federal jurisdiction is to preserve a domain of decision-making autonomy for the state courts.[142] The limited nature of the Constitution's delegation of federal judicial power has led federal courts to presume their own lack of jurisdiction unless and until it is affirmatively demonstrated by the parties.[143] These limitations are buttressed by a number of subsidiary doctrines, such as those treating objections to federal subject matter jurisdiction as nonwaivable, nonforfeitable, and not amenable to discretionary or equitable relief by the courts.[144] These limiting principles, along with judicially devel-

---

[139] *Id.* at 635–36 (acknowledging that his proposed definition would classify as nonjurisdictional some doctrines that are conventionally regarded as jurisdictional and as jurisdictional some doctrines that are conventionally regarded as nonjurisdictional).

[140] U.S. CONST. art. III, § 2, cl. 1.

[141] Congress's authority to make "exceptions and regulations" to the Supreme Court's appellate jurisdiction is expressly recognized in the text of Article III. U.S. CONST. art. III, § 2, cl. 2. Congress's control over the jurisdiction of the federal district courts and intermediate appellate courts is inferred as a corollary of its more general power to determine whether or not to establish such courts. *See* U.S. CONST. art. III, § 1 (vesting the "judicial Power of the United States" in the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish"); *see also, e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("[H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.").

[142] *See* HENRY M. HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM xi (1953) ("The jurisdiction of courts in a federal system is an aspect of the distribution of power between the states and the federal government.").

[143] *See, e.g.*, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside [the federal courts'] limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction." (citations omitted)); Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 11 (1799) ("A circuit court [ ] is of *limited* jurisdiction. . . . And the fair presumption is . . . that a cause is without its jurisdiction, till the contrary appears.").

[144] *See infra* note 218 and accompanying text.

oped discretionary doctrines allowing courts to decline the exercise of jurisdiction in limited circumstances,[145] leave a substantial amount of the nation's judicial business in the hands of the state courts.[146]

A further allocation of decision-making authority is reflected in the distinction between original and appellate jurisdiction in the federal system. By limiting parties' ability to seek relief from trial court rulings prior to entry of a final judgment,[147] the limited nature of appellate jurisdiction allows trial courts the freedom to revisit and revise their interlocutory orders and protects appellate courts from being inundated with requests for piecemeal review.[148] Like subject matter jurisdiction, appellate jurisdiction is regarded by the courts as a necessary condition for the exercise of their power and if such condition is not satisfied, the appellate court is deemed "powerless" to proceed.[149]

The doctrine of personal jurisdiction serves a similar allocative function by distributing decision-making authority among the various state courts based on their respective connections to the parties and the claims at issue in a case.[150] Current Supreme

---

145 *See, e.g.*, R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 498, 501 (1941) (allowing federal courts to abstain from exercising jurisdiction where state proceedings could settle an unresolved issue of state law in a way that would avoid the need to decide a difficult issue of federal constitutional law); Younger v. Harris, 401 U.S. 37, 53–54 (1971) (prohibiting federal court interference with ongoing state criminal proceedings); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–20 (1976) (authorizing abstention to avoid needless duplication of effort with parallel state-court proceedings).

146 *See* Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1039–40 (2020) (reporting data from 2015 showing that "litigants filed 86.2 million cases in local [state] courts" compared to "343,176 cases [filed] in federal courts" during that year).

147 *See* 28 U.S.C. § 1291 (2020) (authorizing federal courts of appeals to exercise jurisdiction over "appeals from all final decisions of the district courts"); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238 (2007) ("[T]he [ ] final judgment rule [ ] ordinarily postpones any appellate review until the district court reaches a final judgment.").

148 *See, e.g.*, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (noting that the final judgment rule protects against "piecemeal appeals" that would "undermine the independence of the district judge" and "also serves the important purpose of promoting efficient judicial administration").

149 *See id.* at 379:

> [T]he finality requirement embodied in § 1291 is jurisdictional in nature. If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. A court lacks discretion to consider the merits of a case over which it is without jurisdiction.

150 *See* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 61 (2010) ("[The] constitutional law limiting the scope of personal jurisdiction in state courts in cases involving domestic actors and events serves an *allocational* function: it defines which states can and which states cannot provide a forum to issue binding judgments." (emphasis in original)).

Court doctrine allows state courts to exercise "general jurisdiction" over all claims asserted against a defendant who is "essentially at home" in that state[151] but limits jurisdiction over nonresident defendants to those claims that are in some way directly connected to the defendant's purposefully developed contacts or connections with the forum state.[152] Unlike subject matter jurisdiction, personal jurisdiction is a waivable defense that can be surrendered or forfeited by party conduct.[153] But like subject matter jurisdiction, personal jurisdiction is regarded as "'an essential element of the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication.'"[154]

But not all rules that allocate decision-making authority among different forums are properly characterized as jurisdictional. Consider, for example, laws governing federal venue, which limit the permissible forums in which a case may be filed and provide for moving cases to different courts in specified circumstances.[155] Unlike jurisdictional rules, which focus on the adjudicative authority of a particular court, "[v]enue rules generally reflect equity or expediency in resolving disparate interests of parties to a lawsuit in the place of trial."[156] As such, venue provisions reflect a classic example of procedural rules. Procedural rules regulate the *manner* of adjudicating claims within the court's power without purporting to limit or determine the existence of adjudicatory power itself.[157] Unlike jurisdiction, which focuses on "separation of authority among institutions," procedural rules tend to focus on different values, such as "efficiency, cost-effectiveness, autonomy, predictability, and fairness."[158]

The similar functional roles that jurisdiction and procedure play in allocating decision-making authority sometimes leads to difficult line-drawing problems for courts trying to distinguish the

---

151 Daimler AG v. Bauman, 571 U.S. 117, 138–39 (2014) (quoting Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915, 919 (2011)).

152 *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024–25 (2021).

153 Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinée, 456 U.S. 694, 703–05 (1982).

154 Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) (quoting Emps. Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937)).

155 28 U.S.C. §§ 1390–1413.

156 Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 651 (1992); *see also, e.g.*, Olberding v. Ill. Cent. R. Co., 346 U.S. 338, 340 (1953) (explaining that the federal venue statute "is not a qualification upon the power of the court to adjudicate, but a limitation designed for the convenience of litigants").

157 *See* Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1552 (2008) ("While jurisdictional rules define *whether* a court can exercise power to hear and resolve a case, procedural rules dictate *how* a court will do so." (emphasis in original)).

158 *In Search of Jurisdiction*, *supra* note 2, at 60.

two.[159] But the distinction is nonetheless important. For one thing, the different functions and purposes of procedural and jurisdictional rules typically correspond to differences in the effects attributed to such rules. For example, like most other procedural rules (but unlike subject matter jurisdiction), venue is regarded as a personal privilege of the litigants that can be waived or forfeited by party conduct.[160] Procedural rules are also typically, though not invariably, applied with a greater degree of flexibility and discretion than jurisdictional rules.[161]

More fundamentally, jurisdiction and procedure proceed from different starting assumptions and rhetorical justifications. Because procedural rules are generally viewed as mechanisms for attaining some background purpose or objective—for example, efficiency, accuracy, or fairness—courts are often much more willing to bend, modify, or excuse noncompliance with such rules in circumstances in which strict compliance would inhibit attainment of those objectives.[162] Some such authority over procedure might be seen as inhering in the very nature of the courts' judicial power.[163]

Jurisdiction is different. Jurisdiction, at least in its idealized form, can never be made to bend to a court's "inherent authority"

---

[159] *See, e.g.*, *Jurisdiction and Its Effects*, *supra* note 15, at 623–26 (describing the Supreme Court's recent efforts to distinguish jurisdictional rules from other types of legal rules).

[160] *See, e.g.*, Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167–68 (1939):

> The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But . . . the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition.

[161] *See, e.g.*, Torres v. Oakland Scavenger Co., 487 U.S. 312, 316–17 (1988) (noting that federal courts may excuse "technical[ ]" variance "with the letter of a procedural rule" but "may not waive [ ] jurisdictional requirements . . . even for 'good cause shown' . . . ." (citation omitted)); Karen Petroski, *Statutory Genres; Substance, Procedure, Jurisdiction*, 44 LOY. U. CHI. L.J. 189, 215 (2012) (identifying "insusceptibility to judicial modification" as a "special attribute[ ]" of jurisdictional rules "that nonjurisdictional rules largely lack").

[162] *See In Search of Jurisdiction*, *supra* note 2, at 60 ("If the procedural rule in question is designed to promote fairness or equitable administration, then it is reasonable to allow courts to bend or break the procedural rules in certain cases when equity or fairness demands it."); *cf.* Washington v. Ryan, 833 F.3d 1087, 1103 (2016) (Bybee, J., dissenting) ("[Procedural rules] must be respected and enforced, but these rules, after all, are our rules and we feel a freer hand in the flexible application of those rules.").

[163] *Cf.* Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) (noting that while "the exercise of the inherent power of lower federal courts can be limited by statute and rule," it should not be "'lightly assume[d] that Congress has intended to depart from established principles,' such as the scope of a court's inherent power" (quoting Weinberger v. Romero–Barcelo, 456 U.S. 305, 313 (1982))).

because jurisdiction *is* the court's authority. Jurisdiction presents itself as a binary—something that either exists or does not, that courts either possess or do not.[164] The criteria that define a court's jurisdiction may give the court discretion regarding whether to exercise jurisdiction in a particular case or category of cases.[165] But a court that determines it lacks jurisdiction has no discretion to exercise authority over the parties and subject matter of the lawsuit in the interests of some broader panoply of background values or principles.[166]

As various scholars have recognized, this rigid and inflexible rhetoric of jurisdiction masks a more complex reality.[167] Some rules that seem to limit a court's jurisdiction might be amenable to reclassification as nonjurisdictional.[168] The language of jurisdiction-limiting provisions and the substance of jurisdiction-limiting doctrines can sometimes be stretched to allow courts to exercise jurisdiction that seems to be foreclosed (or to decline jurisdiction seemingly reposed in them).[169] Lines of demarcation that are clear in theory are sometimes revealed to be murky and indeterminate in application.[170]

But despite such complexities, it seems quite plausible that jurisdiction's binary self-presentation facilitates the allocation of decision-making authority in a way that more overtly procedural

---

[164] *See, e.g.*, Adkins v. VIM Recycling, Inc., 644 F.3d 483, 492 (7th Cir. 2011) ("Subject matter jurisdiction . . . is usually thought of in binary terms. It either exists or it does not."); May v. Wal-Mart Stores, Inc., 751 F. Supp. 2d 946, 951 (E.D. Ky. 2010) ("Federal jurisdiction is a binary choice. The switch is either on or off.").

[165] *See, e.g.*, 28 U.S.C. § 1367(c) (authorizing federal courts to decline jurisdiction over pendent state law claims in certain circumstances).

[166] *See, e.g.*, Dane, *supra* note 19, at 40 ("The law can give judges discretion [over] whether they will exercise their jurisdiction. . . . But courts cannot have discretion to decide whether they have jurisdiction. Crudely stated, if a court has discretion to decide whether it has jurisdiction, then, it must have jurisdiction.").

[167] *See, e.g.*, Bloom, *supra* note 8, at 995 ("[J]urisdiction is a pliable legal instrument—less a rigid legal structure than a court-help 'bag of tricks.'" (quoting Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 723 (1981))).

[168] *See, e.g.*, Caterpillar Inc. v. Lewis, 519 U.S. 61, 75 n.13 (1996) (characterizing the one-year time limit set forth in 28 U.S.C. § 1446(b) for removing a case from state court into federal court as "nonjurisdictional" and thus subject to waiver by party conduct).

[169] *See* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1217 (2001) (contending that "[d]espite the [Supreme] Court's jurisdiction-first rhetoric, it has," in certain cases, chosen to "dispense[ ] federal judicial power based on how important the Court considers the federal interests at stake, on the merits, and how necessary the Court considers it to provide a federal remedy where those interests are impaired").

[170] *See* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 13–14 (2011) ("[J]urisdictional doctrine is riddled with uncertainty and complexity. Indeed, virtually every jurisdictional doctrine contains opacity that the Court continues to defend, despite its simultaneous rhetoric to the contrary." (citing Field, *supra* note 167, at 684)) [hereinafter *Jurisdictional Clarity*].

rules would not. As Professor Perry Dane observes, "[l]aw is a world of words" that "depends upon a singular confidence in the power of words."[171] Maintaining jurisdiction's identity as both a source of and limitation on judicial power encourages courts to be attentive to the limits of their own decision-making authority, as well as their relationships with other authoritative decision makers. The distinction between jurisdictional rules and other types of legal rules serves as a reminder that courts derive their authority from sources external to themselves and that their authority is thus limited by those external sources.[172] A judge cannot candidly admit to pressing beyond such limits—no matter how compelling the justification—without undermining the very authority she claims to be exercising.

B. Allocations Between Different Legal Systems

In addition to allocating authority among different adjudicative institutions within a particular legal system, jurisdiction also facilitates the allocation of authority between different legal systems. The division of authority between state and federal courts reflected in federal subject matter jurisdiction and the interstate division resulting from the limits on state-court personal jurisdiction could plausibly be characterized as reflecting an intersystemic allocation of this sort.[173] But a much clearer example is provided by the context of transnational litigation involving forums or potential forums in two or more different countries.

In the transnational context, jurisdiction's allocative function is most clearly visible in the doctrine of personal jurisdiction. As noted above, personal jurisdiction limits the circumstances in which courts may exercise adjudicative power over nondomiciliaries.[174] In cases brought against foreign defendants in U.S. courts, personal jurisdiction limits judicial authority in much the same way that the reach of state courts is limited in the domestic

---

171 Dane, *supra* note 19, at 3.

172 *See* Perry Dane, *Sad Time: Thoughts on Jurisdictionality, the Legal Imagination*; Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 164, 166 (2008) ("[T]he notion of jurisdictionality suggests that the authority of courts is not grounded merely in their identity as courts, but in a set of discrete, legally delimited, grants of power, beyond whose bounds a judge in a robe might almost as well be any common person on the street.").

173 *See supra* notes 142–146 and accompanying text (discussing federal subject matter jurisdiction); *supra* notes 150–154 and accompanying text (discussing personal jurisdiction).

174 *See supra* note 150 and accompanying text.

context.[175] U.S. courts may also be called upon to determine the jurisdictional reach of foreign courts in cases in which they are asked to recognize or enforce judgments rendered by foreign courts.[176]

In the judgment-recognition context, jurisdiction's perspectival nature is brought to the fore. In discussions of judgment recognition involving the courts of two or more sovereigns, it is common to recognize a distinction between "direct jurisdiction"—i.e., "the jurisdiction a state grants its own courts to render judgments that will be considered valid and enforceable" within the state—and "indirect jurisdiction"—i.e., the standard a court should use "to test the jurisdiction of another state whose judgment is presented to it for recognition and enforcement."[177] Courts of one nation called upon to recognize or enforce judgments rendered by the courts of a different nation are not bound by the rendering court's view of its own jurisdiction. Rather, the recognizing court is free to apply its own jurisdictional standard to determine whether the foreign court's relationship to the parties and subject matter warrants recognizing its judgment as valid.[178]

Most U.S. courts, for example, apply the test prescribed by the U.S. Supreme Court for determining the jurisdictional capacity of state courts to assess the validity foreign judgments.[179] But

---

[175] *See, e.g.*, Daimler AG v. Bauman, 571 U.S. 117, 132–33 (2014); J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 877–78 (2011); William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1207 (2018) ("[T]he conventional approach to the minimum-contacts requirement of personal jurisdiction is that state [and federal] courts . . . apply the same standard to both alien and domestic defendants.").

[176] *See, e.g.*, RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 403:

> A court in the United States will not recognize a judgment of a court of a foreign state if . . . the court that rendered the judgment did not have personal jurisdiction over the party resisting recognition or in rem jurisdiction over the res, or did not have jurisdiction over the subject matter of the dispute.

[177] *See* Harold L. Korn, *The Development of Judicial Jurisdiction in the United States, Part One*, 65 BROOK. L. REV. 935, 969 (1999); *see also, e.g.*, Arthur Nussbaum, *Jurisdiction and Foreign Judgments*, 41 COLUM. L. REV. 221, 224–25 (1941) (explaining the distinction between "direct" and "indirect" jurisdiction).

[178] *See* Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 11 (Rudiger Wolfrum ed., online ed. 2009), https://perma.cc/D665-3HVN ("In the absence of treaty commitments, countries are under no obligation to recognize and/or enforce foreign judgments.").

[179] *See, e.g.*, Ronald A. Brand, *Understanding Judgments Recognition*, 40 N.C. INT'L J.L. & COMM. REG. 877, 889–90 (2015) (noting that "grounds for non-recognition" under virtually all legal rules applied by U.S. courts "include the rule that a [foreign] judgment will not be recognized if the court of origin did not have jurisdiction in accordance with

this standard may sometimes result in a determination that a foreign judgment is invalid and unenforceable in circumstances in which courts of the country where the judgment was rendered would regard it as valid.[180]

The interplay between direct and indirect jurisdictional standards provides a (not always cooperative) framework through which legal systems on the international plane allocate decision-making authority among themselves.[181] Each nation exercises effectively plenary control over how broadly it will view the jurisdictional reach of its own courts. But this authority is significantly constrained by the reality that, in order to obtain recognition or enforcement of those courts' judgments in a different nation, litigants will have to satisfy the test of indirect jurisdiction applied by that other nation's legal system.

As in the domestic sphere, allocation of decision-making authority on the international plane is facilitated by a variety of nonjurisdictional mechanisms as well, including procedural rules, like those governing discovery and joinder of parties,[182] as well as substantive principles, such as the presumption against federal statutory extraterritoriality.[183] But as in the case of domestic allocations, none of these alternative mechanisms carries the same consequence as do jurisdictional limitations.

U.S. rules of personal jurisdiction"). Not all courts apply such a unitary standard in assessing direct and indirect jurisdiction. Courts in many foreign countries, for example, accept a broader set of bases for their own exercise of direct jurisdiction than they are willing to accept in assessing the jurisdictional reach of other countries' courts. *Id.* at 891–92.

180 *See, e.g.*, Kaupthing ehf. v. Bricklayers & Trowel Trades Int'l Pension Fund Liquidation Portfolio, 291 F. Supp. 3d 21, 30–33 (D.D.C. 2017) (refusing to recognize a foreign judgment where the foreign court lacked personal jurisdiction under U.S. standards despite the rendering court's determination that it possessed jurisdiction under its own country's standards).

181 Efforts to coordinate a broad multilateral framework for transnational judgment recognition have not been successful. *See* Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 174–76 (2008) (describing failure of efforts to negotiate a broad multilateral judgment recognition convention in the 1990s). *See generally* Linda Silberman & Andreas Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635 (2000).

182 *See* Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. CHI. L. REV. 2089, 2100–09 (2020) (discussing mechanisms through which litigants in foreign proceedings may access and use discovery ordered by U.S. courts); Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens in Transnational Class Actions*, 97 CORNELL L. REV. 87, 93–95 (2011) (discussing the potential for foreign plaintiffs to bring claims in U.S. courts through the U.S. class action mechanism).

183 *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) ("It is a 'longstanding principle of American law that legislation of Congress, unless a contrary

Indeed, the power-based conception of jurisdiction carries even more significance in the transnational context, where the bootstrap doctrine has made fewer inroads on the traditional voidness principle. The Full Faith and Credit Clause, which governs the recognition due to sister-state judgments, has been read by the Supreme Court to require that state courts' jurisdictional determinations be given preclusive effect in subsequent suits.[184] But no similar federal standard governs the recognition due foreign court judgments.[185] State and federal courts are thus free to reexamine jurisdictional determinations made by foreign courts and to regard such judgments as void if they determine that jurisdiction was lacking.[186] Perhaps unsurprisingly, the claimed lack of jurisdiction provides the most common defense to actions seeking recognition of foreign judgments.[187]

C. Allocations Across Time

In addition to allocating authority within a particular legal system and between different legal systems, jurisdictional limitations also serve to allocate decision-making authority across time. Perhaps the most familiar illustration of this temporal aspect of jurisdiction's allocative function is provided by the related doctrines of ripeness and mootness. Along with the closely related doctrine of standing,[188] ripeness and mootness serve as "gatekeeper doctrines" limiting access to the federal courts for particular types of disputes.[189] But whereas standing limits *who* can

---

intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991))).

184 Durfee v. Duke, 375 U.S. 106, 111 (1963).

185 *See, e.g.*, Nippon Emo-Trans Co. v. Emo-Trans, Inc., 744 F. Supp. 1215, 1229 (E.D.N.Y. 1990) ("New York courts have consistently distinguished between judgments of sister states, which must be accorded full faith and credit as a matter of constitutional law, and judgments of foreign countries, for which full faith and credit is not constitutionally mandated.").

186 *See, e.g.*, Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1324–26 (S.D. Fla. 2009) (concluding that a foreign judgment was not entitled to recognition because rendering court lacked subject matter jurisdiction), *aff'd sub nom.* Osorio v. Dow Chemical Co., 635 F.3d 1277 (11th Cir. 2011); Hunt v. BP Expl. Co. (Libya), 492 F. Supp. 885, 898 (N.D. Tex. 1980) ("[S]ubject matter jurisdiction of a foreign court can be reexamined by a recognizing court.").

187 RESTATEMENT (THIRD) FOREIGN RELATIONS § 482 cmt. C ("The most common ground for refusal to recognize or enforce a foreign judgment is lack of jurisdiction to adjudicate in respect of the judgment debtor."); LINDA SILBERMAN, 1 TRANSNAT'L JOINT VENTURES § 5:3 (2019) ("Lack of judicial jurisdiction of the rendering court is the most common defense to recognition or enforcement of foreign judgments.").

188 *See infra* notes 202–207 and accompanying text (discussing standing).

189 Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 606 (1992).

invoke the courts' adjudicative authority, both ripeness and mootness focus much more centrally on the question of *when* such authority can be legitimately brought to bear.[190] Ripeness bars adjudication of claims that are viewed as having been asserted "too early"—before a threatened injury is sufficiently imminent or concrete to warrant judicial intervention—while mootness limits power to adjudicate claims beyond a point the courts view as "too late"—after the conditions necessary for meaningful judicial redress have passed.[191] These doctrines expressly tie the federal courts' adjudicative power to the passage of time, resulting in certain cases that courts are unable to adjudicate today, but might tomorrow, and other cases over which the courts lack power today, despite their possession of such power the day before.[192]

Other jurisdictional doctrines have less obvious, but nonetheless significant, effects on the allocation of judicial authority across time. For example, the "minimum contacts" test for personal jurisdiction may sometimes result in a court gaining (or, more rarely, losing) adjudicative authority to determine the rights of a particular defendant because of changes in the nature of the defendant's connections with the forum state.[193] Likewise, the "time-of-filing rule" for assessing the existence of federal diversity jurisdiction fixes a particular point in time for assessing jurisdictional sufficiency, allowing courts to ignore subsequent events that might either create or extinguish jurisdiction.[194] The doctrine of foreign sovereign immunity, which bars courts from adjudicating claims against foreign sovereigns or their agencies or instrumentalities, likewise calls for determination of the defendant's status at the time the lawsuit is filed.[195] Jurisdictional

---

190 *Cf.* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973) (describing justiciability doctrines as fundamentally concerned with determining "who may obtain constitutional declarations and when").

191 *See* Warth v. Seldin, 422 U.S. 490, 499 n.10 (1975) (describing ripeness as focusing on "whether the harm asserted has matured sufficiently to warrant judicial intervention" and mootness as focusing on "whether the occasion for judicial intervention persists").

192 *Cf.* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 207 (2012) (Sotomayor, J., concurring) (identifying mootness and ripeness as among the "many longstanding doctrines under which considerations of justiciability or comity lead courts to abstain from deciding questions whose initial resolution is better suited to another time").

193 *See generally* Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101 (2010) (discussing how assessments of the contacts necessary to establish personal jurisdiction may be influenced by the passage of time).

194 Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 570 (2004) ("It has long been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" (quoting Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824))).

195 *See* Dole Food Co. v. Patrickson, 538 U.S. 468, 478–80 (2003).

time limits deprive courts of adjudicative authority after the nonoccurrence of particular events within a specified period of time.[196]

Each of these doctrines has the effect of placing adjudicative authority in a time frame,[197] conferring on particular courts jurisdiction that they previously lacked or might otherwise have lacked—or depriving them of jurisdiction that they previously possessed or could have possessed—based on the passage of time and the occurrence or nonoccurrence of particular events. The equation of jurisdiction with a court's power or basic authority facilitates this temporal allocation by preserving unimpaired the legal status of claims asserted at the wrong time. Unlike statutes of limitations—and other rules that extinguish or bar remediation for claims after a specified period[198]—application of a jurisdictional rule "usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'"[199] Even when no other forum is available to remediate a claim that is jurisdictionally barred,[200] the focus of jurisdictional rules on adjudicative power rather than the status of the underlying right leaves open the way to potential reassertion of the claim if it is later brought within the scope of a particular court's legitimately conferred jurisdiction.[201]

D. Allocations Between Adjudicative and Nonadjudicative Institutions

A further allocative function of jurisdiction involves the allocation of decision-making authority between courts and other types of decision-making institutions, such as legislatures and executive authorities. The Supreme Court has emphasized this

---

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

197 *Cf.* Monaghan, *supra* note 190, at 1384 (describing mootness as "the doctrine of standing set in a time frame.").

198 *See, e.g.*, Am. Trucking Ass'ns, Inc. v. Smith 496 U.S. 167, 221 (1990) ("Statutes of limitations proceed upon the 'presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period.'" (quoting Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 538 (1868))).

199 Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) (quoting Hallowell v. Commons, 239 U.S. 506, 508 (1916)).

200 *Cf. Landgraf*, 511 U.S. at 292–93 (Scalia, J., concurring) (noting that a jurisdictional rule may sometimes "deny a litigant a forum for his claim entirely . . . or may leave him with an alternate forum that will deny relief for some collateral reason (*e.g.*, a statute of limitations bar)").

201 *Cf.* Republic of Austria v. Altmann, 541 U.S. 677, 703 (2004) (Scalia, J., concurring) (noting that jurisdiction-conferring rules can sometimes have the effect of "creating a forum where none existed" before (emphasis omitted)).

particular form of allocation as central to the constitutional limitation of Article III courts to adjudicating actual "Cases" and "Controversies."[202] The Court has described this case-or-controversy requirement, along with "[t]he several doctrines that have grown up to elaborate that requirement," as being "'founded in concern about the proper—and properly limited—role of the courts in a democratic society."[203]

Among the most significant jurisdictional doctrines through which this case-or-controversy requirement is implemented is the doctrine of standing, which aims to assess "whether [a] plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[204] By insisting that plaintiffs demonstrate an actual, concrete injury that is fairly traceable to the defendant's alleged conduct and redressable by the court,[205] the standing doctrine aims to "limit the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'"[206] A corollary of this limitation is that some disputes may be deemed insusceptible to resolution by the federal courts, leaving their resolution to other decision makers, such as the president or Congress.[207]

Other jurisdictional doctrines reflect a similar allocation of decision-making authority to institutions other than courts. The political-question doctrine, for example, has sometimes been explained as a mechanism for preventing courts from interfering with questions properly "entrusted to one of the political

---

202 U.S. CONST. art. III; *see also* Allen v. Wright, 468 U.S. 737, 750 (1984) ("[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded.").

203 *Allen*, 468 U.S. at 750 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

204 *Warth* 422 U.S. at 498–99 (emphasis omitted) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

205 Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009).

206 Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)).

207 *See* United States v. Richardson, 418 U.S. 166, 179 (1974) ("[T]he absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."); Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992):

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."

branches" of government.[208] The sovereign immunity of the federal and state governments has the effect of ensuring that institutions other than courts make certain types of decisions regarding governmental conduct and the allocation of scarce public resources.[209] The doctrine of foreign sovereign immunity preserves a similar realm of decision-making authority for foreign governments while also channeling complaints based on the conduct of foreign governments toward the diplomatic process rather than toward the courts.[210]

As with the other types of allocation discussed in this Section, jurisdictional rules are not the only types of rules that affect the balance of authority between courts and other types of institutions.[211] But once again, the power-centered conception of jurisdiction facilitates certain types of allocations that would not be possible using other types of rules. Unlike substantive and procedural rules that limit or extinguish a litigant's legal entitlements, jurisdictional rules merely limit the availability of a particular forum or a particular group of forums, leaving the parties' underlying substantive entitlements unaffected.[212] Jurisdictional constraints may thus limit the courts' adjudicatory authority over substantive entitlements that the political branches lack the power to alter directly, such as entitlements grounded in the U.S. Constitution.[213] But such restrictions do not alter the substantive

---

[208] *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (quoting Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality opinion)).

[209] *See, e.g.*, Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1869) ("The principle [of sovereign immunity] is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created."); Gray v. Laws, 51 F.3d 426, 431 (4th Cir. 1995) (noting that the concern "that federal court judgments not deplete state treasuries" was among the principal motivations for the adoption of Eleventh Amendment immunity for states).

[210] *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945) (noting that the practice of granting foreign sovereigns immunity from suit "is founded upon the policy . . . that the national interests will be best served when controversies . . . are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings").

[211] *See, e.g.*, *Jurisdiction and Its Effects*, *supra* note 15, at 647 (mentioning "issues of statutory coverage, statutes of limitations, and the like" as examples of rules that similarly "restrict court relief but leave open the possibility of statutory reform by Congress").

[212] *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) (observing that the "[a]pplication of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case'" (quoting *Hallowell*, 239 U.S. at 508 (1916))).

[213] The scope and limits of Congress's authority to selectively limit the jurisdiction of the federal courts with respect to particular types of constitutional claims is the subject of a longstanding debate in scholarship on federal courts. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 307–25 (7th ed. 2015) (describing various aspects of and positions asserted in this debate).

legal obligations applicable to the political branches of government. Even in the absence of judicial review, the president, members of Congress, and other public officials remain bound by their oaths of office to comply with the Constitution and all laws duly enacted under it.[214] Decisions by elected officials regarding the proper actions to take in the absence of judicial reviewability thus reflect not only considerations of policy or political expediency but also—at least as a formal matter[215]—decisions regarding legality.[216] Rules restricting the availability of a judicial forum to the review of such determinations by nonjudicial decision makers effectively allow those decision makers, rather than the courts, to have the last word on the question of legality.

IV. JURISDICTION'S EFFECTS

Understanding jurisdiction's identity as the power or basic authority of a court and its role in allocating decision-making authority among different actors and institutions allows for a clearer understanding of jurisdiction's effects. The association of jurisdiction with power is sometimes assumed to lead directly and perhaps even "inexorably" to a set of "unique and immutable effects."[217] Among other things, characterizing a rule as "jurisdictional" typically leads to the following assumptions: (1) that the rule cannot be waived or forfeited by the parties; (2) that it must

---

214 *See generally* Richard M. Re, *Promising the Constitution*, 110 NW. L. REV. 299 (2016) (discussing the link between constitutional oath taking and officials' obligations to comply with the law).

215 The extent to which legal norms constrain officials in the political branches in the absence of formal sanctions is a subject of academic debate. Skeptical views of the constraining effect of law are reflected in, for example, the works of Professors Eric Posner, Adrian Vermeule, and Frederick Schauer. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 4 (2011) ("[T]he major constraints on the executive . . . do not arise from law or from the separation-of-powers framework . . . but from politics and public opinion."); Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 797–801 (2010) (suggesting that public officials may have little incentive or inclination to obey the law just because it is the law). Professor Julian Davis Mortenson provides a more optimistic perspective. *See, e.g.*, Julian Davis Mortenson, *Law Matters, Even to the Executive*, 112 MICH. L. REV. 1015, 1033 (2015) (contending that "influential actors across the political spectrum take law seriously and have done so even in the teeth of serious threats to the national security" (reviewing JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012) and POSNER & VERMEULE, *supra* note 215).

216 *Cf. Jurisdiction and Its Effects*, *supra* note 15, at 647 (arguing that standing and other doctrines that limit judicial review of decisions by the political branches should not be seen as "jurisdictional" because, inter alia, "Congress and the Executive consider policies and political expediencies, not (usually) unconstitutionality or legality").

217 *Id.* at 623.

be rigidly and inflexibly applied without regard to equitable considerations; (3) that noncompliance may be contested by any party at any time prior to judgment and must be considered by the court sua sponte if no challenge is raised; and (4) that any dismissal for noncompliance with the rule must be without prejudice, preserving the legal status of the underlying claim.[218]

But a closer focus on what it means to speak of jurisdiction as a court's power reveals that several of these associated effects are not, in fact, essential features of jurisdiction but rather incidental features that have come to be associated with particular jurisdictional rules. Nothing about the essential definition of jurisdiction as power demands that any given jurisdictional rule be regarded as nonwaivable, nonforfeitable, insusceptible to equitable or discretionary modification, or obligatory on courts to raise on their own initiative. These features all reflect things that jurisdictional rules could be and often are, but that they are not necessarily.

By contrast, the inability of courts to conclusively determine the parties' rights and responsibilities by entering a binding judgment *is* a necessary, and not merely incidental, feature of jurisdiction's identity. A court that has the capacity to enter a binding judgment possesses the kind of authority that is the hallmark of jurisdiction as it is classically understood. Attempting to decouple this particular effect from jurisdictional rules is to transform jurisdiction into something else, something that jurisdiction necessarily is not.

A. What Jurisdiction Is Not Necessarily

1. Nonwaivable and nonforfeitable.

Perhaps the easiest way to start distinguishing the necessary effects of jurisdiction from the merely incidental effects is by focusing on issues of waivability and forfeitability.[219] These effects are particularly susceptible to decoupling from jurisdiction's identity because they do not actually characterize multiple existing doctrines that are widely recognized as "jurisdictional" in nature.

---

[218] *See* Preis, *supra* note 24, at 1420–21 (listing jurisdiction's presumed effects); *see also Jurisdiction and Its Effects*, *supra* note 15, at 623 (providing a similar list).

[219] Although sometimes used interchangeably, "waiver" and "forfeiture" refer to different concepts; forfeiture refers to "the failure to make the timely assertion of a right," while waiver refers to "the intentional relinquishment or abandonment of a known right." Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 17 n.1 (2017) (alterations omitted) (quoting United States v. Olano, 507 U.S. 725, 733 (1993)).

Personal jurisdiction, for example, is clearly "jurisdictional" and its absence, according to conventional accounts, renders the courts "powerless to proceed to an adjudication."[220] But personal jurisdiction is, and has always been, regarded as a personal privilege that can be waived, consented to, or forfeited by the parties.[221] Sovereign immunity is likewise regarded as a jurisdictional barrier.[222] But as with personal jurisdiction, a sovereign is free to waive the protection sovereign immunity provides, thereby rendering itself amenable to a court's jurisdiction.[223]

The waivable nature of both personal jurisdiction and sovereign immunity poses obvious challenges for those who would define jurisdiction by reference to the list of traditionally associated effects discussed above.[224] One possible response might be to recategorize these doctrines as nonjurisdictional in order to preserve jurisdiction's conceptual identity.[225] But such a project would run counter to centuries of tradition and practice.

A more modest response might be to accept the jurisdictional nature of both personal jurisdiction and sovereign immunity but insist that there is something special about subject matter jurisdiction that requires it to remain nonwaivable. The Supreme Court has suggested an argument along these lines as a basis for distinguishing personal jurisdiction from subject matter jurisdiction, suggesting that the latter doctrine's nonwaivability derives

---

[220] Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) (quoting Emps. Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937)).

[221] *See, e.g.*, Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinée, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."); Pollard v. Dwight, 8 U.S. (4 Cranch) 421, 428–29 (1808) ("By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which they would have stood, had process been served upon them, and consequently waived all objections to the non-service of process.").

[222] *See, e.g.*, FDIC v. Meyer, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature.").

[223] *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997) (noting that sovereign immunity is waivable); *see also, e.g.*, Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613, 620 (2002) (holding that the state waived sovereign immunity when it removed a case to federal court); Gardner v. New Jersey, 329 U.S. 565, 574 (1947) (holding that a state waives immunity when it sues in federal court).

[224] *Cf. Jurisdiction and Its Effects*, *supra* note 15, at 629–31 (discussing deficiencies of effect-based definitions).

[225] *See, e.g.*, Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 18–28 (2008) (arguing that state sovereign immunity could be reconceptualized as a nonjurisdictional doctrine); 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").

from its connection to "sovereignty."[226] But this sovereignty-based rationale obviously fails as a basis for distinguishing sovereign immunity, which—like subject matter jurisdiction—functions as a structural limitation on the sovereign power of the courts.

Nor is it clear why waivers or consent by private parties should be thought categorically incapable of affecting structural judicial powers. For example, current law makes private consent relevant to determining whether certain non–Article III officials, such as federal magistrate judges and bankruptcy judges, may exercise jurisdiction over certain types of claims.[227] More generally, the scope of federal judicial authority over private claims routinely depends on a variety of purely private litigation decisions regarding, among other things, which claims to assert, which parties to name, which court to file in, and whether to remove a case to federal court.[228]

Of course, subject matter jurisdiction in the U.S. legal system typically *is* regarded as nonwaivable and nonforfeitable. And nonwaivability is a sufficiently common feature of jurisdictional rules to make the proposition that "jurisdiction cannot be waived" a plausible description of legal doctrine in much the same way that "birds fly" is a plausible description of the natural world.[229] But in making such statements, it is important to keep in mind the distinction between commonly associated features and features that are necessary and sufficient to define the underlying concept. Just as there are some birds that do not fly (e.g., emus and penguins) and some flying animals that are not birds (e.g., bats and bees), the existence of waivable jurisdictional rules (and

---

[226] *See Ins. Corp. of Ir.*, 456 U.S. at 702 ("[T]he personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."); *see also id.* at 702 n.10 (explaining that if personal jurisdiction "operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.").

[227] *See* 28 U.S.C. § 636(c) (authorizing magistrate judges to "order the entry of judgment" in civil cases where the parties consent); 28 U.S.C. § 157(c)(2) (empowering bankruptcy courts to adjudicate certain categories of cases "with the consent of all the parties to the proceeding"); *see also, e.g.*, Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 669–71 (2015).

[228] *See* Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 8 n.29 (2014) ("Party choices of whom to sue, what claims to assert, the amount of relief to claim, and what court to file in (or remove to), all can establish or defeat subject-matter jurisdiction.").

[229] *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1838 (2012) ("A sentence like 'birds fly' isn't universally true. . . . But [it] is still perfectly acceptable shorthand for describing the world, in a way that 'walruses fly' is not.").

nonwaivable rules that are not jurisdictional)[230] demonstrates that nonwaivability cannot be regarded as a defining feature of "jurisdiction" as a legal concept.[231]

2. Inflexible and insusceptible to equitable accommodation.

In addition to being generally considered nonwaivable and nonforfeitable, jurisdictional rules are also usually assumed to be rigid, inflexible, and insusceptible to judicial modification or equitable accommodation.[232] On this understanding, it is in the nature of jurisdictional rules to be applied "rigidly, literally, and mercilessly," and a court can brook no exception to such harsh treatment without overstepping its lawfully conferred power.[233]

At least part of the intuition driving this rigid and inflexible conception of jurisdiction's identity has already been sketched above. As noted earlier, if jurisdiction is identified with the court's legal power over the parties and subject matter, it can never be a matter of pure judicial discretion or grace to decide whether such power exists.[234] But it hardly follows that the legal standards that define a court's jurisdiction can never allow considerations of equity, undue hardship, or the like to play a role in defining the parameters of that jurisdiction. For example, although the Supreme Court has held that the thirty-day deadline for taking an appeal from a final judgment of a district court is jurisdictional,[235] the statute that provides for that deadline expressly allows for its extension by the district court "upon a showing of excusable neglect or good cause."[236]

---

230 *See, e.g.*, Kontrick v. Ryan, 540 U.S. 443, 457 n.12 (2004) (noting that nonjurisdictional time limits applicable to bankruptcy proceedings may not be modifiable by the consent of a debtor and creditor when the modification might prejudice other creditors); *cf.* United States v. Blaylock, 15 M.J. 190, 193 (C.M.A. 1983) (holding that an unlawful-command-influence defense in court martial proceedings is nonjurisdictional but also nonwaivable).

231 *See, e.g.*, Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1305 (2017) ("Whether an issue is waivable depends on the particular legal standard involved, not on the abstract category to which it belongs.").

232 *See, e.g.*, Bowles v. Russell, 551 U.S. 205, 214 (2007) ("[T]his Court has no authority to create equitable exceptions to jurisdictional requirements.").

233 *See* Dane, *supra* note 19, at 5 ("[I]f a time limit is jurisdictional, courts will interpret and apply it rigidly, literally, and mercilessly."); *see also, e.g.*, *Bowles*, 551 U.S. at 214.

234 *See supra* notes 164–166 and accompanying text; *see also* Dane, *supra* note 19, at 10 ("[C]ourts cannot simply excuse [jurisdictional time limits] as a matter of judicial discretion, if discretion is understood as akin to an act of grace.").

235 *Bowles*, 551 U.S. at 213–14.

236 28 U.S.C. § 2107(c); *see also* Scott Dodson, *Appreciating Mandatory Rules: A Reply to Critics*, 102 NW. U. L. REV. COLLOQUY 225, 230 (2008) (observing that "Congress might make a rule jurisdictional yet also intend it to be subject to some flexibility in application").

Nor is it obvious that less textually explicit statutory directives need to be interpreted in an unflinchingly merciless manner. Most theories of statutory interpretation—textualism included—allow for statutory language to carry nonliteral meanings.[237] Thus, even seemingly clear statutory limits on jurisdiction might be read in light of their surrounding legal context to confer on courts the discretion to take the equities of a particular case into account in determining whether the jurisdictional prerequisites have been satisfied.[238]

Of course, the fact that jurisdictional rules *can* be interpreted and applied flexibly does not necessarily suggest that such flexible application is desirable. Rigid and unflinching application of a jurisdictional rule might have important benefits, such as incentivizing compliance, promoting finality, easing administrability, protecting reasonable reliance interests, and ensuring the equal treatment of similarly situated litigants.[239] It should thus come as no surprise that many jurisdictional rules are, in fact, interpreted and applied in a strict and inflexible manner. The important point is that the inflexibility of jurisdictional rules results from the content of the rules themselves, when read in light of applicable background legal rules and interpretive principles, rather than from anything inhering in the concept of jurisdiction as such.

3. Mandatory and subject to judicial self-policing.

A further cluster of effects typically associated with jurisdiction relates specifically to the obligations of courts. The Supreme Court, for example, has insisted that federal courts must police their own jurisdiction and raise and resolve jurisdictional questions sua sponte, regardless of the stage of proceedings and even if no jurisdictional objection has been raised by any party to the

---

[237] *See, e.g.*, Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RES. L. REV. 855, 856–57 (2020) (contesting the view that textualism requires literalism); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108 (2001) ("Modern textualists [ ] are not literalists.").

[238] *See, e.g.*, *Hybridizing Jurisdiction*, *supra* note 9, at 1459–61; Dane, *supra* note 19, at 63–65.

[239] *Hybridizing Jurisdiction*, *supra* note 9, at 1449–50 (discussing potential benefits of inflexibility); E. King Poor, *The Jurisdictional Time Limit for an Appeal: The Worst Kind of Deadline—Except for All Others*, 102 NW. U. L. REV. COLLOQUY 151, 152 (2008) (contending that ignoring unambiguous jurisdictional time limits "in the name of 'flexibility' or 'equity' . . . causes uncertainty and confusion as to when a judgment is final, invites wasted resources in sorting out whether exceptions apply, and undermines the reliability and evenhandedness that are essential for a system of justice").

litigation.[240] The Court has characterized this obligation as "springing from the nature and limits of the judicial power of the United States."[241]

The presumed obligation of courts to confirm the existence of their own jurisdiction cuts somewhat closer to jurisdiction's conceptual core than some of the other effects mentioned above. As will be discussed in further detail below, any putative exercise of jurisdiction by a court reflects at least an implicit representation by the court that such jurisdiction actually exists.[242] But it does not necessarily follow that courts must police their own jurisdictional boundaries in the particular manner reflected in the Supreme Court's current doctrine concerning subject matter jurisdiction.

For example, because jurisdictional objections need not be regarded as nonforfeitable,[243] a party's failure to raise a particular jurisdictional objection at a particular stage of a litigation might be regarded as grounds for deeming the objection forfeited. A party who has affirmatively invoked a particular court's jurisdiction or made representations supporting the existence of such jurisdiction might likewise be barred by principles of estoppel from later seeking to contest such jurisdiction.[244] Indeed, both forfeiture and estoppel are already recognized by the Supreme Court as permissible bases for establishing a court's personal jurisdiction over a defendant.[245] And though the Court has viewed state sovereign immunity as somewhat less vulnerable to forfeiture

---

[240] *See, e.g.*, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999) ("[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level."); Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884):

> [T]he rule . . . is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.

[241] *Mansfield*, 111 U.S. at 382.

[242] *See infra* notes 274–276 and accompanying text.

[243] *See supra* notes 219–228 and accompanying text.

[244] *Cf.* DiFrischia v. N.Y. Cent. R.R., 279 F.2d 141, 144 (3d Cir. 1960) (holding that a party was estopped from denying previously admitted allegations of diverse citizenship). *But see* Mennen Co. v. Atlantic Mut. Ins. Co., 147 F.3d 287, 294 n.9 (3d Cir. 1998) (noting that *DiFrischia*'s holding had been repudiated by subsequent Supreme Court precedent).

[245] *See Ins. Corp. of Ir.*, 456 U.S. at 704 ("[T]he requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue.").

than personal jurisdiction,[246] the Court has signaled that the sovereign immunity of state governments is not the type of jurisdictional issue that need be raised and addressed by the courts sua sponte.[247]

Alternatively, a particular legal system might allow courts to presume the validity of a plaintiff's jurisdictional allegations absent sufficiently clear proof to the contrary. Such a presumption is contrary to current Supreme Court doctrine, which requires jurisdiction to be affirmatively demonstrated by the proponent.[248] But it is consistent with the practices of many state courts, which place the burden of disproving jurisdiction on the party contesting its existence.[249] Such an approach may also find some support in the early practices of federal courts, which were much more dependent on pleadings to determine whether the factual requisites of jurisdiction were satisfied.[250]

B. What Jurisdiction Necessarily is Not

For reasons discussed in the preceding Section, I agree with those scholars who have argued that jurisdictional rules are susceptible to a broader and more varied range of effects than is typically assumed.[251] But it does not follow that the effects properly attributable to jurisdiction are infinitely malleable. For the term "jurisdiction" to function as a useful legal concept, it must carry

---

[246] *Compare* Edelman v. Jordan, 415 U.S. 651, 678 (1974) (holding that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court" and can be raised for the first time on appeal), *with Ins. Corp. of Ir.*, 456 U.S. at 705 (observing that "the failure to enter a timely objection to personal jurisdiction" in a responsive pleading "constitutes . . . a waiver of the objection").

[247] Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 515 n.19 (1982) ("[W]e have never held that [Eleventh Amendment defenses] . . . must be raised and decided by this Court on its own motion.").

[248] *See supra* note 143.

[249] *See, e.g.*, Lavallie v. Jay, 945 N.W. 2d 288, 291 (2020) ("State courts of general jurisdiction enjoy a presumption of jurisdiction, and the party challenging subject matter jurisdiction bears the burden of proving the court lacks jurisdiction."); GKN Co. v. Magness, 744 N.E. 2d 397, 404 (Ind. 2001) ("As a general proposition, the party challenging subject matter jurisdiction carries the burden of establishing that jurisdiction does not exist.").

[250] *See* Collins, *supra* note 68, at 1831–32 (contending that "in the early Republic, there was heavy, and sometimes exclusive, reliance on the parties' pleadings to settle jurisdictional questions in the federal courts, even when jurisdiction might be lacking 'in fact'").

[251] *See, e.g.*, *Jurisdiction and Its Effects*, *supra* note 15, at 630 (arguing that "jurisdictional rules can have fewer, even none, of the effects commonly associated with jurisdiction"); Preis, *supra* note 24, at 1430 (arguing that Congress can "make jurisdictional laws subject to waiver or forfeiture, not subject to *sua sponte* inquiry, or impose any other effect commonly attached to jurisdictional laws").

at least *some* intrinsic linguistic and legal content. If jurisdiction is understood as the power of a court to conclusively determine the legal rights and responsibilities of the parties who appear before it, then the existence of "jurisdiction" would seem to be a necessary precondition for the court's ability to enter a final judgment that will conclusively bind the parties. By contrast, a rule or condition that does not affect the court's ability to enter such a binding judgment would not properly be regarded as "jurisdictional" in nature.

This somewhat simplified picture of jurisdiction's necessary effects is rendered more complex by the various intricacies of preclusion doctrine. As already discussed, the doctrine of jurisdiction-to-determine-jurisdiction—which reflects a distinctive branch of preclusion law[252]—sometimes allows later courts to behave as if a judgment rendered by a court that lacked jurisdiction was, in fact, valid when issued.[253] Further complexities result from the distinction in preclusion law between claim preclusion and issue preclusion—or, to use a slightly more antiquated and imprecise terminology, res judicata and collateral estoppel.[254]

Claim preclusion describes the set of principles that allow and require courts to "treat[ ] a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action.'"[255] Claim preclusion has two principal components: (1) "merger," which cuts off a successful litigant's ability to reassert the same claim or cause of action in a later proceeding, thereby limiting any potential relief to that reflected in the judgment itself, and (2) "bar," which prohibits an unsuccessful litigant from relitigating the same claim or cause of action in a subsequent proceeding.[256]

Issue preclusion, on the other hand, "recognizes that suits addressed to particular claims may present issues relevant to suits on other claims" and "bars the relitigation of issues actually adju-

---

[252] *See* Clermont, *supra* note 19, at 318.

[253] *See supra* Parts II.A & II.B (discussing the doctrine of jurisdiction-to-determine-jurisdiction and its relationship to the power-based conception of jurisdiction).

[254] 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402 (rev. ed. 2002) (describing the "varying and occasionally conflicting terminology" surrounding preclusion doctrine and efforts to clarify the terminology through the embrace of "claim preclusion" and "issue preclusion").

[255] Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535 (5th Cir. 1978).

[256] RESTATEMENT (SECOND) OF JUDGMENTS §§ 17–19 (AM. L. INST. 1982).

dicated, and essential to the judgment, in a prior litigation between the same parties."[257] Unlike claim preclusion, which only applies in subsequent actions involving the same underlying claims or causes of action, issue preclusion bars relitigation of *any* issues that were actually litigated and necessary to the disposition of a prior adjudication.[258]

A finding of jurisdiction—either explicit or implicit—is generally viewed as essential for claim preclusion, and a dismissal for lack of jurisdiction thus carries no claim-preclusive effect.[259] Issue preclusion, by contrast, can bar relitigation of at least *some* issues determined by a court that acknowledges its lack of jurisdiction—including issues that were necessarily decided by the court in the course of determining that jurisdiction was lacking.[260]

This difference in the respective significance of jurisdiction for claim preclusion and issue preclusion makes sense in view of the two doctrines' different historical and conceptual foundations. Claim preclusion traces its origins to Roman antecedents, which emphasized both the public and private interests in litigation finality as well as "the theoretical conception of a judicial decision as absorbing, when pronounced, that which had till then been a mere cause of action."[261] The influence of this tradition is still visible in the doctrine's modern contours—particularly, the connected features of merger and bar, which collectively extinguish

---

[257] *Kaspar Wire Works*, 575 F.2d at 535–36.

[258] RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. L. INST. 1982).

[259] *See, e.g.*, Frederiksen v. City of Lockport, 384 F.3d 437, 438 (7th Cir. 2004) ("A suit dismissed for lack of jurisdiction cannot also be dismissed 'with prejudice'; that's a disposition on the merits, which only a court with jurisdiction may render."); NextWave Pers. Commc'ns, Inc. v. FCC, 254 F.3d 130, 143 (D.C. Cir. 2001) ("Dismissals for lack of jurisdiction [ ] are not decisions on the merits and therefore have no claim preclusive effect on subsequent attempts to bring suit in a court of competent jurisdiction." (quotation marks and alterations omitted)); RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(a) ("A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim [ ] [w]hen the judgment is one of dismissal for lack of jurisdiction . . . .").

[260] *See, e.g.*, Matosantos Com. Corp. v. Applebee's Int'l Inc., 245 F.3d 1203, 1209 (10th Cir. 2001) ("Although a dismissal for lack of jurisdiction does not bar a second action as a matter of claim preclusion, it does preclude relitigation of the issues determined in ruling on the jurisdiction question." (quoting 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4436 (1981))); Goldsmith v. Mayor & City Council of Baltimore, 987 F.2d 1064, 1069 (4th Cir. 1993) ("[A] jurisdictional dismissal that does not constitute a judgment on the merits so as to completely bar further transactionally-related claims still operates to bar relitigation of issues actually decided by that former judgment."); RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. C (1982) ("When the question of the tribunal's jurisdiction is raised in the original action . . . there is no reason why the determination of the issue should not thereafter be conclusive under the usual rules of issue preclusion.").

[261] 1 GEORGE SPENCER BOWER, THE DOCTRINE OF RES JUDICATA 219 (1924).

the parties' preexisting legal rights with respect to the asserted claims and replace them with a new set of entitlements grounded in the judgment itself.[262]

Issue preclusion, by contrast, originally grew out of Anglo-Germanic ideas connected to principles of estoppel.[263] Like other estoppel doctrines, issue preclusion reflects the view that a party's own conduct can serve as a permissible basis for limiting the positions he or she can later assert in litigation.[264] The core idea underlying issue preclusion is that it is both prudent and fair to prohibit a party who has received a full and fair opportunity to litigate a particular issue from relitigating that same issue in later proceedings.[265] Whereas claim preclusion focuses centrally on the effect of a court's judgment in transforming or extinguishing preexisting rights, issue preclusion is more concerned with the record established by the proceedings leading up to that judgment.[266]

In its earliest iterations, issue preclusion was wholly disconnected from the final judgment, allowing preclusion to attach to any issues resolved by the court, even if no final judgment was

---

[262] *See, e.g.*, Adams v. Davies, 107 Utah 579, 584 (1945) ("Judgments take the place of the cause of action, and are the only admissible criterion of its existence, scope and effect."); Frost v. Thompson, 219 Mass. 360, 367 (1914) ("[A] cause of action, when reduced to a judgment, has ceased to exist as an independent liability, and has changed its nature and is transmuted into the obligation created by the judgment, which is different in kind and essential characteristics from the initial cause of action."); Biddleson v. Whitel (1764), 1 Blackstone W. 506, 507 (K.B.) (describing the parties' preexisting rights connected to the cause of action as having been "drowned in the judgment").

[263] On the historical foundations of issue preclusion and its relationship to claim preclusion, see, for example, Alexandra Bursak, Note, *Preclusions*, 91 N.Y.U. L. REV. 1651, 1660–69 (2016); Robert Wyness Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41, 41–56 (1940).

[264] *See, e.g.*, 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: OR, A COMMENTARY UPON LITTLETON § 667, at 352a (London, J. & W.T. Clarke, 19th ed. 1832) (1628) (explaining that the concept of estoppel "commeth of the French word *estoupe*, from whence the English word stopped: and it is called an estoppel or conclusion, because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth . . . .").

[265] *See* Austin Wakeman Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 3 (1940) (explaining that the "estoppel" underlying issue preclusion "does not rise from representations made by one of the parties upon which the other party has relied" but rather reflects the view that "a party who has once fought out a question in litigation with the other party" should be "precluded from fighting it out again"); *see also* Kilheffer v. Herr, 17 Serg. & Rawle 319, 320 (Pa. 1828) ("[A]s the defendant had an opportunity of showing the truth of the fact, he shall not afterwards be permitted to contradict a record to which he is a party. He is estopped to deny that which has been solemnly ruled against him.").

[266] *See, e.g.*, Cromwell v. County of Sac, 94 U.S. 351, 353 (1877) ("It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel." (quoting Outram v. Morewood (1803), 3 East 346, 355 (K.B.))).

ultimately issued.[267] Even after the doctrine evolved to limit preclusion to issues that were necessary to the court's final judgment, the judgment's role was limited to "perfecting, confirming and authenticating the record of the antecedent episode of the proceeding which constituted the estoppel."[268] Vestiges of this somewhat attenuated relationship between issue preclusion and judgment can still be glimpsed in modern case law allowing at least some determinations reached prior to a final judgment to be regarded as sufficiently "final" to warrant issue preclusive effect.[269]

This clearer picture of jurisdiction's relationship to preclusion doctrine allows for a more accurate description of jurisdiction's necessary effects. At a minimum, a finding of jurisdiction seems to be a necessary precondition for a court's ability to issue the type of judgment that should be entitled to claim-preclusive effect—sometimes referred to as a judgment "on the merits."[270] Claim preclusion defines a judgment's capacity to make new law for the parties—to directly transform or extinguish the parties' legal rights and responsibilities with respect to the claims asserted in a litigation. Claim preclusion is thus intimately connected to the type of authority that is central to the conception of jurisdiction as power described above in Part I.[271]

Issue preclusion, by contrast, is much more tenuously connected to a judgment's lawmaking capacity. To the contrary, the doctrine of issue preclusion sometimes dispenses with the requirement of a valid final judgment entirely.[272] Nor does issue preclusion purport to directly transform, extinguish, or modify any preexisting rights. Rather, it merely limits the types of evidence

---

[267] Bursak, *supra* note 263, at 1664–65.

[268] Millar, *supra* note 263, at 55.

[269] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13:

> The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

See also, e.g., Lummus Co. v. Commonwealth Oil Refin. Co., 297 F.2d 80, 87–90 (2d Cir. 1961).

[270] *See infra* note 348 and accompanying text (discussing the meaning of "on the merits" in the preclusion context).

[271] *See supra* note 41 and accompanying text.

[272] *See supra* note 269 and accompanying text.

and arguments that the parties may use to establish their rights in subsequent litigation.[273]

From these premises, a few conclusions follow. First, a rule or restriction that purports to limit judicial decision-making but does not restrict the court's ability to enter a claim-preclusive judgment is not properly regarded as "jurisdictional" in nature. Such rules may be obligatory on the court—as is true of myriad rules of substantive and procedural law—but they do not deprive the court of the core judgment-rendering power that is central to the classical conception of jurisdiction as power.

Second, a judge who seeks to stay within the limits of the court's prescribed jurisdiction *must* determine that jurisdiction actually exists before proceeding to enter a judgment that he or she expects will carry claim-preclusive effects in subsequent litigation. Even if a merits-based dismissal allows for a decision that is more expeditious and efficient, more obviously correct, or less controversial,[274] the court cannot avoid answering the jurisdictional question, at least implicitly. To the extent that a judge reasonably believes that a particular ruling will or should carry claim-preclusive effect, a decision to issue that ruling unavoidably reflects a decision to exercise jurisdiction. A judicial opinion that purports to "avoid" addressing a jurisdictional issue on such grounds and proceeds to a merits determination (a practice once common in the lower federal courts)[275] might avoid a burdensome, uncomfortable, or potentially erroneous explanation of the court's decision to exercise jurisdiction. But it would not change the fact that the court has, in fact, exercised the power to conclusively bind the parties to its determinations—i.e., that it has exercised jurisdiction.[276]

---

[273] *See, e.g.*, Drennen v. Wren, 416 S.W.2d 229, 235–36 (Mo. 1967) (finding that, where a second suit involves a different cause of action, "the judgment in the first suit does not extinguish the second cause of action by either merger or bar, but may be effective, through collateral estoppel, to conclude the parties as to facts and matters actually contested and litigated in the first action").

[274] *Cf.* Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 305–14 (1999) (summarizing various rationales offered by federal circuit courts for choosing to address merits issues before jurisdictional questions).

[275] *See infra* note 323 and accompanying text.

[276] As then-Judge Clarence Thomas observed in criticizing a decision reflecting a similar attempt to avoid reaching a jurisdictional question:

> The truistic constraint on the federal judicial power [ ] . . . is this: A federal court may not decide cases when it cannot decide cases, and must determine whether it can, before it may. The majority here changes this fundamental precept to read, in effect, that under certain circumstances a federal court should decide

Finally, a court faced with the question of whether to give claim-preclusive effect to a prior adjudication *must* conclude that the rendering court possessed jurisdiction as a necessary step to recognizing the earlier judgment. Such recognition need not require investigation into the factual basis for the rendering court's jurisdiction. A later court might instead rely upon a presumption of the type relied upon by English and early U.S. courts with regard to the rulings of courts of general jurisdiction.[277] Or a finding of jurisdiction might be premised instead on a lawfully authorized "as if" exception of the type reflected in the bootstrap principle.[278] But if jurisdiction is equated with a court's power or basic authority, then such a conclusion regarding the rendering court's authority is unavoidable. Whether acknowledged or not, according claim-preclusive effect to an earlier court's judgment necessarily acknowledges the earlier court's legal authority—i.e., its "jurisdiction"—to conclusively validate, alter, or extinguish the legal rights at issue in the earlier case and to bind the parties to its judgment.

V. IMPLICATIONS

A clearer understanding of jurisdiction's connection to judicial power can help to inform and clarify multiple strands of judicial doctrine as well as broader theoretical debates regarding the judiciary's role in the constitutional framework. This Part focuses on three such potential implications of jurisdiction-as-power for current jurisprudential and constitutional debates. First, reinforcing jurisdiction's identity as adjudicatory power can help to clarify the dividing line separating "jurisdictional" rules from other types of rules and help to eliminate some of the confusion that has crept into judicial doctrine addressing this distinction. Second, understanding the relationship between jurisdiction and power points to a clearer framework for sequencing jurisdictional and nonjurisdictional issues for resolution by the federal courts. Finally, a clearer understanding of jurisdiction's relationship to judicial power can also help to clarify the binding force of judicial judgments on executive branch officials.

> cases regardless of whether it can, and need not determine whether it can, before it does.

Cross-Sound Ferry Servs., Inc. v. ICC, 934 F.2d 327, 340 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in the denial of the petition for review).

277 *See supra* notes 60–70 and accompanying text.

278 *See supra* Parts II.A and II.B.

A. Classification and Effects

As discussed above, jurisdictional rules are not the only types of rules that constrain courts. Other rules, including rules of procedural and substantive law, also bind the courts without purporting to limit or narrow the scope of their jurisdiction. Distinguishing jurisdictional rules and limitations from such nonjurisdictional rules has proven a persistent challenge for courts and commentators. After decades of somewhat incautious use of the "jurisdictional" label, the Supreme Court has endeavored in recent years to clarify the line between "jurisdictional" and "nonjurisdictional" provisions.[279] The Court has adopted a "clear statement rule" demanding that "courts . . . treat [a] restriction as nonjurisdictional in character" unless Congress has clearly manifested a contrary intent.[280] But while the Court's new approach has eliminated some of the needless confusion spurred by unthinking "drive-by" jurisdictional characterizations,[281] it has not succeeded in clearly demarcating the boundary between jurisdictional and nonjurisdictional rules.[282]

To some extent, the persistence of uncertainty surrounding jurisdictional classification may be unavoidable. Jurisdictional policies reflect a diverse range of sometimes competing values that are challenging to reconcile with one another.[283] And such values may sometimes overlap in substantial measure with the values furthered by other types of legal rules, including rules of substantive and procedural law.[284] But despite such challenges, there is reason to believe that a closer focus on jurisdiction's con-

---

[279] *See* Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2033–48 (2015). *See generally* Howard M. Wasserman, *The Demise of "Drive-by Jurisdictional Rulings"*, 105 NW. U. L. REV. 947 (2011).

[280] Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006); *see also, e.g.*, Sebelius v. Auburn Regional Med. Ctr., 568 U.S. 145, 153–54 (2013); Gonzalez v. Thaler, 565 U.S. 134, 141–42 (2012); Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 435–36 (2011).

[281] *See, e.g.*, Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010) ("Our recent cases evince a marked desire to curtail such 'drive-by jurisdictional rulings,' which too easily can miss the critical difference[s] between true jurisdictional conditions and nonjurisdictional limitations on causes of action." (alteration in original) (quoting Kontrick v. Ryan, 540 U.S. 443, 456 (2004))).

[282] *See, e.g.*, Scott Dodson, *A Critique of Jurisdictionality*, 39 REV. LITIG. 355, 360 (2020) ("Though the Court has declared its framework to be clear and simple, the framework has generated a number of complications and oddities that the Court has tended to ignore or gloss over.").

[283] *Jurisdictional Clarity*, *supra* note 170, at 24–26.

[284] *See supra* notes 157–170 and accompanying text (discussing the overlap between jurisdiction and procedure).

nection to adjudicative authority might go some way toward clarifying the boundary that separates jurisdictional provisions from other types of provisions. Although the Supreme Court has gestured toward this idea in certain recent opinions,[285] the Court has too often dispensed with the inquiry into adjudicative authority by viewing jurisdiction as merely a "convenient shorthand" for a defined set of effects.[286]

Consider the Court's 2006 decision in *Arbaugh v. Y & H Corp.*,[287] the case in which the Court first articulated its clear-statement rule for jurisdictional characterization.[288] *Arbaugh* involved a claim brought under Title VII of the Civil Rights Act of 1964,[289] which prohibits various forms of employment discrimination.[290] The Court granted certiorari to resolve a division among the lower courts regarding whether a provision of Title VII limiting the category of "employers" covered by the statute to entities having "fifteen or more employees,"[291] was "jurisdictional or simply an element of a plaintiff's claim for relief."[292] The Court ultimately determined that the statute's employee numerosity requirement was not a jurisdictional limitation based primarily on its assessment that Congress did not intend the restriction to carry the types of effects traditionally associated with jurisdictional rules, such as nonwaivability and mandatory judicial self-policing.[293]

This emphasis on effects does as much to obscure as it does to illuminate. For reasons already discussed, the list of effects typically associated with jurisdictional rules, such as nonwaivability and insusceptibility to equitable exceptions, are

---

[285] *See, e.g.*, *Kontrick*, 540 U.S. at 445 ("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.").

[286] *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134 (2008) (noting that courts have sometimes used the term "jurisdictional" as a "convenient shorthand" for time limits that are construed to limit the effects of waiver or that forbid courts from making equitable exceptions); *see also, e.g.*, *Sebelius*, 568 U.S. at 153 (focusing on the set of effects that attach to "[c]haracterizing a rule as jurisdictional" and observing that such effects render jurisdictional rules "unique in our adversarial system"); *Henderson*, 562 U.S. at 434–36 (describing the significance of jurisdictional characterization in terms of "the consequences that attach to the jurisdictional label").

[287] 546 U.S. 500 (2006).

[288] *Id.* at 515–16.

[289] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6).

[290] *Arbaugh*, 546 U.S. at 503–05.

[291] 42 U.S.C. § 2000e(b).

[292] *Arbaugh*, 546 U.S. at 509.

[293] *Id.* at 514–16.

not essential features of jurisdiction.[294] Congress is thus free to attach as many or as few such effects to particular jurisdictional provisions as it chooses, just as it may attach particular "jurisdictional" consequences to nonjurisdictional rules.[295] More basically, focusing on incidental effects distracts from what should be the principal focus of interpretive inquiry—namely, whether, in view of the available interpretive evidence, it is reasonable to conclude that Congress meant to deprive the federal courts of power to adjudicate the particular claims or category of claims at issue.

In *Arbaugh*, for example, interpreting the numerosity requirement as a limit on federal adjudicatory authority would have produced some highly peculiar consequences. For example, because state courts possess concurrent jurisdiction over Title VII claims,[296] a conclusion that the numerosity requirement functioned as a limit on federal jurisdiction would have left plaintiffs free to pursue their claims against defendants with fewer than fifteen employees in state court. Moreover, if the numerosity requirement were regarded as jurisdictional, federal courts considering a Title VII challenge would have no choice but to resolve that issue before reaching the substantive merits of the case.[297] By contrast, interpreting the provision as going only to the substantive merits would allow courts to dispose of Title VII claims on other merits grounds without reaching the numerosity question—an option that might be particularly attractive where resolving the numerosity issue would require resolution of more challenging factual or legal issues.[298]

None of this is to say that effects are wholly irrelevant to the classification inquiry. Congress does not legislate on a blank slate, and it thus seems reasonable to presume that when it designates a particular restriction as "jurisdictional," it intends the restriction to carry the types of effects typically associated with

---

294 *See supra* Part IV.

295 *See, e.g.*, United States v. Wong, 575 U.S. 402, 408 n.2 (2015) ("Congress may preclude equitable tolling of even a nonjurisdictional statute of limitations."); Eberhart v. United States, 546 U.S. 12, 17–18 (2005) (per curiam) (explaining that a rule can be mandatory without being jurisdictional).

296 Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 821 (1990).

297 *See Steel Co.*, 523 U.S. at 94–95 (holding that federal courts must resolve jurisdictional questions before reaching the merits of a claim); *see also infra* Part V (discussing jurisdictional sequencing).

298 In *Arbaugh*, for example, the applicability of the numerosity requirement turned in part on the determination of whether a certain group of workers was properly regarded as "employees" within the meaning of Title VII or, instead, consisted of independent contractors. 546 U.S. at 508–09.

that characterization.[299] But it is important to recognize the defeasible nature of this presumption and Congress's correlative power to alter the precise bundle of effects associated with any particular "jurisdictional" rule it chooses to prescribe.

Somewhat ironically, given the Supreme Court's emphasis on incidental effects as the hallmark of jurisdiction's identity in recent cases, the Court has been much less attentive to effects that cut much closer to jurisdiction's identity as a source of—and limitation on—judicial power.[300] In its recent decision in *Brownback v. King*,[301] the Court demonstrated a basic misunderstanding of jurisdiction's relationship to these more central effects by suggesting that a jurisdictionless court possesses the authority to conclusively bind the parties to its judgment.

Brownback involved claims asserted against the federal government under the Federal Tort Claims Act[302] (FTCA), a federal statute authorizing plaintiffs to sue the United States for injuries caused by the alleged negligence or wrongful actions of federal employees in specified circumstances.[303] The district court granted the government's motion to dismiss those claims, concluding that the allegations did not state a claim for relief.[304] The question before the Supreme Court was whether that dismissal triggered a provision of the FTCA, providing that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."[305] The Sixth Circuit had found the judgment bar inapplicable, concluding that the district court's dismissal of the case for "lack of subject-matter jurisdiction" did not have any preclusive effect.[306]

The Supreme Court reversed. The Court agreed with the Sixth Circuit that the district court "did lack subject-matter jurisdiction" over the plaintiff's improperly pleaded FTCA claims and acknowledged the usual rule that "a court cannot issue a ruling

---

299 *Cf. In Search of Jurisdiction*, *supra* note 2, at 77 (arguing that courts "should consider the effects of characterizing the provision as jurisdictional or procedural" as one factor, along with others, in determining "whether a jurisdictional or procedural characterization makes sense in the statutory scheme").

300 *See supra* Part IV.

301 141 S. Ct. 740 (2021).

302 28 U.S.C. §§ 1346(b)(1), 2671–2680 (2018).

303 28 U.S.C. § 1346(b).

304 *Brownback*, 141 S. Ct. at 746–47.

305 28 U.S.C. § 2676.

306 *Brownback*, 141 S. Ct. at 747.

on the merits 'when it has no jurisdiction' because 'to do so is, by very definition, for a court to act ultra vires.'"[307] But it nonetheless concluded that where the requirements of pleading a claim and the requirements of pleading jurisdiction "entirely overlap, a ruling that the court lacks subject-matter jurisdiction may simultaneously be a judgment on the merits that triggers the judgment bar."[308]

The Supreme Court claimed that its decision was consistent with the common law of claim preclusion as it existed at the time of the FTCA's enactment in 1946, citing the First Restatement of Judgments as support for its interpretation of the FTCA.[309] But the only provision of the First Restatement cited by the Court, Section 49, provides no support for extending claim-preclusive effect to dismissals based on lack of jurisdiction. To the contrary, Section 49 addresses the effect of a "final personal judgment *not on the merits*" in favor of the defendant and makes clear that such a judgment should *not* preclude the plaintiff "from thereafter maintaining an action on the original cause of action."[310] Rather, such a "judgment is conclusive only as to what [was] actually decided" in the prior proceeding.[311] The comments to Section 49 make clear that a judgment "based on the lack of jurisdiction of the court over the defendant or over the subject of the action" is *not* a judgment on the merits and that such judgments do not "extinguish[ ]" the plaintiff's cause of action.[312] Rather, such a judgment merely prevents the relitigation of any "matter actually litigated and determined" in the prior proceeding.[313]

In other words, according to the First Restatement, judgments rendered by courts that lack jurisdiction over the parties or the subject matter carry issue-preclusive effect but not claim-preclusive effect.[314] The *Brownback* Court elided this important distinction between issue preclusion and claim preclusion and thus misperceived the very different respective relationship that each doctrine bears to jurisdiction.

---

307 *Id.* at 749 (quoting *Steel Co.*, 523 U.S. at 101–02).

308 *Id.*

309 *Id.* at 748–49; *see also* James E. Pfander & Neil Aggarwal, *The Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 430 (2011) (noting that the First Restatement "appeared just four years before the FTCA's adoption").

310 RESTATEMENT (FIRST) OF JUDGMENTS § 49 (1942) (emphasis added).

311 *Id.*

312 *Id.* § 49 cmt. a.

313 *Id.* cmt. b.

314 *See supra* notes 254–269 and accompanying text (discussing the distinction between issue preclusion and claim preclusion).

The Court also invoked the doctrine of "jurisdiction-to-determine-jurisdiction" to support its conclusion that a "federal court can decide an element of an FTCA claim on the merits if that element is also jurisdictional."[315] But as discussed above, the doctrine of jurisdiction-to-determine-jurisdiction operates to insulate a court's determination that it possesses jurisdiction from later attack.[316] It does not, as the *Brownback* Court seems to have assumed, demand that claim-preclusive effect be given to a court's determination that it *lacks* jurisdiction.

The *Brownback* decision marks an incautious extension of preclusion doctrine and an unfortunate aberration in the law of federal jurisdiction. To the extent possible, it should be narrowly cabined to the "unique context" of the FTCA, as the Court suggested it might be.[317] A better path to the same result—and one for which the United States advocated in its merits brief to the Supreme Court—would have been to interpret the FTCA to authorize jurisdiction over cases asserting claims under the statute even if the district court concludes that the plaintiff fails to state a claim on the merits.[318] Finding the FTCA's substantive elements nonjurisdictional would have allowed the courts to accord claim-preclusive effect to dismissals on the merits without distorting the boundaries of traditional preclusion doctrine or ignoring the linkage between jurisdiction and judicial power.

But what if this option were unavailable? What if Congress were to expressly declare that a party's failure to comply with a particular statutory restriction to which it had affixed the "jurisdictional" label should result in the entry of a binding, claim-preclusive judgment? Could courts ignore such a statutory directive based solely on their own preferred understanding of "jurisdiction" as an abstract concept? Of course not. Congress is the master of the language it uses and the courts are obliged to give effect to statutory language even when Congress chooses words that, when read in context, depart from standard definitions.[319]

---

315 *Brownback*, 141 S. Ct. at 750.

316 *See supra* Parts II.A & II.B. (discussing the origins and the theoretical grounding of the jurisdiction-to-determine-jurisdiction doctrine).

317 *Brownback*, 141 S. Ct. at 749.

318 *See* Brief for the United States at 32, *Brownback*, 141 S. Ct. 740 (No. 19-546) ("[C]ontrary to the reasoning of the panel majority, the district court here *did* have subject-matter jurisdiction to enter a preclusive judgment on respondent's FTCA claims." (emphasis in original)).

319 *See, e.g.*, Preis, *supra* note 24, at 1417 ("Congress has the power to create the lower federal courts, and if it wants to define their jurisdiction in odd ways, it is free to do so—just as all of us are free to call a tail a leg if it serves our purposes.").

Congress may, for example, decide to use the term "fruit" in a manner that excludes tomatoes or the phrase "tangible object" in a way that excludes undersized fish even if lexicographers (not to mention botanists and beloved children's authors) hold different views regarding those terms' proper usage.[320] But just as an aberrational statutory usage of "tangible object" would not change the generally accepted meaning of that phrase's constituent terms, a usage of "jurisdiction" to mean something other than a court's adjudicatory power should not be understood to affect the generally accepted and longstanding meaning of that term.

B. Sequencing

A second doctrinal area that might benefit from a closer focus on the connection between jurisdiction and power involves the sequencing of issues for decision by the judiciary. For reasons already discussed, the traditional conception of jurisdiction as power renders the existence of jurisdiction a threshold inquiry that must be resolved before the court may adjudicate the merits of a case.[321] This conception of jurisdiction's "threshold" status was repeatedly invoked by the Supreme Court for more than a century.[322] By the late 1990s, however, nearly all lower federal appeals courts had embraced some form of "hypothetical jurisdiction," a doctrine that "allowed courts to adjudicate a dispute and render a judgment on the merits without first verifying that subject-matter jurisdiction . . . actually existed."[323]

In its 1998 decision in *Steel Co. v. Citizens for a Better Environment*,[324] the Supreme Court seemed to close the door on this practice, instructing that "[t]he requirement that jurisdiction

---

[320] *See* Nix v. Hedden, 149 U.S. 304, 306–07 (1893) (determining that a tomato should be classified as a "vegetable" rather than a "fruit" as those terms were used in the Tariff Act of 1883, notwithstanding dictionary and botanical definitions suggesting that a tomatoes could properly be considered a "fruit"); Yates v. United States, 574 U.S. 528, 534–48 (2015) (interpreting a federal statute that criminalized the destruction or concealment of any "tangible object" in certain circumstances as not applying to a fisherman's destruction of undersized grouper); *cf. Yates* 574 U.S. at 553–54 (Kagan, J., dissenting) (citing Dr. Seuss's *One Fish Two Fish Red Fish Blue Fish* as support for the proposition that "[a] fish is . . . a discrete thing that possesses physical form").

[321] *See supra* notes 274–276 and accompanying text.

[322] *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 305–06 (1962) ("[A] review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before us."); United States v. More, 7 U.S. (3 Cranch) 159, 172 (1805) ("A doubt has been suggested respecting the jurisdiction of this court . . . and this question is to be decided before the court can inquire into the merits of the case.").

[323] Scott Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 5 (2001).

[324] 523 U.S. 83 (1998).

be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'"[325] But just two years later, the Court handed down a decision that seemed to qualify the sweeping holding of *Steel Co.* In *Ruhrgas AG v. Marathon Oil Co.*,[326] the Court held that *Steel Co.*'s directive "that subject-matter jurisdiction necessarily precedes a ruling on the merits" did "not dictate a sequencing of jurisdictional issues" and that therefore lower courts were free to dismiss a case for lack of personal jurisdiction without first resolving all questions regarding the existence of subject matter jurisdiction.[327]

Taken together, *Steel Co.* and *Ruhrgas* seemed to demand that jurisdictional issues be addressed and resolved before *any* nonjurisdictional issue while allowing courts a limited degree of discretion regarding the order in which different kinds of jurisdictional questions should be resolved. This seemingly straightforward demarcation proved untenable, however, following the Court's 2007 decision in *Sinochem International Co. v. Malaysia International Shipping Corp.*[328] *Sinochem* held that courts need not confirm the existence of their own jurisdiction before dismissing a case based on the unambiguously *non*jurisdictional doctrine of *forum non conveniens*.[329]

Lower courts have struggled to make sense of the *Steel Co.*–*Ruhrgas*-*Sinochem* line of cases, producing divisions regarding the proper application of the Supreme Court's jurisdictional sequencing doctrine. Some lower courts have sought to confine the Court's sequencing jurisprudence by reading the command to prioritize subject matter jurisdiction as addressed only to constitutional limits on federal jurisdiction, allowing courts a freer hand to resequence questions regarding statutory limits on jurisdiction.[330] Other courts have disagreed with this approach, insisting

---

[325] *Id.* at 94–95 (quoting Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884)).

[326] 526 U.S. 574 (1999).

[327] *Id.* at 584–85.

[328] 549 U.S. 422 (2007).

[329] *Id.* at 432–36.

[330] *See, e.g.*, Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys., 173 F.3d 46, 54 (1st Cir. 1999) (interpreting *Steel Co.* as "'distinguish[ing] between Article III jurisdiction questions and statutory jurisdiction questions, holding that the former should ordinarily be decided before the merits, but the latter need not be."); Kramer v. Gates, 481 F.3d 788, 791 (D.C. Cir. 2007).

that it is no more permissible for a court to assume its statutory jurisdiction than its constitutional jurisdiction.[331]

Other disagreements center on the range of concededly nonjurisdictional issues that may be addressed and resolved without resolving all jurisdictional questions.[332] Lower courts have held that a diverse array of such putatively "threshold" issues may be resolved without a finding of jurisdiction, including preclusion,[333] statutes of limitations,[334] the availability of a *Bivens* remedy,[335] and the enrolled-bill doctrine.[336] But other courts have reached contrary conclusions with regard to several of these issues.[337]

Understanding the connection between jurisdiction and power helps to clarify some of the confusion that has grown up in the lower courts around the Court's resequencing line of cases. As an initial matter, understanding the connection between jurisdiction and judicial power demonstrates the fallacy of the posited distinction between Article III jurisdiction and statutory jurisdiction that many lower courts have embraced. Congress's power to establish courts "inferior" to the Supreme Court has long been understood (correctly) to carry with it the power to define and

---

331 *See, e.g.*, Friends of the Everglades v. EPA, 699 F.3d 1280, 1288–89 (11th Cir. 2012); Seale v. INS, 323 F.3d 150, 156 (1st Cir. 2003).

332 *See* Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1113 (2013) ("The division among lower courts has been even more pronounced with respect to clearly nonjurisdictional issues.").

333 *See, e.g.*, Hoffman v. Nordic Naturals, Inc., 837 F.3d 272, 277–78 (3d Cir. 2016) (concluding that claim preclusion is a "non-merits" issue that may be addressed before addressing subject matter jurisdiction); Noone v. Town of Palmer, 2 F. Supp. 3d 1, 8 (D. Mass. 2014) (issue preclusion principles reflect "non-merits, nonjurisdictional" rules of dismissal which may precede resolution of subject matter jurisdiction questions).

334 *See, e.g.*, Chalabi v. Hashemite Kingdom of Jordan, 503 F. Supp. 2d 267, 273 (D.D.C. 2007) (holding that there was no need to resolve "arduous" jurisdictional questions where "all the claims are clearly barred by the relevant statutes of limitations").

335 *See* Arar v. Ashcroft, 585 F.3d 559, 571–82 (2009) (declining to resolve the "vexed question" of whether a statutory bar limited the court's subject matter jurisdiction where "the case must be dismissed at the threshold for other reasons"—namely, the unavailability of a *Bivens* remedy).

336 *See, e.g.*, OneSimpleLoan v. U.S. Sec'y of Educ., 496 F.3d 197, 203–04 (2d Cir. 2007); Pub. Citizen v. U.S. Dist. Ct. for D.C., 486 F.3d 1342, 1343, 1347–49 (D.C. Cir. 2007).

337 *See, e.g.*, Int'l Precision Components Corp. v. Greenpath Recovery W., Inc., 2018 WL 1920118, at *3 (N.D. Ill. April 24, 2018) (noting that personal jurisdiction "'must be addressed and resolved ahead of substantive issues' such as claim preclusion" (quoting Weisskopf v. Marcus, 695 F. App'x 977, 978 (7th Cir. 2017)); Bernier v. Trump, 299 F. Supp. 3d 150, 155–58 (D.D.C. 2018) (deciding that a plaintiff's claim was moot before considering a *Bivens* claim and characterizing the decision to address qualified immunity before jurisdiction as "a mistake").

limit those courts' jurisdiction.[338] A statutory limit on a lower court's jurisdiction is no less a restriction on that court's adjudicatory authority than is a restriction flowing directly from Article III itself.[339] Courts have no more authority to claim authority withheld from them by statute than they do to exceed the limits prescribed by the Constitution itself.

Understanding the connection between jurisdiction and power can also help to clarify the second major set of questions that have divided lower courts—namely, which types of *non*jurisdictional issues are sufficiently distinct from the "merits" that a court *may* resolve them before addressing jurisdiction. As discussed above, the most plausible connection between jurisdiction and power views jurisdiction as a necessary precondition to a court's ability to enter a final judgment determining the parties' respective rights and responsibilities.[340] Jurisdiction is thus a necessary prerequisite to a court's ability to enter a binding judgment that will either extinguish the parties' preexisting rights and entitlements or merge them into the judgment itself—i.e., a judgment carrying claim-preclusive effect. [341]

As Professor Kevin Clermont has argued, "the list of resequenceable grounds should" thus "include only those defenses that could result in decisions not on the merits, in the claim-preclusive sense."[342] This approach is consistent with the list of "non-merits" grounds that the Supreme Court has already held to be "resequenceable," such as *forum non conveniens*[343] abstention,[344] and discretionary dismissal of state law claims that may or may not fall within the federal courts' pendent jurisdiction.[345] It is also consistent with the Court's description in *Sinochem* of

---

[338] Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies [in Article III].").

[339] *See, e.g.*, Trammell, *supra* note 332, at 1128 ("If Congress has imposed a truly jurisdictional requirement, courts have a duty to police that restriction just as rigorously as a constitutional limitation.").

[340] *See supra* note 41 and accompanying text.

[341] *See supra* notes 270–272 and accompanying text.

[342] *See* Clermont, *supra* note 19, at 329 (emphasis omitted).

[343] *Sinochem*, 549 U.S. at 425.

[344] *See* Ellis v. Dyson, 421 U.S. 426, 433–34 (1975) (finding that a court need not resolve questions of Article III jurisdiction before dismissing a case under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971)); *see also Sinochem*, 549 U.S. at 431 (identifying *Ellis* as an exception to the categorical rule of *Steel Co.*).

[345] Moor v. County of Alameda, 411 U.S. 693, 715–16 (1973); *see also Ruhrgas*, 526 U.S. at 585 (identifying *Moor* as a permissible exception to *Steel Co.*).

the "principle underlying these decisions"—namely, that jurisdiction "is vital only if the court proposes to issue a judgment on the merits."[346]

Lower courts that have embraced an expansive view of their authority to resequence decisional issues have generally taken a narrower view of what an "on-the-merits" judgment refers to. Although not usually explicit about their understanding, courts embracing this narrower conception seem to equate an "on-the-merits" judgment with something like a ruling that requires a case-specific inquiry into whether plaintiffs have sufficiently alleged (or can prove) facts that would entitle them to relief under the applicable standards of substantive law. Grounds of decision that avoid such case-specific substantive analysis—such as statutes of limitations or preclusive prior judgments—are assumed to be "non-merits" grounds and thus resolvable without an express finding of jurisdiction.[347] But this narrow conception does not match the much broader sense in which "on the merits" is routinely used in discussions of preclusion law. In the preclusion context, "on the merits" is merely a shorthand way of identifying judgments entitled to claim-preclusive effect, including judgments that do "not rest on any examination whatever of the substantive rights asserted."[348]

This preclusive sense of "on the merits" provides the best understanding of the Supreme Court's usage of that phrase in *Sinochem* and other sequencing cases. This understanding is not only consistent with the resequenceable grounds that the Court has already recognized but also the most consistent with the traditional understanding of jurisdiction as the adjudicatory power of a court. For reasons already discussed, the existence of jurisdiction is a necessary precondition to a court's ability to bind the

---

346 *Sinochem*, 549 U.S. at 431 (quoting Intec USA, LLC v. Engle, 467 F.3d 1038, 1041 (7th Cir. 2006)).

347 *See, e.g.*, Hoffman v. Nordic Naturals, Inc., 837 F.3d 272, 277 (3d Cir. 2016) (asserting that a judgment issued "on claim preclusion grounds [ ] is not technically a judgment on the merits" but rather reflects a determination that the merits have already been resolved elsewhere); *Chalabi*, 503 F. Supp. 2d at 273 (characterizing a statute-of-limitations defense as a "non-merits ground"); *cf.* Trammell, *supra* note 332, at 1136–49 (urging a similar distinction between "conduct rules" and "allocative rules" as a guide for identifying resequenceable issues).

348 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4435 (rev. ed. 2002); *see also* Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 570 (5th Cir. 1996) ("[C]ertain dismissals that do not reach the substantive issues of the litigation still may be regarded as 'on the merits' for purposes of res judicata and preclusion.").

parties to the effects of a claim-preclusive judgment.[349] A court that proceeds to a merits determination without verifying its jurisdiction thus risks exercising an authority it does not possess.

The principal objection to this preclusion-centered framework stems from language in *Ruhrgas* acknowledging that even jurisdictional dismissals can "preclude the parties from relitigating the very same . . . issue" in later litigation.[350] But this objection ignores the important distinction between issue preclusion and claim preclusion and those two doctrines' very different respective relationships to jurisdiction. As discussed above, preclusion doctrine has long recognized that dismissals on jurisdictional grounds can preclude relitigation of the specific issues actually litigated and necessarily decided by the court.[351] No similar longstanding history supports according claim-preclusive effect to jurisdictionless judgments. The prospect that dismissals on "nonmerits" grounds other than jurisdiction may similarly carry certain issue-preclusive effects is thus far less problematic for the conceptual ideal of jurisdiction than the prospect of allowing courts to bind the parties to claim-preclusive judgments without even deciding whether they possess the authority to do so.

C. The Separation of Powers and Jurisdictional Departmentalism

A final set of debates that might be illuminated by a clearer understanding of the connection between jurisdiction and power involves the question of what effect must be given to judicial decisions by officials in other branches of the federal government. These debates are often framed in terms of a posited distinction between "judicial supremacy"—roughly, the idea that "the Supreme Court's interpretations of the Constitution should be taken by all other officials, judicial and nonjudicial, as having an authoritative status equivalent to the Constitution itself"[352]—and "judicial departmentalism"—roughly, the idea that "each branch, or department, of government has an equal authority to interpret the Constitution in the context of conducting its duties."[353] These

---

[349] *See supra* notes 270–272 and accompanying text.

[350] *Ruhrgas*, 526 U.S. at 585; *see also* Trammell, *supra* note 332, at 1130–32 (contending that *Ruhrgas* and other cases acknowledging that jurisdictional dismissals can carry issue-preclusive effect render preclusion-centered theories descriptively implausible).

[351] *See supra* note 260 and accompanying text.

[352] Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 455 (2000).

[353] Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 782–83 (2002).

debates center mostly on the question of what effect should be given to judicial precedents by nonjudicial actors.

A less visible corner of this debate centers on the obligation of nonjudicial officials—principally the president and other members of the executive branch—to comply with courts' final judgments.[354] By far the dominant view among judicial supremacists and departmentalists alike has been that executive branch officials are bound to obey federal court judgments.[355] But a handful of departmentalists have argued that the same considerations authorizing the president to exercise independent judgment regarding the meaning of the Constitution support a limited or absolute presidential privilege to disregard judgments because they are wrong.[356]

In a recent Article, Professor William Baude suggested a middle position in this debate—one that accepts the consensus view of the binding force of judgments on the executive branch but contends that this duty is limited to those instances in which courts act within the lawful scope of their jurisdiction.[357] Drawing on the traditional connection between jurisdiction and power, Baude argues that courts are empowered to bind other branches of government only when they act within the legitimate scope of their jurisdiction; purported judgments that exceed that jurisdiction may thus be regarded by the president and other members of the executive branch as void and of no legal effect.[358]

But as Baude himself recognizes, this connection between jurisdiction and judicial power raises an important corollary question—namely, "who decides whether a court has jurisdiction?"[359]

---

354 *See* Baude, *supra* note 53, at 1832–34 (summarizing this aspect of the debate).

355 *See, e.g.*, Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993) ("[T]here is widespread agreement that the executive has a legal duty to enforce valid final judgments rendered by courts, regardless of whether the executive agrees with the legal analysis that forms the basis for the judgment.").

356 *See, e.g.*, Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1325 (1996) ("[T]he President may legally refuse to enforce a court judgment, but only if the President concludes, in accordance with an appropriately demanding standard of proof, that the judgment was constitutionally erroneous."); Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 83–84 (1993) (contending that accepting autonomous presidential authority to interpret the Constitution necessarily implies a corollary authority to disobey "a judicial decree that [the President believes to be] predicated on an incorrect understanding of the Constitution").

357 *See generally* Baude, *supra* note 53.

358 *Id.* at 1846 ("[J]udgments bind the President when they have jurisdiction, and when they don't, they don't.").

359 *Id.*

Given the judiciary's embrace of the bootstrap principle, requiring the executive branch to acknowledge the validity of any judgment that the federal courts would regard as valid risks "collapsing 'judgments within a court's jurisdiction' into 'judgments, period.'"[360] Such an approach would thus leave little meaningful role for independent judgment by members of the executive branch regarding which judgments are or are not obligatory.

The analysis presented here supports the view that the executive branch may exercise its own independent judgment in determining whether a particular judgment falls within the jurisdiction of the rendering court.[361] This conclusion draws support from both the history of jurisdiction in the Anglo-American legal tradition and from the perspectival nature of jurisdiction (and of existence conditions more generally). As discussed above, the voidness of jurisdictionless judgments reflected the traditional common law view for centuries leading up to the Constitution's enactment and for more than a century thereafter.[362] Given the comparatively late arrival of the bootstrap principle in U.S. law, it seems highly doubtful that the recognitional criteria it prescribes should be seen as effectively "baked in" to the meaning of Article III.[363]

And because it is not uncommon for different institutional actors to adopt different criteria for determining the validity of a claimed source of law,[364] allowing executive branch officials to exercise independent judgment regarding the scope of judicial jurisdiction may be less threatening to the separation of powers than

---

[360] *Id.*

[361] Baude notes that the president may not necessarily possess the final word on the jurisdictional validity of a particular judgment because the question of that judgment's validity may come before the courts in a later proceeding. *Id.* at 1848–49. Even if the president disagrees with the court's reasoning in that later case—for example, because the later court applied the bootstrap doctrine to validate the earlier court's judgment—such an objection would not provide a ground for disregarding that second court's judgment, provided that second court actually did possess jurisdiction. *Id.* at 1848. But as Baude acknowledges, this successive-litigation strategy could only succeed if the president concedes that the second court actually possesses jurisdiction. *Id.* at 1849.

[362] *See supra* Part II.

[363] *See* Baude, *supra* note 53, at 1847 ("Even if Article III incorporated or reflected background principles of civil procedure at the time of its enactment, it is not clear that modern changes in procedural doctrines should also change the constitutional rule.").

[364] *Cf. supra* notes 109–113 and accompanying text; *see also* Adler & Dorf, *supra* note 104, at 1181–93 (identifying the political question doctrine and the rational basis standard of constitutional review as additional examples of possible judicial "underenforcement" of existence conditions).

it might, at first, appear.[365] The federal courts have long claimed authority to exercise independent judgment when reviewing the conduct of both Congress and the president without feeling themselves bound by those branches' understandings of their own constitutional powers.[366] Presidents have asserted a similar authority when reviewing acts of Congress.[367] Of course, unlike the president or Congress, the judiciary may possess a qualified "right to be wrong" about constitutional meaning and even to compel other institutional actors to act on such incorrect understandings.[368] But such a "right to be wrong" exists only by virtue of those courts' constitutionally and statutorily conferred jurisdiction. Far from an infringement of the separation of powers, allowing the president some independent ability to police the outer boundaries of the courts' jurisdiction might well be an indispensable ingredient of the separation-of-powers framework.[369]

An important question remains, however, regarding which recognitional criteria the executive branch *should* adopt in determining whether a particular court acted within the scope of its jurisdiction. Even if the president is not bound as a matter of constitutional obligation to accept the courts' assertions of their own jurisdiction at face value, there may be sound pragmatic reasons for giving jurisdictional determinations by the judiciary at least some degree of deference. For one thing, the same considerations

---

365 *Cf.* Richard H. Fallon, Jr., *Political Questions and the Ultra Vires Conundrum*, 87 U. CHI. L. REV. 1481, 1544 (2020) ("To many contemporary Americans, the departmentalist approach looks clumsy, chaotic, and frightening.").

366 *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that Congress lacked the authority to expand the Supreme Court's jurisdiction beyond limits prescribed by Article III); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588–89 (1952) (holding that President Harry S. Truman lacked the authority to unilaterally seize control of steel mills without statutory authorization).

367 *See, e.g.*, ANDREW JACKSON, VETO MESSAGE (July 10, 1832), *reprinted in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576–91 (Washington, D.C., Gov't Printing Off., James Richardson ed., 1897) (defending the veto of the statute rechartering the Bank of the United States on constitutional grounds despite an earlier Supreme Court decision concluding that legislation was within Congress's constitutional authority).

368 *See supra* note 49 and accompanying text.

369 *See, e.g.*, Fallon, *supra* note 365, at 1544 ("[A]ccording any official or institution a boundless authority to determine its own jurisdiction leaves no logical space between a claim of lawful authority and an assertion of potentially arbitrary power."); Lawson & Moore, *supra* note 356, at 1324 ("If judgments are truly and absolutely binding, then the federal courts, through the issuance of judgments, can take command of all aspects of the government."). *But cf.* Baude, *supra* note 53, at 1848–49 (noting that the jurisdictional validity of a particular judgment may sometimes be placed at issue in a later case before a court that all sides agree possesses jurisdiction to conclusively resolve the question of the original court's jurisdiction).

of certainty, finality, and efficiency that drove U.S. courts to embrace the bootstrap doctrine may also support according some degree of deference to judicial resolutions of jurisdictional questions.[370] In the specific context of interbranch disputes, additional concerns exist regarding the potential impairment of rule-of-law values resulting from multiple "official" pronouncements where no institution possesses the acknowledged authority to act as the final arbiter of legal correctness.[371]

The precise degree of deference that the executive branch should give to courts' jurisdictional determinations is a subject on which reasonable minds can differ. Pressed to its limits, a highly deferential approach might even resemble something like the bootstrap doctrine itself, which, under its most prominent formulations, embraces a very limited exception for actions that are so "plainly beyond the court's jurisdiction" as to constitute "a manifest abuse of authority."[372] It is important to recognize, however, that any such deference should be viewed a matter of policy and pragmatism. As a strictly formal matter, a court without jurisdiction lacks the power to bind *anyone* to its view of the law, the president most certainly included. If a president is sufficiently certain that a purported judgment has issued from a court that lacked the requisite jurisdiction, she is free under the Constitution to disregard that court and treat its ruling as of no more force or effect than "mere waste paper."[373]

CONCLUSION

Jurisdiction is both a conceptual ideal and a messy reality. The bootstrap doctrine's ascendance in the middle decades of the twentieth century reflected a choice to sacrifice some degree of the coherence associated with the conceptual ideal of jurisdiction as

---

370 *See supra* notes 83–94 and accompanying text (discussing the rationale underlying decisions that embraced the bootstrap principle).

371 *See, e.g.*, Fallon, *supra* note 365, at 1541 (describing—without endorsing—the view that "it would better promote the rule of law and other relevant values for conscientious officials and citizens to accept judicial rulings on the outer boundaries of judicial jurisdiction as authoritative, even if fair-minded observers would adjudge the judicial rulings ultra vires").

372 RESTATEMENT (SECOND) OF JUDGMENTS § 12; *cf.* Fallon, *supra* note 365, at 1544 ("In my view, the most reasonable accommodation of competing rule-of-law ideals—even in cases involving plausible allegations of ultra vires action by the judicial branch—calls for a very strong but not absolutely irrebuttable presumption that final judicial rulings authoritatively settle the obligations of the parties.").

373 *See* Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 475 (1836) (describing a jurisdictionless judgment as "waste paper").

power in order to accommodate the felt necessities of litigation reality. But the ideal itself still retains value.

The goal of this Article has been to demonstrate that the power-based conception remains a descriptively plausible and normatively desirable description of jurisdiction's conceptual identity, notwithstanding the bootstrap doctrine's predominance. The power-based conception not only conforms to centuries of pre-twentieth-century legal thought and at least one prominent strand of contemporary thinking about jurisdiction's identity but also facilitates jurisdiction's distinctive role in dispersing and allocating power among different decision-making institutions. A clearer understanding of what it means to speak of jurisdiction as power should help to clarify thinking about jurisdiction's necessary and incidental effects and minimize confusion surrounding both jurisdictional doctrine and the judiciary's relationship to other constitutional actors.