



# Stanford Law Review

## JURISDICTION'S NOBLE LIE

Frederic M. Bloom

# ARTICLES

## JURISDICTION’S NOBLE LIE

Frederic M. Bloom\*

*This Article makes sense of a lie. It shows how legal jurisdiction depends on a falsehood—and then explains why it would.*

*To make this novel argument, this Article starts where jurisdiction does. It recounts jurisdiction’s foundations—its tests and motives, its histories and rules. It then seeks out jurisdictional reality, critically examining a side of jurisdiction we too often overlook. Legal jurisdiction may portray itself as fixed and unyielding, as natural as the force of gravity, and as stable as the firmest ground. But jurisdiction is in fact something different. It is a malleable legal invention that bears a false rigid front. This Article aims to prove as much.*

*This Article then examines both the flexibility and the ruse. It supports the first with two uncommon jurisdictional theories—one that shows how pragmatics, remedial context, and rights-accommodation permit courts to reach smart equilibriums; another that details the cultural, “spatial,” and federalist value of jurisdictional malleability. It then explains the second through more conditional claims about the functional, deliberative, and structural benefits of jurisdiction’s long-running trick. This study does not mean to excuse the inexcusable. It hopes instead to offer new insight on an old problem. And it helps to make sense of why jurisdiction’s lie has so long endured.*

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## INTRODUCTION

Jurisdiction poses a difficult problem. It claims to be something it is not. Jurisdiction claims to be “inflexible and without exception.”<sup>1</sup> It casts itself as an “obligation” that rarely relents.<sup>2</sup> But the truth is something different. Jurisdiction is not a rigid legal constant or a duty courts never ignore. It is a place where strict limits sometimes falter and firm rules can bend.<sup>3</sup>

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1. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)). The Supreme Court has used this description in a dozen cases, each connecting back to *Mansfield v. Swan*. See *Ruhrgas*, 526 U.S. at 577; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998); *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990); *Delaware v. Van Arsdall*, 475 U.S. 673, 692 & n.4 (1986) (Stevens, J., dissenting); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U.S. 413, 419 (1911); *Kentucky v. Powers*, 201 U.S. 1, 35 (1906); *Giles v. Harris*, 189 U.S. 475, 502 (1903) (Harlan, J., dissenting); *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900); *Morris v. Gilmer*, 129 U.S. 315, 325 (1889); *King Iron Bridge & Mfg. Co. v. County of Otoe*, 120 U.S. 225, 226 (1887); see also *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007) (“[T]his Court has no authority to create equitable exceptions to jurisdictional requirements . . .”). And the Court’s insistence on robust jurisdictional analysis reaches back further still. See *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 126 (1804).

2. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). This “unflagging” description is as common as the “inflexible” one before. See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 664 (1978); see also *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233-41 (1998) (disclaiming the existence of a “roving public policy exception” to the Full Faith and Credit Clause) (internal quotation marks omitted).

3. Not all of these jurisdictional “bends” are identical. See *infra* Part II. Some show courts excusing themselves from hard rules stated elsewhere. See, e.g., *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180 (1921) (sidestepping the “well-pleaded complaint” rule from *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908)). Others witness courts disregarding their own stern rhetoric. See, e.g., *Colo. River*, 424 U.S. at 817; see also *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75-77 (1996). But what matters most is what they have in common: they prove jurisdiction’s inflexibility to be more and less than it pretends.

This Article attempts to document and defend that discrepancy. It aims to show how legal jurisdiction<sup>4</sup> trades on a deception—and then to make sense of why it would. Others may offer quick jurisdictional fixes, fast-acting tonics that promise to “purg[e] the doctrine” of its many faults.<sup>5</sup> I mean to do something different, something more counterintuitive and curious. I mean to search out where jurisdictional rhetoric splits from jurisdictional reality—and then explain why that split endures.

Not that jurisdiction's split is unique in all facets. Other doctrines also resort to bold overstatement. Other doctrines use strict-sounding rules to mask less rigid realities too.<sup>6</sup> So other doctrines can teach us something useful about the causes and consequences of rhetorical excess. But jurisdiction's story still warrants separate retelling, and its pieces still merit careful review. There is a strange and revealing image of legal falsehoods in its broad outlines. And there are important and peculiar lessons in its distinctive details.

One of those lessons involves the shape of related doctrines. Jurisdiction's inaccurate rhetoric does more than misstate its own firmness. It creates a need for offsetting measures, elaborate “escape valve[s]”<sup>7</sup> devised to soften jurisdiction's hard rules.<sup>8</sup> Forum non conveniens exists to temper jurisdiction's

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4. A brief note on usage: I use the term “legal jurisdiction” to denote, however inelegantly, what others have called “adjudicative jurisdiction” or “judicial jurisdiction.” I also use the terms “legal jurisdiction” and “jurisdiction” interchangeably. My reasons are stylistic, not definitional. “Legal jurisdiction” means here what “adjudicative jurisdiction” and “judicial jurisdiction” (but not “regulatory” or “legislative” jurisdiction) mean elsewhere—namely, the power of a court to hear and resolve disputes.

5. See A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 672 (2006); see also William Cohen, *The Broken Compass: The Requirement That a Case Arise “Directly” Under Federal Law*, 115 U. PA. L. REV. 890 (1967); Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 S. CT. REV. 241; John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What “Arise Under” Federal Law*, 76 TEX. L. REV. 1829 (1998); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

6. An imperfect example: strict scrutiny applied in religious accommodation cases—an analysis some have called “strict in theory, feeble in fact.” See Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1963-64 (2006) (noting however that *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), “seems to suggest some invigoration”); see also Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006). Useful analogies extend beyond doctrinal areas too. They include rigid-sounding judicial philosophies—like originalism—that occasionally display interpretive wiggle room. They also take in standards of appellate review—like abuse of discretion—that disguise what analytical approaches courts often use. See *infra* Conclusion.

7. Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 788 (1985).

8. Cf. Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 683 (1981) (noting the benefits of “clear and simple” jurisdictional rules). Contract law also seems relevant here. If parties perceive jurisdiction's flexibility,

(supposedly) fixed requirements, excusing courts from hearing cases they otherwise must. Federal-court abstention and supplemental jurisdiction likewise work to relax jurisdiction's (seemingly) inflexible limits—the first releasing courts from duties that otherwise bind them, the other permitting courts to claim authority they otherwise do not hold.<sup>9</sup> None would be necessary absent jurisdiction's own rigid terms.

Another lesson concerns the scope of judicial power. Jurisdiction's feigned inflexibility pushes that power in two ways at once. It pushes in part toward expanded court authority—not by increasing that authority directly, but by cautiously appeasing those who could scale it back.<sup>10</sup> Were courts less guarded about their jurisdictional discretion, Congress might feel goaded to react and rescind it. A bit of inflexible jurisdictional rhetoric, by contrast, might keep Congress passive and inactive, if not entirely duped. But jurisdiction's misleading rhetoric pushes against inflated judicial authority too—not by removing all jurisdictional latitude, but by warning against deviations too rash. Courts will still fashion exceptions, carving out new gaps in jurisdiction's preset rules. But those gaps may be more thoughtfully opened and less frequently invoked, not least because they have been so vigorously disavowed.

And still another lesson reveals the odd purpose of the ruse. Jurisdiction speaks a misleading language. In that sense it tells a lie. But jurisdiction's ploy is peculiar: It is a lie not designed to deceive. It is a lie devised instead to secure a set of functional, deliberative, and structural benefits that do not require us to be fooled. Jurisdiction's lie may not convince us. Nor may it even need to. It may focus adjudicative energy, encourage judicial caution, constrain jurisdictional discretion, and ease inter-branch tension—even if we know it is wrong.

This does not mean that jurisdiction's ruse is faultless. Its trick is not some heroic construct. So this Article does not try to present jurisdiction's lie as a model, a seamless ideal bearing no weighty flaws. Nor does it aim to praise deceit over integrity, as if a bit of clever court trickery should trump judicial

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they may turn to choice-of-forum and choice-of-law clauses to mitigate any consequent uncertainty. *See, e.g.,* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (finding that a particular choice-of-forum clause served as consent to jurisdiction); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482 n.24 (1985) (reading a choice-of-law clause as a sort of tacit jurisdictional consent). This in turn may help allocate scarce judicial resources and leverage limited court capital. *See* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 627-29 (2005).

9. *See infra* Parts I, II.

10. *See* U.S. CONST. art. III; *see also infra* Part IV. Some applications of jurisdiction's lie will certainly seem like judicial self-denial, a means for courts to cut against their own institutional strength. *See, e.g.,* *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In these places, the lie may seem noble without more—a generous moment of judicial self-sacrifice. But not all court self-denial is as simple or as charitable as it seems. *See* Frederic Bloom, *Unconstitutional Courses*, 83 WASH. U. L. REV. 1679, 1722-30 (2005).

honesty more blunt. But jurisdiction's false rigid front may persist for a reason.<sup>11</sup> It may prove less a tool of dreadful court duplicity than a kind of noble lie.<sup>12</sup>

This Article untangles that lie in four steps. Part I treads familiar jurisdictional ground. It presents jurisdiction in its standard form, recalling its basic meanings, its primary functions, its customary language, and its brief histories. Portions of this study may seem test-heavy and primer-like, a kind of sweeping topical survey of jurisdiction overall. But this first (credulous) review will itself prove useful, not least in counterpoint. To make sense of the split between jurisdictional rhetoric and jurisdictional reality we should start with what the doctrine so often purports to be. Part I thus begins with jurisdiction's self-styled portrait, rehearsing what its familiar self-image shows.

Part II resets that image. It recasts jurisdiction, not as something "absolutely compelling"<sup>13</sup> and uncompromisingly constant, but as something quietly flexible and carefully contingent—an invention that courts can bend. Part II then reads and critically re-reads a selection of well-known jurisdiction cases, each pulled from the Supreme Court's docket.<sup>14</sup> These cases offer

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11. To be clear, I do not mean to suggest that jurisdiction's lie is uniquely or particularly suited to accomplishing good jurisdictional ends. I mean only to suggest that some good things might follow something as distasteful as a lie.

12. In this sense, my definition of "noble lie" is both standard and unconventional. Standard because I use the term to denote a lie told to serve broader social—and, in this case, adjudicative—interests. See PLATO, REPUBLIC 414b-415c (Allan Bloom trans., Basic Books 1968); see also LEO STRAUSS, THE CITY AND MAN 102 (1964) ("[A] good city is not possible . . . without a fundamental falsehood; it cannot exist in the element of truth, of nature."); Scott J. Shapiro, *Fear of Theory*, 64 U. CHI. L. REV. 389, 396 (1997) (book review) (deeming a noble lie "well intentioned insofar as its aim is to promote social stability, but . . . still a paternalistic whitewashing of the truth"). Unconventional because I claim it is a lie that does not, and need not, successfully deceive. Others might thus call this a "legal fiction," not a lie. See L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 367 (1930) ("For a fiction is distinguished from a lie by the fact that it is not intended to deceive."); see also Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1437 (2007) (discussing legal rules built on "factual premise[s] that [are] false or inaccurate"). But if jurisdiction's story is part fiction, it is part subterfuge and part something else too. See GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 60 (1985) (defining legal subterfuges). I discuss this point at length in Part IV, *infra*.

13. Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 850 (1999).

14. There are certainly costs to my Supreme Court-centric focus. It leads me to elide detailed discussion of federal district court opinions—the decisions where most jurisdictional analysis occurs. Even worse, it risks overstating the malleability of jurisdictional doctrine, since the Court's jurisdictional docket may be especially (and intentionally) difficult. Skeptical readers may thus think this project too easy. They may think my selection of cases opportunistic, as if I picked only those that advance my cause. Even more, they may say that *all* legal rules are fundamentally indeterminate—and that jurisdictional rules are no more or less so than anything else. Any project designed to detect the flexibility of jurisdictional rules will thus seem too simple and too obvious to fail. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 114-16 (1984). I do not mean to ignore these concerns. But I do not mean to focus this project on them either. I hope instead to do more than spot

concrete evidence of the split between jurisdictional rhetoric and jurisdictional reality. They show the Supreme Court eliding “contacts”-based categories, ignoring “well-pleaded complaint” mandates, and flouting “time of filing” rules—all after declaring those requirements too strict to move. Even more, these cases confirm a pivotal point: federal courts may disclaim the “authority to create . . . exceptions to jurisdictional requirements,”<sup>15</sup> but they create them all the same. Part II closes by asking why and when they would.

Part III takes up the challenge of answering those critical questions. It presents two jurisdictional concepts, each explaining why courts might prefer jurisdiction’s more pliable pieces, and each suggesting when courts might use those pieces best. One concept derives from jurisdiction’s broader adjudicative context—its relationship with substantive rights and judicial remedies, its influence on these other “stages” of litigation,<sup>16</sup> and the wisdom of trying to find balance (or “equilibration”) among them. The other connects to more philosophical concerns—the often-ignored power of legalized “space,” the role of judges as “geographers,” and the value of jurisdictional malleability in a system of many sovereigns.<sup>17</sup> Both “equilibration” and “space” help illustrate how jurisdictional flexibility can promote worthy objectives—preserving judicial capital, crafting sensible adjudicative “composites,” soothing federalist friction, and curtailing races among cultural competitors. And both “equilibration” and “space” hint at when jurisdiction’s more pliable pieces might best be used.<sup>18</sup> Part III draws these descriptive and normative ideas together. It then asks its own necessary question: if jurisdiction is actually better for its flexibility, what should we make of its false rigid front?

Part IV offers a provisional answer. It rethinks jurisdiction’s rhetoric of inflexibility, reading that language not as a classic legal fiction or a cunning judicial subterfuge, but as an open and constructive lie. It then provides a partial and preliminary explanation of why that legal oddity still endures. It argues that jurisdiction’s misleading rhetoric may channel jurisdictional resources, counsel jurisdictional caution, shield jurisdictional integrity, and avert legislative overreaction—even if we know it is false. Part IV then admits

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patches of indeterminacy in likely places. I hope to find meaning, purpose, and potential merit in the misleadingly rigid signals the courts often send. It is here that Supreme Court opinions are most helpful.

15. *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007).

16. *See, e.g.,* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 683 (2006).

17. *See, e.g.,* NICHOLAS K. BLOMLEY, *LAW, SPACE, AND THE GEOGRAPHIES OF POWER* 36, 45 n.15 (1994).

18. A caveat: This argument is not intended to be a proof or a prediction. I do not mean, that is, to suggest that courts have always bent jurisdiction for these reasons—nor that they always will. I mean instead to suggest that if courts persist in molding and adapting jurisdictional requirements, these are places where perhaps they should.

and addresses the costs of jurisdiction's shallow falsehood, using a familiar example to recount both possible benefits and inevitable<sup>19</sup> faults.

A brief conclusion then brings this Article to a close. It recounts the split between jurisdictional rhetoric and jurisdictional reality. It places longstanding case law on sharper footing. It forges initial connections between jurisdiction's overstated language and other legal pockets of rhetorical excess. And it highlights what is novel and what might be noble about jurisdiction's strange and open lie.

## I. LEGAL JURISDICTION: A STANDARD VIEW

Legal jurisdiction presents two blunt and basic options. A court with jurisdiction may reach a judgment, declare a winner, and assign a punishment. A court without it can do nothing "in any cause" at all.<sup>20</sup> No room exists between these alternatives.<sup>21</sup> And not even the Supreme Court admits the "authority to create . . . exceptions" to jurisdiction's hard terms.<sup>22</sup>

19. And perhaps overwhelming. Again, I do not mean to claim that jurisdiction's lie is a perfect solution. A precisely crafted rule supported by immaculately framed exceptions would almost surely be a better approach, a kind of first-best response to jurisdiction's problem. *See infra* Part IV. It would also be very different from the system we now have.

20. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868); *see, e.g., United States v. Cotton*, 535 U.S. 625, 630 (2002), *overruling Ex parte Bain*, 121 U.S. 1 (1887) ("Bain's elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, 'the courts' statutory or constitutional power to adjudicate the case.'" (quoting *Steel Co. v. Citizens for a Better Environment*, 535 U.S. 83, 89 (1998)); *see also Pennoyer v. Neff*, 95 U.S. 714, 732 (1877) ("But if the court has no jurisdiction over the person of the defendant . . . and, consequently no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non iudice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice—it is difficult to see how the judgment can legitimately have any force . . .").

21. *McCardle*, 74 U.S. at 514. Others may still offer somewhat more nuanced (if still compatible) definitions, which is no surprise. After all, jurisdiction has become a figure of many faces—"too many" faces, perhaps. *Steel Co.*, 523 U.S. at 90 (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). Some see in jurisdiction "the motive force of a court, the root power to adjudicate." Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22 (1981). Others spot only a "presumption in favor of . . . legitimacy." Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1622 (2003) (emphasis omitted). Some regard jurisdiction as "nothing less than the map of the law's interaction with society." *See Ford, supra* note 13, at 929. Still others perceive it as the lawful extension of brute authority. *See McDonald v. Mabee*, 243 U.S. 90, 91 (1917). And jurisdiction sustains plenty of clever analogies too. Professor Lee compares jurisdiction to an "electrical appliance"—a thing that only works when properly plugged in. *See Lee, supra*, at 1616. Professor Ford treats jurisdiction's rote steps like the formal code and prescribed turns of a rigidly structured "tango"—though he is careful not to denigrate modern dance or avant garde choreography as he does. *See Ford, supra* note 13, at 856-58 & n.28; *see also Akhil Reed Amar, Law Story*, 102 HARV. L. REV. 688, 695 (1989) (book review) (noting that process always "has a substance of its own") (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST* 100 (1980), and Laurence H. Tribe, *The Puzzling Persistence of Process-Based*



This Part examines the law behind this stark image. It explores jurisdiction's key pieces—its core elements, its primary purposes, its basic language and rules. It also (briefly) reviews a pair of jurisdictional adjuncts, two common-law doctrines that loosen jurisdiction's strict terms. Not all of this account is pioneering. It indulges the old "habit" of legal formalism, since jurisdiction is a place where "mechanical" rules still seem to thrive.<sup>23</sup> It also rehearses many of jurisdiction's most familiar lines. But this assessment still plays a crucial diagnostic part. To spot where jurisdictional rhetoric breaks from jurisdictional reality we should look first at the doctrine's own terms. This Part thus starts where jurisdiction does, presenting the doctrine in its standard modern form.

Standard as this form may be, of course, it still raises compositional concerns. One concern involves focus, another scope—and both should be addressed outright. First, then, this Article focuses on the jurisdiction of *federal* courts. State courts encounter their own jurisdictional problems, and they figure prominently in some of the stories told below. But this Article looks to the jurisdiction of federal courts—something often quite comparable to state-court jurisdiction, but also often quite different from it.<sup>24</sup> Second, this Article looks at *both* of legal jurisdiction's two sides. Few surveys attempt to address both "personal" and "subject-matter" jurisdiction, perhaps for fear of analytical overreaching.<sup>25</sup> This Article risks that overreaching. It offers a careful, if condensed,<sup>26</sup> account of both of jurisdiction's halves—and it does so for a

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*Constitutional Theories*, 89 YALE L.J. 1063 (1980)).

22. *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007).

23. Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 132 (1998).

24. See FED. R. CIV. P. 4(k). One part of Federal Rule of Civil Procedure 4(k) draws state and federal courts together, equating the personal jurisdiction reach of federal courts with those of the relevant states. FED. R. CIV. P. 4(k)(1)(A). But another part of Rule 4(k) pulls state and federal courts apart, allowing federal courts addressing federal questions to consider only the (personal) jurisdictional limits set by the federal constitution, not those imposed by state law. FED. R. CIV. P. 4(k)(2). See also Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1 (1984) (arguing that nationwide jurisdiction is impermissible, even in federal courts addressing federal questions).

25. Lee, *supra* note 21, is a notable exception.

26. Most of these jurisdictional "road[s]" are beyond "well-travelled"—as Professor Stein aptly notes. Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 693 n.18 (1987). My aim is not to revisit every twist and turn along these paths, but simply to place modern jurisdiction in historical context. I thus emphasize broad conceptual themes, not intricate doctrinal details. Of course, even these broad themes leave some things out, most notably federal criminal jurisdiction and Supreme Court appellate review. Space does not allow adequate consideration of either, so neither receives much attention here. Even in passing, though, it is worth noting that the Court's approach to its appellate jurisdiction fits parts of my thesis well. See, e.g., *Michigan v. Long*, 463 U.S. 1032 (1983) (creating ample space for the Court to find federal issues—and thus appellate jurisdiction—when it wishes, and to miss them when it does not); see also Frederic M. Bloom, *Cooper's Quiet Demise (A Short Response to Professor Strauss)*, 52 ST.

reason. Looking at jurisdiction's two sides together helps expose trends and themes that narrower lenses tend to omit.<sup>27</sup> Looking at jurisdiction as a whole, that is, allows us to trace critical lines we tend to ignore.

Subpart A begins that tracing. It studies jurisdiction's more "territorial" side, looking at personal jurisdiction and its somewhat-tardy analog, *forum non conveniens*. Subpart B turns to subject-matter jurisdiction and its own slightly belated cousin, federal-court abstention.<sup>28</sup> Subpart C then (re)connects these pieces, presenting jurisdiction's customary picture in full form.

### A. *Personal Jurisdiction and Forum Non Conveniens*

Personal jurisdiction asks a simple question. It asks whether a particular court may enter judgment against a particular defendant in a particular case.<sup>29</sup> The answer to this question may depend on territorial contacts, valid contract, party consent, or adjudicative burdens—but never on substance. Personal jurisdiction is indifferent to the character of the underlying dispute, in theory at least.<sup>30</sup>

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LOUIS U. L.J. 1115 (2008) (discussing the Court's strategic certiorari decisions in and after *Williams v. Georgia*, 349 U.S. 375 (1955)). So too do recent jurisdictional decisions in the criminal realm. *See, e.g., Bowles*, 127 S. Ct. 2360.

27. A cursory example: Both parts of legal jurisdiction implicate the most pressing of structural (constitutional) concerns. Federalism influences personal jurisdiction rather powerfully. Separation of powers obviously informs the contours of subject-matter jurisdiction. But these initial pairings are imperfect—or at least incomplete. Abstention, subject-matter's tardy cousin, raises immediate issues of federalism as well as separation of powers. *See, e.g., Younger v. Harris*, 401 U.S. 37 (1971) (concluding that federalist comity generally prohibits a federal suit enjoining a pending state criminal proceeding). *Forum non conveniens*, personal jurisdiction's own belated analog, implicates real separation-of-powers concerns. *See Elizabeth T. Lear, Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1152 (2006) (“[T]he Court must abandon . . . *forum non conveniens* doctrine as an unconstitutional usurpation of congressional power.”). These insights are hardly novel. *Id.* But they reveal what a wider-angle lens can show.

28. This order of analysis may be unfashionable, but it is not entirely wrong. Subject-matter jurisdiction questions typically claim a place of analytical priority, displacing all other preliminary questions in importance and rank. *See, e.g., Stein, supra* note 7, at 787 (placing subject-matter jurisdiction “[a]t the top of the [jurisdictional] hierarchy”). Even so, personal jurisdiction is an important consideration—and one that courts sometimes tackle first. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (discussing the “sequencing” of jurisdictional issues). What's more, the sequence hardly matters here. All that matters is that both personal and subject-matter jurisdiction are “essential element[s] . . . of judicial power.” *See Scott C. Idleman, The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 13 (2001).

29. Put slightly differently, personal jurisdiction asks whether a court may “adjudicate a dispute and enter a binding judgment against a [particular] defendant.” Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 257-58 (1990) (citations omitted).

30. *But cf. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984) (acknowledging that the plaintiff's choice of forum was based largely, if not exclusively, on

The source of this jurisdictional limit is the United States Constitution—if only partly<sup>31</sup> and vaguely so. Nothing in the Constitution’s text says anything about “personal jurisdiction” or “territorial limits on adjudicative authority.”<sup>32</sup> Instead, courts (and scholars) have fixed this border-based limit to a pair of more oblique constitutional terms: the Full Faith and Credit Clause,<sup>33</sup> where personal jurisdiction’s story may well start;<sup>34</sup> and the Due Process Clause, where that story may well end.<sup>35</sup>

Most tellings of this story begin with *Pennoyer v. Neff*,<sup>36</sup> that long and turgid quarrel over a piece of Oregon land. A few scholars have stretched the doctrine back even further,<sup>37</sup> linking modern personal jurisdiction analysis to *D’Arcy v. Ketchum*<sup>38</sup> and Justice Johnson’s dissent in *Mills v. Duryee*.<sup>39</sup> Some have even connected personal jurisdiction’s distinctly territorial (or “spatial”) turn to the Treaty of Westphalia and the end of the Thirty Years War.<sup>40</sup> But *Pennoyer* remains the anchor of modern personal jurisdiction doctrine, even if that anchor has long since come loose.<sup>41</sup>

the fact that no other state’s statute-of-limitations would have permitted suit).

31. Only partly, of course, because I elide discussion of state long-arm statutes, concentrating instead on federal (constitutional) limits on personal jurisdiction.

32. See, e.g., Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1113-14 (1981) (“In the personal jurisdiction context . . . the Court has infused vague concepts of interstate sovereignty into the due process clause . . . . [I]t has relied on neither the language, history, nor policy of the due process clause . . . .”); Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 785 (1955) (“Nowhere . . . can we find any clause which by clear words defines the territorial limits of [personal] jurisdiction . . .”).

33. U.S. CONST. art IV, § 1.

34. See James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 172 (2004) (“[T]he basic territorial framework . . . stems not from the Due Process Clause . . . but from federal common law rules developed under the influence of the Full Faith and Credit Clause . . .”). *But cf.* Kogan, *supra* note 29, at 278 (“[T]he historical sources from which the full faith and credit clause evolved were not concerned with solving questions of territorial sovereignty.” (citation omitted)).

35. See John N. Droback, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015 (1983) (insisting that personal jurisdiction cares most about individual fairness); Redish, *supra* note 32, at 1115-19 (same).

36. 95 U.S. 714 (1877); see LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 24 (1986) (“Any discussion of the due process clause and personal jurisdiction must begin with *Pennoyer v. Neff*, the foundation of Supreme Court discourse on the subject.” (citation omitted)). *But cf.* Kogan, *supra* note 29, at 259 n.11 (“defy[ing]” this orthodoxy).

37. See, e.g., 1 ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 2-1[2] to [3] (3d ed. 1998).

38. 52 U.S. (11 How.) 165 (1850).

39. 11 U.S. (7 Cranch) 481, 485 (1813) (Johnson, J., dissenting).

40. In 1648, no less. See Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2508 (2005).

41. See, e.g., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 54

What keeps *Pennoyer* so compelling is not the glamour of its facts. Nor is it *Pennoyer*'s rogue-filled cast—the embittered Oregon governor, the “illiterate but litigious settler,” the “bigamous United States Senator . . . elected under an alias.”<sup>42</sup> What keeps *Pennoyer* so compelling, rather, is the puzzle of its majority opinion, penned by Justice Field.

Justice Field's opinion builds from “two well-established principles of public law.”<sup>43</sup> The first holds that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.”<sup>44</sup> The second says that “no State can exercise direct jurisdiction and authority over persons or property without its territory.”<sup>45</sup> Not everyone thought these two principles were rightly invoked, even then.<sup>46</sup> Fewer still subscribe to both principles now.<sup>47</sup> But in *Pennoyer* these territorial principles proved decisive. They defeated personal jurisdiction over Neff, a defendant who had not been served with process—and was thus not adequately “present”—within Oregon state lines.<sup>48</sup>

And *Pennoyer* could have stopped there. The Court's two public-law “principles” were enough, most say,<sup>49</sup> to determine Neff's fate without more. But *Pennoyer* took another step regardless, locating support for its conclusion in the Fourteenth Amendment's Due Process Clause. Some have called this due

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(1990) (asserting that we have now been “liberat[ed]” from *Pennoyer*'s grip).

42. Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 479-80 (1987). Professor Perdue's study of *Pennoyer*'s factual background—as well as the Court's reliance on dubious facts—is more than compelling. *Id.* at 480-90. But for now it is enough to restate *Pennoyer*'s basics: In late 1865, J.H. Mitchell sued Marcus Neff in Oregon court to recover unpaid attorneys fees. *Pennoyer v. Neff*, 95 U.S. 714, 719 (1877). Mitchell notified Neff, a nonresident, only by publication. Neff did not appear. The trial court entered default judgment for Mitchell accordingly, and he then attempted to satisfy judgment by attaching (and cheaply purchasing) a parcel of Neff's Oregon land. Mitchell assigned that property to Sylvester Pennoyer, who Neff then sued, arguing that the judgment on which the execution sale was based was invalid for lack of personal jurisdiction. *See Neff v. Pennoyer*, 17 F. Cas. 1279 (C.C.D. Or. 1875) (No. 10,083), *aff'd*, 95 U.S. 714 (1877).

43. *Pennoyer*, 95 U.S. at 722; *see* Redish, *supra* note 32, at 1116 (“As authority for these propositions, Justice Field cited no principle of American constitutional law . . . . Instead, he relied upon Justice Story's writings on international conflict of laws . . . .” (footnotes omitted)).

44. 95 U.S. at 722.

45. *Id.*

46. In my opinion, this decision is at variance with the long-established practice under the statutes of the States of this Union, is unsound in principle, and, I fear, may be disastrous in its effects. It tends to produce confusion in titles which have been obtained under similar statutes in existence for nearly a century; it invites litigation and strife, and over throws a well-settled rule of property.

*Id.* at 737 (Hunt, J., dissenting). Of course, even *Pennoyer* acknowledged some role for extraterritorial power—at least in particular contract or corporate disputes. *Id.* at 734-35.

47. *See* Redish, *supra* note 32, at 1116-17.

48. 95 U.S. at 723.

49. *See, e.g.*, Perdue, *supra* note 42, at 499-500.

process step inapposite, noting that the Fourteenth Amendment was not yet ratified at the time of the relevant dispute.<sup>50</sup> Harsher critics have labeled the step distracting—pure “dictum” at best.<sup>51</sup> But *Pennoyer*’s turn to due process was no mere anachronism. It was a choice of lasting influence, both for litigants and for courts.

Much of that influence is felt in doctrinal policy. No Court before *Pennoyer* had so knotted personal jurisdiction’s focus on federalist imperatives<sup>52</sup> with a concern for individualized fairness—and no Court has untangled the two since.<sup>53</sup>

But even more of *Pennoyer*’s lasting influence comes from the constitutional<sup>54</sup> tradition it inspired. This tradition has its skeptics. Some say that it rests on precarious foundations, promotes inaccurate history, and generates consequences that seem unwise.<sup>55</sup> Others claim that it warrants serious “refine[ment]”<sup>56</sup> and “revis[ion],”<sup>57</sup> if not rejection outright. But *Pennoyer*’s due process mark still defines the law of personal jurisdiction.<sup>58</sup>

50. See Spencer, *supra* note 5, at 620-21 & n.16 (reviewing the relevant timelines).

51. Weinstein, *supra* note 34, at 210 n.157 (citing *Burnham v. Superior Court*, 495 U.S. 604, 617 (1990)).

52. See, e.g., Stein, *supra* note 26, at 689-90.

53. *Id.* at 690 (noting that personal jurisdiction has been partly “privatiz[ed]” by due process). See also Droback, *supra* note 35, at 1028 (“State sovereignty may have been a principal reason for Justice Field’s definition of [*Pennoyer*’s] jurisdictional principles, but fairness to the defendant was at the heart of his application . . . .”); Kogan, *supra* note 29, at 359 (“The Court . . . has been unsuccessful in its struggle to reconcile the relationship between these values.”); Kevin McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 210-11 (1998) (calling the Court’s interest in fairness “selective” while noting that its attention to federalism has “waxed and waned”); Stein, *supra* note 26, at 689 (“The role of interstate federalism in . . . personal jurisdiction is cyclical.”); Margaret G. Stewart, *Forum Non Conveniens: A Doctrine In Search of a Role*, 74 CAL. L. REV. 1259, 1261 n.10 (1986) (“That a defendant can consent to personal jurisdiction supports the conclusion that the primary interests protected by this restraint are private.”).

54. Very few still doubt that *Pennoyer* constitutionalized personal jurisdiction doctrine. See *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 193 (1915) (“Equally well settled is that the courts . . . cannot, without violation of the due process clause, extend their authority beyond their jurisdiction . . . . [This] was long ago established by the decision in *Pennoyer* . . . .”). One who might is Professor Borchers. See Borchers, *supra* note 41, at 24 (“[A] plausible reading of *Pennoyer* is that the Court did not intend to transform the substance of personal jurisdiction into a matter of constitutional law.”).

55. Professor Weinstein goes so far as to say that modern doctrine invites a “mismatch” between personal jurisdiction’s source and its content. Weinstein, *supra* note 34, at 210, 299. A better approach, he argues, is to link personal jurisdiction to full faith and credit-based common law rules. *Id.*

56. Stein, *supra* note 26, at 693, 697.

57. Spencer, *supra* note 5, at 620.

58. Kogan, *supra* note 29, at 258 (“[T]he fecund [*Pennoyer*] dragon left many offspring . . . .”).

And no case bears that mark as plainly as *International Shoe Co. v. Washington*.<sup>59</sup>

*International Shoe* is not blessed with exhilarating facts. It involves no particularly scurrilous parties and no especially scandalous claims. It involves instead a Missouri corporation hoping to sell shoes in Washington and a sovereign state hoping to collect contributions to its unemployment fund.<sup>60</sup> Yet this lackluster setting still gave rise to important jurisdictional change. *International Shoe* altered key definitions, expanding *Pennoyer's* strict (territorial) notion of “presence” to include both physical tenancy and more “symbolic forms”<sup>61</sup>—like non-resident “activities” within a forum state.<sup>62</sup> It expanded personal jurisdiction’s powerful net, distinguishing physical location from legal residence.<sup>63</sup> And it reworked core jurisdictional analyses, adding new features—like “contacts,” “relations,” and “notions of fair play”<sup>64</sup>—to personal jurisdiction’s basic test.

Later Supreme Court opinions applied and adjusted this test over time. Some of these opinions brought old doctrinal pieces together.<sup>65</sup> Others broke new pieces apart.<sup>66</sup> Some revived elements of *Pennoyer's* most fundamental premises—in particular contexts, at least.<sup>67</sup>

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59. 326 U.S. 310 (1945).

60. *Id.* at 311-14. At the time, *International Shoe* maintained ongoing relationships with “approximately one dozen [in-state] sales solicitors.” Kogan, *supra* note 29, at 349. Washington believed these relationships occasioned some tax payment. Even more, it claimed that these relationships sufficed for *Pennoyer*-like “presence”—and thus personal jurisdiction—in Washington. *International Shoe* disagreed, arguing that it could not be “present” in Washington since it kept no office and employed no official agent within state borders. The lower courts sided with Washington. The Supreme Court affirmed. 326 U.S. at 313-22.

61. Kogan, *supra* note 29, at 351.

62. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945). This modification, like some that followed, seems designed to respond to rapidly evolving economic situations—the very kind of changes that personal jurisdiction doctrine seems always to chase but never to catch.

63. See generally Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 431-32 (2002) (“[M]any of the boundaries that define social settings by including and excluding participants—including walls, doors, barbed wire, and other physical and legal barriers—are less significant in a world where the once consonant relationship between access to information and access to places has been greatly weakened.” (internal quotation marks and citation omitted)); Twitchell, *supra* note 5, at 619 (depicting personal jurisdiction’s development as a kind of one-way ratchet, always pushing toward more judicial power).

64. *Int'l Shoe*, 326 U.S. at 316, 319 (citation and internal quotation marks omitted).

65. In personam, in rem, and quasi-in-rem jurisdiction, specifically. See Shaffer v. Heitner, 433 U.S. 186 (1977).

66. “General” and “specific” personal jurisdiction, in particular. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (detailing the pieces of specific personal jurisdiction); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (assessing an exercise of general personal jurisdiction).

67. See *Burnham v. Superior Court*, 495 U.S. 604, 619, 624 (1990) (permitting

And still others assembled a prescribed and categorical approach to personal jurisdiction disputes. One part of this approach assesses “general” personal jurisdiction, a type that permits a court to act without regard to the claims alleged or the nature of the dispute.<sup>68</sup> Another part considers “specific” personal jurisdiction, a type that extends court power over a defendant only in a particular suit.<sup>69</sup> Of the two, “general” is more straightforward: It requires no special connection between the claims asserted and the defendant’s contacts with the forum—so long as the defendant lives, is incorporated, maintains a principal place of business,<sup>70</sup> sustains “substantial and continuous” contacts, or is served with valid process in the relevant locale.<sup>71</sup> “Specific” personal jurisdiction is comparatively abstruse: It requires that the defendant have some purposeful contact (however isolated or “minimal”<sup>72</sup>) with the relevant forum *and* that those contacts be related to the substance of the case. Even more, “specific” demands that the assertion of jurisdiction be “reasonable” according to five Supreme Court-crafted factors: the burden on the defendant, the plaintiff’s interest in obtaining relief, the interests of the forum state, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.<sup>73</sup>

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“general” jurisdiction to follow in-hand service of process within state lines). Established as *Burnham*’s conclusion may now be, its logic still claims some unabashed critics. See Albert Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 YALE L.J. 289, 290 (1956) (deeming transient jurisdiction “closer . . . to robbery than to justice” (citation and internal quotation marks omitted)); Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. LAW 249 (1991) (“The *Burnham* case is . . . a disaster of judicial misunderstanding of the nature of the judicial process.”).

68. “Once general jurisdiction is established,” that is, “the forum may assert its authority over the defendant on any cause of action whatsoever—even over one having nothing to do with the forum.” Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 4 (1991); see also *id.* at 3 (noting that this power “depends on community membership”).

69. “Specific jurisdiction,” in other words, “justifies jurisdiction over the defendant only for a cause of action that ‘arose out of’ or ‘is related to’ the defendant’s activities in the forum.” *Id.* at 5; see also *id.* at 3 (rooting this power in “territorial impact”). Professor Twitchell deems the “general” and “specific” categories outdated and prone to abuse, explaining their resilience in terms of alleged necessity, seeming innocuousness, and unquestionable inertia. See Twitchell, *supra* note 5, at 613-43.

70. If the defendant is a corporation, that is.

71. These tests are disjunctive.

72. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

73. I have reordered these factors slightly, not to criticize the original articulation, but to frame more policy-coherent groups. The latter group (which includes forum, interstate, and efficiency interests) seems most attentive to federalism. The former (which includes party concerns) seems more attuned to individual fairness. But however these factors are catalogued, Professor McMunigal may well be right: The list may be a “motley assortment” of slippery terms. McMunigal, *supra* note 53, at 193.

No one doubts that this prescribed approach has grown elaborate, even convoluted in parts. Its “general” and “specific” options are saddled with multiple layers, overlapping features, and “accumulate[ed]” supplements.<sup>74</sup> Even the Supreme Court has acknowledged that small pockets of “flexib[ility]” inform the robust analytical structure it has built.<sup>75</sup>

But more often the Court speaks of strictness, not pliability. It declares jurisdiction’s structure dependably solid, built on “rigid categories” “theoretically unaltered” by new doctrine and time.<sup>76</sup> It warns against the “mistake” of pushing any hint of flexibility too far.<sup>77</sup> And it insists that modern personal jurisdiction analysis provides a well-defined path to “evident” conclusions and a mechanical means to “natural” results.<sup>78</sup>

Some of these results will be outlined in detail below. They will show how the Court applies its formal jurisdictional mandates, and they will reveal too what those mandates might disguise. But this preliminary review is itself important, if only as a predicate step. It puts the critical examination that follows in jurisdictional context. And it frames personal jurisdiction in the categorical way that modern courts do.<sup>79</sup>

No understanding of personal jurisdiction would be complete, of course, without some mention of forum non conveniens—that strange and understudied “housekeeping rule.”<sup>80</sup> Forum non conveniens is not a jurisdictional mandate. Nor can it claim deep statutory or constitutional roots.<sup>81</sup> Forum non

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74. *Id.* at 195.

75. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (citing *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958)).

76. *Shaffer v. Heitner*, 433 U.S. 186, 201-02 (1977).

77. *Hanson*, 357 U.S. at 251.

78. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Not that these quotations prove everything. Personal jurisdiction is likely thought to be more manipulable than its subject-matter sibling, not least because of its modern sliding scale. But its rigidity is still rhetorically powerful and practically potent, at least in one direction. *International Shoe* may give courts the tools to find personal jurisdiction in most places that they wish. But it does not give them the tools to reject it in those places where they do not. Courts thus either finesse internal pieces or create external ones to relax this rigidity. Forum non conveniens can—and does—play that latter role. See *infra* notes 80-89 and related text.

79. See *Shaffer*, 433 U.S. at 201-02.

80. *Lear*, *supra* note 27, at 1148 (citing *American Dredging Co. v. Miller*, 510 U.S. 443, 457 (1994)); see also Judith Resnick, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990). Some might say that venue is no less essential, though I ignore its important (statutory) terms here.

81. Not until 1947 did forum non conveniens earn widespread acceptance in the federal courts. See Stein, *supra* note 7, at 812. Many state courts followed even later still. See generally David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 950-53 (1990) (detailing state court forum non conveniens policy and practice). And though it claims no obvious legal anchor, the doctrine’s constitutional (rather than statutory) source might seem more assured. There is no basic forum non conveniens statute whatsoever, but the doctrine can be connected, however tenuously, to notions of



conveniens is instead a judge-made “escape valve,”<sup>82</sup> a common-law trapdoor that permits courts to dismiss cases otherwise within their jurisdictional purview.<sup>83</sup>

Explanations for this doctrine are sometimes ethereal and sometimes concrete. Some link forum non conveniens to the federal courts’ “inherent power.”<sup>84</sup> Others fix it to case-specific facts. But neither explanation seems to change how the doctrine applies: Courts dismiss cases for forum non conveniens only when an alternative forum is available *and* dismissal is (“strongly”) indicated by an array of “interests.”<sup>85</sup> These “interests” divide into “public” and “private” groups<sup>86</sup>—the former looking at docket pressures, local preferences, jury burdens, and conflicts of law;<sup>87</sup> the latter at access to evidence, burdens on parties, “obstacles” to fair trial, and “all other practical” concerns.<sup>88</sup> They also sound “almost identical” to personal jurisdiction’s “reasonableness” factors in style and tone.<sup>89</sup>

This similarity is no coincidence. Forum non conveniens is not just a common-law trapdoor for parties. It is a procedural backstop for courts, a handy tool allowing judges to release jurisdictional pressures and to avert jurisdictional excess, however tardily.<sup>90</sup> Personal jurisdiction may be responsible for many of these pressures and much of this excess. But surely some appears in other jurisdictional settings. Surely some appears in the context of subject-matter jurisdiction, a separate (if related) jurisdictional limit that Subpart B next explores.

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constitutionally granted inherent court powers. See Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 741 (2001) (lamenting the Supreme Court’s “indiscriminate” use of the “inherent powers” label).

82. Stein, *supra* note 7, at 788.

83. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

84. See Pushaw, *supra* note 81, at 741.

85. See *Gulf Oil*, 330 U.S. at 506-08. Even now, the Supreme Court’s interest in forum non conveniens seems less than avid. The doctrine has gained the Court’s attention only rarely—and recently not much at all. Only twice has the Court considered forum non conveniens decisions squarely: in *Piper* and *Gulf Oil*.

86. *Piper*, 454 U.S. at 241 & n.6.

87. *Gulf Oil*, 330 U.S. at 508-09.

88. *Id.*

89. Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 387 (1992); see *id.* at 387 n.178 (“The primary difference is that various formulations of the interests considered under forum non conveniens doctrine always include whether an alternative forum is available.”).

90. See Stein, *supra* note 7, at 782 (noting that the “system . . . takes away with one hand what it gives with the other”); *id.* at 785 (“[F]orum non conveniens doctrine has come to accommodate the collective shortcomings and excesses of modern [jurisdictional] rules . . .”).

### B. Subject-Matter Jurisdiction and Abstention

Subject-matter jurisdiction asks its own straightforward question. It asks whether a particular court has the authority to resolve a particular type of suit.<sup>91</sup> The answer to this question does not depend on contacts, contract, consent, or convenience—though some believe that it should.<sup>92</sup> It depends instead on substantive law, party citizenship, and the basis of the litigants' claims.

The source of this jurisdictional limit is again the United States Constitution—though this time more evidently so. Article III expressly lists those “cases” and “controversies” within the “judicial Power” of federal courts, confining that catalog to nine subject-matter heads.<sup>93</sup> Congress has in turn narrowed that “Power,” implementing pieces<sup>94</sup> of Article III's grant over time.<sup>95</sup> Only those claims satisfying both constitutional and statutory demands fall within the limited subject-matter jurisdiction of federal district courts.<sup>96</sup> No others do.

This jurisdictional limit can seem an “expensive habit.”<sup>97</sup> Parties may not waive, disguise, or stumble through subject-matter jurisdiction defects. Nor may federal courts avoid, elide, or ignore them—no matter when they

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91. *Id.* at 787.

92. *See, e.g.*, Cohen, *supra* note 5, at 894 (arguing that the well-pleaded complaint rule “operates blindly to preclude original federal jurisdiction in cases where, as a matter of sound policy, the parties ought to be permitted to choose a federal forum.”).

93. U.S. CONST. art. III, § 2. These jurisdictional heads are almost entirely generic. *See* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1215-16 (2001) (“Article III's only nongeneric heads of jurisdiction are those extending the judicial power to ‘Cases of admiralty and maritime Jurisdiction’ and to ‘Controversies . . . between Citizens of the same State claiming Lands under Grants of different States.’”). But they should not be confused with the bases Article III prescribes for original Supreme Court jurisdiction, however much they may overlap. U.S. CONST. art. III, § 2, cl. 2.

94. Though by no means all of it. *See, e.g.*, Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982) (asserting that Congress need not vest the full range of Article III powers in the federal courts).

95. There was, for example, no original federal-question jurisdiction until 1875. *See* Cohen, *supra* note 5, at 891.

96. *See* Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1830 (2007); *see also* Bowles v. Russell, 127 S. Ct. 2360, 2364-65 (2007). State courts encounter no such restriction, operating instead as courts of “general” subject-matter jurisdiction. This fact has serious practical impact today. It also mattered a great deal at the Founding. Absent state-court jurisdiction, many cases would then have been left without any judicial forum, since Article III limited federal judicial power in substantial ways.

97. *See* David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. CHI. L. REV. 268, 298 (1969); *see also* Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1794 (1992) (“[J]urisdictional uncertainty can surely lead to both a waste of judicial time and added expense to the litigants.”).

emerge.<sup>98</sup> Courts are told to decide subject-matter jurisdiction questions first in most cases. But they must resolve them always and unfailingly, even if last.<sup>99</sup>

Most “original” subject-matter questions follow one of two lines. The first is called “federal-question,” and it aims to promote the predictable, uniform, and expert administration of federal law.<sup>100</sup> The other is called “diversity,” and it seeks to “counteract prejudice on the part of state courts.”<sup>101</sup> Both federal-question and diversity shape federal court power in fundamental ways. And both merit careful attention here, with federal-question first.

Federal-question jurisdiction is not as old as it may seem. Article III extends the federal “judicial Power” to “all Cases, in Law and Equity, arising under th[e] Constitution, the Laws of the United States, and Treaties,”<sup>102</sup> but for decades this was a promise unfulfilled. Not until 1875 did Congress vest jurisdiction to hear federal questions in the federal district courts—and even then Congress only went so far. It gave federal courts less jurisdiction than Article III permitted, even as it mimicked that Article’s more expansive terms.<sup>103</sup>

Today’s federal-question statute does much the same. Like its post-1875 predecessor, 28 U.S.C. § 1331 echoes Article III, granting federal district courts jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.”<sup>104</sup> But in interpretation and effect, § 1331 speaks of something narrower. It speaks of jurisdiction only over federal-law claims

98. *See* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (explaining that parties may not waive or forfeit objections to subject-matter jurisdiction and that courts have an “independent obligation” to determine subject-matter propriety, even when unchallenged); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804) (“[I]t was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.”); *see also* 28 U.S.C. § 1359 (2006) (prohibiting fraudulent joinder); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 555 (2002) (discussing jurisdiction in the context of code pleading).

99. *See* *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998) (rejecting the idea that “hypothetical jurisdiction” is proper, even when useful or efficient).

100. Or so they say. *See* Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 157-59 (1953).

101. Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 86 (1993) (internal quotation marks omitted); *id.* at 81 (adding that diversity aims in part to protect “against aberrational state laws”). A third, often-ignored head of jurisdiction involves the federal government as a party. I focus my attention on the two more common jurisdictional heads here.

102. U.S. CONST. art. III, § 2, cl. 1.

103. *See* Cohen, *supra* note 5, at 891 & n.13 (cataloging consistent cases). *But cf.* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 720 (1986) (discussing the short-lived Judiciary Act of 1801). For a careful examination of the historical or original meaning of Article III’s “arising under” term, *see* Anthony J. Bellia, Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263 (2007).

104. 28 U.S.C. § 1331 (2006). There are, of course, other power-granting statutes, though § 1331 is the primary and most pertinent one.

legitimately raised in a plaintiff's complaint, not in possible or even probable defenses.<sup>105</sup> This federal-question mandate has been called the "well-pleaded complaint" rule. And it admits few exceptions. State-law claims satisfy § 1331 only when their disposition "depends upon the construction or application" of an embedded question of federal law.<sup>106</sup>

Diversity jurisdiction holds no such exception. Instead, it expressly empowers federal courts to hear state-law questions, so long as another set of requirements is met.

Diversity jurisdiction is the older subject-matter sibling—by one measure, at least. Article III speaks of both federal-question and diversity jurisdiction, extending the "judicial Power" to "cases" involving federal questions and to "Controversies . . . between Citizens of Different States."<sup>107</sup> But where federal-question sat dormant for decades, Congress made good on diversity's promise almost from the start. In the First Judiciary Act, passed in 1789, Congress gave inferior federal courts the authority to hear suits between citizens of different states, regardless of the claims made, so long as the "matter in dispute exceed[ed] . . . five hundred dollars."<sup>108</sup> Since then, Congress has raised the "amount-in-controversy" figure sporadically, most recently in 1996.<sup>109</sup> Chief Justice Marshall has also added his own narrowing voice, reading Congress's diversity legislation to require "complete" diversity of "state citizenship" among opposing parties, not just the "minimal" diversity permitted by Article III.<sup>110</sup>

Today's diversity statute, 28 U.S.C. § 1332, bears both constraints. It invests federal courts with diversity jurisdiction only when the "amount-in-

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105. See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908); *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 459 (1894).

106. *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 199 (1921). A mere violation of federal law is not necessarily enough to invoke federal-question jurisdiction. See *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 812 (1986). Some commentators think that "arising under" triggers a kind of protective jurisdiction—that is, jurisdiction to safeguard federal interests—though not all do. See Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 542-43 (1983).

107. U.S. CONST. art. III, § 2, cl. 1.

108. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. For an engaging history of this section, see Borchers, *supra* note 101, at 98-103.

109. See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (raising the figure to \$75,000). In 1887, the "amount-in-controversy" figure rose from \$500 to \$2000, jumping to \$3000 in 1911, to \$10,000 in 1958, and to \$50,000 in 1989. According to legislative records, Congress hoped the 1989 increase would reduce the number of diversity cases in the federal courts—as well as respond to the effects of inflation. See H.R. REP. NO. 100-889, at 45 (1988), *reprinted in* 1988 U.S.C.C.A.N., 5982, 6005-06 (estimating a 40% reduction in diversity cases); see also Foiles by Foiles v. Merrell Nat'l Labs., 730 F. Supp. 108, 110 (N.D. Ill. 1989) (explaining that the 1989 act "raised the jurisdictional amount . . . for the express purpose of reducing the case load of the federal courts"). There is precious little legislative history regarding the 1996 change, but the same congressional motives could well have been at work.

110. See *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806) (Marshall, C.J.).

controversy” exceeds \$75,000 *and* when all plaintiffs are diverse from all defendants at the moment the case enters federal court, not when the judgment is entered or the disputed event occurred.<sup>111</sup> Probate and domestic-relations matters are tacitly excluded, however unfairly.<sup>112</sup> And the term “state citizenship” takes on varied meanings. Individual litigants can hold one such “citizenship,” determined by domicile, presence, and intent to remain. Corporations can hold two—one where they are incorporated, the other where headquartered. And partnerships and associations can hold many more—as many, in fact, as those held by their members.

These are not trivial matters. Nothing is more important, courts often remind, than their grave jurisdictional charge. Subject-matter jurisdiction is a “virtually unflagging obligation,”<sup>113</sup> they say, not an irritation to be glibly ignored.

But this obligation is not detached from other doctrine. Some of its consequences are felt in supplemental jurisdiction, a statutory creation that expands subject-matter jurisdiction beyond preexisting limits.<sup>114</sup> Others are felt in federal-court “abstention,” a common-law doctrine that “causes strange things to happen in federal courts.”<sup>115</sup> Not all of these “strange things” please court critics, many of whom call for abstention to be abolished without more.<sup>116</sup> Nor do they bear the same motive or reflect a common analytical approach. One type of abstention focuses on avoiding constitutional issues and deferring to state-court interpretations of state law.<sup>117</sup> Two more attempt to

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111. This means either filing or removal is the pivotal moment.

112. *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689 (1992) (discussing the domestic-relations exception to diversity jurisdiction); Judith Resnik, “*Naturally*” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682 (1991) (discussing systemic difficulties confronting and afflicting women in federal court).

113. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”).

114. *See* 28 U.S.C. § 1367 (2006). Under § 1367, federal courts have the authority to exercise jurisdiction over claims and parties otherwise beyond their jurisdictional scope—so long as these claims and parties supplement (i.e., link to) a claim otherwise within the jurisdictional reach of the court, and so long as the supplemental pieces form part of the same “case” as the core claim. *Id.* This permits federal courts to expand their jurisdictional reach beyond preset limits, proving subject-matter jurisdictional terms flexible in one direction while abstention proves it flexible in the other.

115. James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1050 (1994). Abstention could well be understood as the same kind of court-made, back-end check that forum non conveniens is. The key difference, it seems, is that abstention checks subject-matter jurisdiction while forum non conveniens effects check personal jurisdiction.

116. *See, e.g.*, Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 72-74 (1984).

117. The types of abstention are generally referred to by the name of the specific variety’s seminal case. This first type, for example, goes by the name of “*Pullman*

limit disruptions of complex and politically sensitive state regulatory regimes.<sup>118</sup> One preserves the sanctity of pending state criminal and civil enforcement proceedings.<sup>119</sup> And still another defers to state courts in certain matters involving inconvenient federal fora, parallel litigation, and real property.<sup>120</sup> But how these abstention types vary is less important than where they converge: all permit<sup>121</sup> federal courts to refrain from exercising jurisdiction they otherwise hold.<sup>122</sup>

In this, abstention is much like *forum non conveniens*. Both proceed in high-sounding phrases and multi-factored analyses, allowing courts to invoke a malleable language of convenience, deference, and court competence.<sup>123</sup> Both purport to promote comity and federalism<sup>124</sup> without unduly infringing other structural concerns. Both respond to—and release courts from—the inflexible mandates jurisdiction claims to impose.

And both help frame some of the jurisdictional stories told below. These stories aim to fill in jurisdiction's abstract tests with authentic facts, showing both how those tests are used and how they might be better understood. But this turn to application should follow one final preliminary step, a step that connects jurisdiction's several pieces into a customary whole. Those connections are drawn (briefly) in Subpart C.

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abstention," named after *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). I do not include the domestic-relations exception to diversity jurisdiction here, though it is often considered with or near abstention doctrines. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1271-83 (5th ed. 2003).

118. See *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). I do not mean to suggest that the two are perfectly coextensive. I mean only to mimic what has become a common pairing. See FALLON ET AL., *supra* note 117, at 1203.

119. See *Younger v. Harris*, 401 U.S. 37 (1971).

120. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

121. Or require. See, e.g., *Younger*, 401 U.S. at 42. Courts retain similar discretion to refuse to exercise supplemental subject-matter jurisdiction, see 28 U.S.C. § 1367(c) (2006), and jurisdiction over certain class actions, see 28 U.S.C. § 1332(d).

122. Cf. Linda S. Mullenix, *A Branch Too Far: Prming [sic] the Abstention Doctrine*, 75 GEO. L.J. 99, 103-04 (1986) (deeming modern abstention practice "dangerous, unprincipled, and unfair"); *id.* at 118, 156 (criticizing the Court for wrapping abstention doctrine in "lofty sounding, conclusory phrases" and "high-sounding . . . rationales").

123. *Id.* at 101 ("Invocation of . . . abstention is usually accompanied by imposing phrases such as federalism, comity, avoidance of duplicative litigation, judicial efficiency, judicial economy, and wise judicial administration." (internal quotation marks omitted)); cf. Albright, *supra* note 89, at 387 (reviewing the motives and goals of *forum non conveniens*).

124. These are less obvious in the context of *forum non conveniens*, but they can surely be found in that doctrine's attention to conflict of laws. No court wants a jury in one forum misinterpreting the laws of another. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

### C. A Short Summary

So what does legal jurisdiction claim to look like, taken in full? What is all of this history, policy, and doctrine supposed to show?

It shows, to start, the sum of two halves. One half is personal jurisdiction, a concept focused on fairness to defendants and deference to sovereign territory. The other is subject-matter jurisdiction, a notion concerned with types of “cases and controversies.” Each piece has its own smaller features and intricate tests. Personal jurisdiction splits into “general” and “specific” options—the first extending court power over all suits against a defendant, the second limiting that power only to particular claims. Subject-matter in turn divides along “federal-question” and “diversity” lines—the former looking for “well-pleaded” federal issues, the latter searching out claims with adequate amounts-in-controversy and citizens from different states.

Federal courts do not need to claim all of these pieces, at least not at any one time. They do not need both “general” and “specific” personal jurisdiction over a defendant. Nor do they need both “federal-question” and “diversity” subject-matter authority. But federal courts do need at least one piece from each side. Federal courts must possess, that is, both the authority to enter valid judgment against a particular defendant *and* the power to adjudicate a particular kind of dispute. Legal jurisdiction falls short otherwise.

Personal and subject-matter jurisdiction thus shape legal jurisdiction’s most fundamental requirements. And they speak a language of “unflagging obligations” and “inflexible” duties as they do. By these terms, federal courts mechanically accept jurisdictional questions, automatically abide their fixed obligations, and “unthinkingly get[] the[] job done.”<sup>125</sup>

But legal jurisdiction involves more than that. It involves intermittent deviations and occasional bends, as even this credulous review foreshadows. Some of those bends come in personal and subject-matter doctrine directly, as federal courts elide or ignore jurisdiction’s hard rules. Others come in forum non conveniens and federal-court abstention, two common-law devices releasing courts from duties that jurisdiction would seem to impose.<sup>126</sup> But all of these bends suggest that jurisdiction’s claims of inflexibility are inaccurate. So all hint that jurisdiction’s standard story should be more skeptically retold. Part II offers a more critical retelling.

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125. Little, *supra* note 23, at 132; *see* ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 310-16 (1950) (listing the benefits of bright-line rules in an analogous context); Field, *supra* note 8, at 683 (noting the benefits of “clear and simple” jurisdictional rules).

126. To repeat: Supplemental jurisdiction also permits a kind of deviation, capturing a bend of a different type. Its bend runs toward a broader exercise of legal jurisdiction, not a narrower one. *See* 28 U.S.C. § 1367 (2006).

## II. LEGAL JURISDICTION: AN UNCONVENTIONAL VIEW

There is much to like about jurisdiction's standard story. Its modern pieces seem compatible with constitutional text and jurisdictional history. Its firm lines seem to promote "absolute [jurisdictional] purity"<sup>127</sup> and to preempt costly and protracted jurisdictional "game[s]."<sup>128</sup>

But there is much to doubt about jurisdiction's standard story too. This Part attempts to detail and demonstrate those doubts. It searches out those places where jurisdiction's standard story proves overstated, misleading, and sometimes knowingly false. I am not the first to take this general tack. Others have spotted pockets of jurisdictional incoherence—and then often tried to close those pockets with fast-acting cures.<sup>129</sup> I do not seek that kind of solution. I hope instead to tell a more cautious jurisdictional story, one that looks carefully at the gaps between what courts often say about jurisdiction and what they sometimes do with its tools. Subpart A begins with a broad analytical brush, outlining some of jurisdiction's linguistic habits and policy goals. Subpart B then focuses in on the two types of jurisdiction outlined above, carefully tracking jurisdictional latitude along "personal" and "subject-matter"

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127. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999); *see also* *Moore v. Sims*, 442 U.S. 415, 430 (1979); *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). In a way, no doubt, this argument triggers a thorny and interminable debate about the nature of rules and standards. But that is a debate I hope to avoid here. I do not doubt that standards often create discretion and thus the potential for abuse. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989) ("And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired."). Nor do I question the costs of rigid rules. But my focus is not the relative merit of one or the other, at least in the jurisdictional context. My focus is simply on the split between the way jurisdiction presents itself and the way it operates. *Cf.* Morton J. Horowitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 98 (1993) (lamenting the Court's cultivation of a "thick undergrowth of technicality" and its development of multipronged tests "everywhere and for everything"); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 165-69 (1985) (criticizing the Court for its "obtrusively elaborate" style, its excessive reliance on "tests" and "prongs," and its tedious use of "requirements" and "hurdles").

128. Field, *supra* note 8, at 683.

129. *See supra* note 5; *see also* Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589 (1992). Other scholars have accused justiciability doctrines (like standing and political question) of wrapping easy manipulation in hard-seeming tests. *See, e.g.*, William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988); Cass Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1475 (1988). Standing is thus a useful analogy in at least one sense. But standing is just as helpful as a kind of counterpoint: Its tests and turns are more self-consciously uncertain—and sometimes quite evidently so. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) ("The existence of one or more of the essential elements of standing [can] depend[] on [] unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." (internal quotation marks and citation omitted)).



lines. As it does, Subpart B considers a selection of prominent Supreme Court cases, reading these jurisdictional opinions critically. Subpart C then uses this evidence to draw two broader jurisdictional lessons—one about the flexibility of modern jurisdictional analysis, the other about the Court’s interest in splitting rhetoric from reality.

### A. A Broader Brush

Legal jurisdiction projects a false rigid front. That front may seem unduly technical, too “dry” to inspire much passion and too sterile to excite those not already enamored with the content of judicial rules.<sup>130</sup> It may also seem a kind of social construction, less tethered to the “world’s brute constraints” than tort or property<sup>131</sup>—and more likely to “require translation” than both.<sup>132</sup> But jurisdiction is not just a rarefied social construct. Nor is it the inflexible bulwark it pretends.<sup>133</sup> It is a power that permits court-made exceptions and a process that admits overstated results.

For a time, these results lay at the mercy of clever parties. Litigants between 1789 and 1875<sup>134</sup> could find their way into (or out of) federal court simply by pleading particular facts—the right claims, the right amounts, the right state citizenships.<sup>135</sup> It did not matter if these facts could be proven. It only mattered that they were properly pled.<sup>136</sup> Then as now, jurisdiction was a matter of sincere judicial interest, as well as a source of serious structural strain.<sup>137</sup> But “good pleading” was once more than a “necessary” condition of

130. LARRY W. YACKLE, *RECLAIMING THE FEDERAL COURTS* 3 (1994); *see also* Little, *supra* note 23, at 76 (noting that jurisdiction “target[s]” those who spend their days “navigating court systems”); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1456-59 (1995) (“The charge of stylistic incompetence leveled against the modern judicial opinion is . . . widespread . . . [T]he opinions lack vigor and intellectual excitement, because they are stodgy and, worst of all, dull.” (internal quotation marks omitted)).

131. Little, *supra* note 23, at 76.

132. *Id.* at 77. I do not mean “translation” in the more nuanced way Professor Lessig has used the term. *See, e.g.*, Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993). I mean it in the more quotidian sense—*viz.*, that non-lawyers may need more expert assistance to understand, say, the subtleties of *Pullman* abstention than to comprehend the nature of assault.

133. *See* Field, *supra* note 8, at 684 (“[J]urisdictional rules are extraordinarily unclear . . . [and] extremely complex.”).

134. This period may have stretched even later still. Professor Collins notes that it was not until 1936—just two years before the promulgation of the Federal Rules of Civil Procedure—that the Court firmly and emphatically changed pleading practice. *See* Collins, *supra* note 96, at 1834.

135. *See id.* at 1838-40.

136. *Id.* (discussing the difficulties confronted by those wishing to challenge jurisdiction in earlier pleading eras).

137. *Id.* at 1882 (hinting at separation-of-powers issues inherent in courts’ “tolerance” of party manipulation).

federal jurisdiction; it was a “sufficient” one.<sup>138</sup> Parties could contrive and “concoct[]” federal jurisdiction with little difficulty, “easily secur[ing] a federal forum and a potentially different decisional rule from that in state court.”<sup>139</sup> Even more, they could almost always “get away with” it—at least back then.<sup>140</sup>

Lucky parties may still get away with it now. But the jurisdictional freedom once enjoyed by parties now belongs to a more likely source: the federal courts. These courts can sometimes “evade” and elide “serious” jurisdictional limits—or simply add new wrinkles to old forms.<sup>141</sup> Their discretion is not always weak and narrow, but often “broad and far-reaching,”<sup>142</sup> informing generous portions of jurisdictional law.

Precisely where this discretion manifests varies in some particulars. Some jurisdictional rules are quietly elusive on their faces.<sup>143</sup> Others are vigorously applied in one case and hastily ignored in the next.<sup>144</sup> Some opinions witness courts excusing themselves from hard rules stated elsewhere.<sup>145</sup> Still others show courts disregarding their own strict rhetoric.<sup>146</sup> The Subsections that follow examine these turns in greater detail, supporting my summary claims with more specific evidence. But even this broad-brush outline serves a useful end: It suggests that jurisdiction is a pliable legal instrument—less a rigid legal structure than a court-held “bag of tricks.”<sup>147</sup>

Some of these tricks echo in judicial language—the words and tenses that federal courts use. Court decisions often exhibit a touch of clumsy styling or a bit of awkward phrasing, regardless of topic or theme.<sup>148</sup> But opinions about federal jurisdiction do more than repeat blunt statements about rigid

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138. *Id.* at 1838, 1876.

139. *Id.* at 1877-78.

140. *Id.*

141. Fitzgerald, *supra* note 93, at 1275; *see, e.g.*, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (creating a new abstention type).

142. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 546 (1985).

143. *See, for example*, § 1331's “arising under” test.

144. *See infra* Part IIB; *see also* Field, *supra* note 8, at 686-87.

145. *See, e.g.*, *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180 (1921) (sidestepping the “well-pleaded complaint” rule from *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908)).

146. *See, e.g.*, *Colo. River*, 424 U.S. at 817; *see also* *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996).

147. Field, *supra* note 8, at 723.

148. There are many “interesting” and “distinguished” writers on the bench, too. *See* RICHARD A. POSNER, *LAW AND LITERATURE: REVISED AND ENLARGED EDITION* 273 (1998). Judge Posner lists “John Marshall, Benjamin Cardozo, Louis Brandeis, Learned Hand, and Robert Jackson” among the best of those writer-judges, *see id.*, though he argues that “[o]nly John Marshall’s style is magisterial.” *Id.* at 274; *see also* Pierre N. Leval, *Judicial Opinions as Literature*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 206, 207 (Peter Brooks & Paul Gewirtz eds., 1996) (urging judges to forgo the “quest after persuasive power or beauty” and to favor “clear analysis and clear transmission of . . . message”).

requirements. They prove especially (and increasingly) thick with dense language and “obfuscatory grammar.”<sup>149</sup> Term after term, the Supreme Court has employed common blurring devices—passive voice, euphemism, “relexicalization”<sup>150</sup>—more often in jurisdictional decisions than elsewhere.<sup>151</sup> This pattern of usage can cloud meaning, complicate outcomes, and frustrate readers. It can also create room for courts to avoid jurisdiction’s supposedly inflexible terms.

But it is not just language that unsettles jurisdiction. It is also jurisdictional policy—or at least that policy’s strange fit with judicial rhetoric. Opinions about jurisdiction “profess fidelity”<sup>152</sup> to text, precedent, and legislative intent, just as many non-jurisdictional decisions do.<sup>153</sup> Jurisdictional decisions also tout a range of other policy interests—federal supremacy, judicial economy, fairness to litigants, devotion to separation of powers, federalist respect—that are as laudable as they are trite. But these policy interests do not always fit with rigid jurisdictional mandates. They often fit much better, in fact, with precisely the opposite: they benefit from adaptability, not inflexibility—pliable pieces and ready escape valves, not unflagging obligations or unflinching rules. Federal courts are surely aware of this, even if they scarcely admit it. So it is no wonder that these courts find room to diverge from jurisdiction’s strict requirements. It is no wonder, that is, that these courts find flexibility behind jurisdiction’s false rigid front.<sup>154</sup>

Saying this, of course, hardly makes it so. Proving that strict jurisdictional rules fail in the face of hard doctrinal fact requires more than earnest repetition. It requires evidence. The Subpart that follows aims to compile that evidence, offering concrete examples of the flexibility behind jurisdiction’s false inflexible front. These examples are specific, since most questions about jurisdiction are “difficult, if not impossible, to answer in gross.”<sup>155</sup> They are also familiar, drawn from the Supreme Court’s docket and shaped by the tests

149. Little, *supra* note 23, at 81, 114; *id.* at 128 (discussing the change in tone and complexity of decisions over time); *id.* at 81 n.18 (noting that obfuscatory grammar and many blurring devices have at most held steady in usage).

150. *Id.* at 81, 96-106. Passive voice and euphemism are not abstract concepts or uncommon things. They surely require no special explanation here. But relexicalization is more ephemeral and unfamiliar, so it demands a bit more definitional work. I use the term to mean a kind of nominalization, one in which the court creates new, often compound terms—like “well-pleaded complaint rule”—to refer to legal requirements and to “crystallize” (if rarify) meaning. *Id.* at 102.

151. *Id.* at 114 (noting that these features appear sometimes “double” the amount in jurisdictional decisions than they do elsewhere).

152. Michael Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499, 511-12 (1989).

153. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 94-101 (1980); Younger v. Harris, 401 U.S. 37, 45-49 (1971).

154. Wells, *supra* note 152, at 519 (“[J]urisdictional policy is merely a convenient rationalization . . .”).

155. Shapiro, *supra* note 142, at 574.

outlined in Part I. But where that Part was mostly credulous, this one adds a more skeptical tone. And it begins, as before, with personal jurisdiction.

## B. A Detailed Study

### 1. Personal jurisdiction

Personal jurisdiction makes a bold promise. It pledges to cabin courts' authority to hear particular claims against particular defendants—and there are good reasons why it would. Fairness to litigants, respect for state sovereignty, deference to community membership, prudent use of resources: All are worthy interests. All seem broadly consistent with personal jurisdiction's avowed goal.

But personal jurisdiction's promise is one it only curiously keeps. The doctrine may speak a steady language of contacts, burdens, and interests, merging federalism and fairness together into one. It may rehearse "categories" that remain "unaltered"<sup>156</sup> and proclaim (qualitatively) "evident" results.<sup>157</sup> But personal jurisdiction depends less on oft-incanted firmness than on unstated "intuitions" and unspoken inputs.<sup>158</sup>

To be fair, personal jurisdiction may be better for these hunches. Old cases about land grabs and oil wells do not fit perfectly with new facts about wireless access and Internet sales. Rigid rules always have their costs. So some space for judicial instinct may often be useful, if not quite personal jurisdiction's "greatest strength."<sup>159</sup> But there is more to personal jurisdiction than the burden of dated doctrine and the blessing of some room to change. There is a doctrine that refutes its own rhetoric—a doctrine, that is, that does something different than what the courts so often say.

This pattern is not limited to unfamiliar cases. Personal jurisdiction's pliability may be at its most visible, rather, in one of the decisions we know best: *Asahi Metal Industry Co. v. Superior Court*.<sup>160</sup> *Asahi's* backstory is as

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156. *Shaffer v. Heitner*, 433 U.S. 186, 201-02 (1977).

157. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). An important caveat: I do not pretend that these micro-quotations prove everything. For one, personal jurisdiction is more intrinsically manipulable than its subject-matter analog, not least because of its modern (relational) sliding scale. For another, both courts and lawyers seem to know precisely that—the search for personal jurisdiction answers is not guided by absolute and "unaltered" categories alone. *See infra* Part IV. But this categorical rhetoric is still noteworthy, particularly for the signals it sends. *See infra* Part IV.

158. Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1450 (1988); *see also* McMunigal, *supra* note 53, at 189; Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 530 (1991) (noting that, in some seminal personal jurisdiction cases, the Court is "unanimous in . . . conclusion, but deeply fragmented in . . . rationale").

159. Berman, *supra* note 63, at 330-31.

160. 480 U.S. 102 (1987).

tragic as it is famous. Not far from San Francisco in 1978, Gary Zurcher lost control of his motorcycle, allegedly because of a defective tire.<sup>161</sup> Zurcher was seriously injured in the accident, his wife killed.<sup>162</sup> In time, Zurcher sued Cheng Shin Rubber, the Taiwanese tire manufacturer, in California court. Cheng Shin then impleaded Asahi, the Japanese maker of a critical tire valve, seeking indemnification. Zurcher and Cheng Shin later settled, leaving only cross-claims and indemnity disputes in court.<sup>163</sup> Asahi moved to have the claim against it dismissed for lack of personal jurisdiction.<sup>164</sup>

Asahi did not have an easy personal jurisdiction case to make. It knew that its valves reached American markets.<sup>165</sup> Even more, it knew that its valves “end[ed] up . . . in California,” where Cheng Shin conducted a full twenty percent of its sales.<sup>166</sup> So though Asahi did no direct business of its own in California, it surely had some commercial contact there. The question in *Asahi* was whether personal jurisdiction still failed.

The Supreme Court said that it did. It failed in part because Cheng Shin could not show “general” personal jurisdiction—which (to refresh) requires that a defendant live, be incorporated, maintain a principal place of business, have “substantial and continuous” contacts, or be served with process in the relevant state.<sup>167</sup> Asahi met none of these demands.<sup>168</sup> And it failed in part because Cheng Shin could not prove “specific” personal jurisdiction—which requires that the defendant have some purposeful (if minimal) contacts with the relevant forum, that those contacts be related to the substance of the dispute, and that the assertion of jurisdiction be “reasonable.”<sup>169</sup> Asahi did not satisfy this test either. Asahi surely did have some contact with California—enough, in

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161. *Id.* at 105-06.

162. *Id.* at 105. Both were California residents. *See Asahi Metal Indus. Co. v. Superior Court*, 702 P.2d 543, 544 (Cal. 1985), *rev'd*, 480 U.S. at 102.

163. 702 P.2d at 552 n.9 (“Subsequent to the filing of the petition for hearing herein, plaintiffs’ complaint was dismissed with prejudice, presumably pursuant to a settlement. The cross-complaints were not dismissed.”).

164. 480 U.S. at 106. To be precise, the motion was actually one to quash the summons.

165. *Id.* at 107, 112-13.

166. *Id.* This factual assertion may seem a bit overstated. Asahi never expressly admitted that it knew of any sales in California. Even more, the Supreme Court accepted this fact only for argument’s sake. *Id.* Still, Asahi never contested Cheng Shin’s suggestion of knowledge. Asahi never claimed, that is, to be “unaware that some of its valve assemblies . . . would be incorporated into tubes sold in California.” *Asahi*, 702 P.2d at 549 n.4. All Asahi argued was that it “never contemplated that its limited sales of tire valves to Cheng Shin in Taiwan would subject it to lawsuits in California.” *Id.* This may undercut any suggestion of foreseeability, but it does not refute the claim of Asahi’s knowledge.

167. *See supra* Part I.

168. The Court paid no explicit attention to this “general” analysis whatsoever, apparently believing it too obvious to merit mention.

169. *See supra* Part I.

fact, to splinter the Court's "contact" votes.<sup>170</sup> But all Justices agreed that an exercise of jurisdiction would still be unreasonable:<sup>171</sup> The burden on the defendant was too "serious," the plaintiff's *and* the state's interests too "diminished" and slight.<sup>172</sup> The affront to other sovereign prerogatives was too substantial, the federal interest in smooth "foreign relations" too compromised. If litigation was necessary, the Court decided, California was the wrong place for it. And so the doctrine's terms "clearly" and categorically showed.<sup>173</sup>

And perhaps the Court was right. Its decision not to permit personal jurisdiction over *Asahi* may well have been correct. It may have been just as right too had the Court reached the same end by a different route, relying on forum non conveniens' "private" and "public" factors instead of personal jurisdiction's "contacts" and "reasonableness" grounds.

But *Asahi* may just as well have been wrong, even by the doctrine's own terms. It may have been wrong about purposeful contacts, for *Asahi* did more than sell tire valves to Cheng Shin. It knowingly, routinely, and (perhaps) purposefully availed itself of the benefits of California's market and the protections of California's laws.<sup>174</sup> Even more, *Asahi* may have been wrong about reasonableness and the balance of those factors. The burden on *Asahi* was not undeniably "serious," but unexceptional and unsubstantiated.<sup>175</sup> The interests of Cheng Shin and California were not plainly minor or "diminished," but myriad and overlapping, reaching both the avoidance of incompatible judgments and the protection of consumers through compliance with state law. Even more, no other domestic forum seemed better suited to hear the dispute, since "most of the evidence" was located within California's state lines.<sup>176</sup>

Not that this proves *Asahi*'s result implausible. But it does take an important half of that step. It shows that either outcome would have been plausible in *Asahi*. No personal jurisdiction (or forum non conveniens) outcome was as plain, categorical, and inevitable as the Court pretends. Even in this seminal (if not prototypical<sup>177</sup>) case, personal jurisdiction is something

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170. *Asahi*, 480 U.S. at 102, 116. By most measures, the four justices favoring a more purposeful contact requirement have won this argument over time. *See* Spencer, *supra* note 5, at 622-23.

171. 480 U.S. at 116.

172. *Id.* at 114.

173. *Id.* at 114-15.

174. *See* *Asahi Metal Indus. Co. v. Superior Court*, 702 P.2d 543, 549-51 (Cal. 1985), *rev'd*, 480 U.S. at 102.

175. *Id.* at 553 ("Asahi presents no evidence to support its contention that it would be inconvenienced if it is subjected to California's jurisdiction.").

176. *Id.* (citation omitted)

177. *Cf.* Ford, *supra* note 13, at 852-55 (listing several "prototypical" characteristics of modern territorial jurisdiction and noting that the resulting definition may seem "extreme as compared to actual jurisdictions in practice"). *Asahi* may seem similarly "extreme" in part—or at least uncommonly difficult as a jurisdictional matter. The other cases I study at length may as well. I discuss the choice of these examples at greater length *infra* Part II.C.

different than what the Court says. It is not an inflexible duty defined by a rigid set of categories. It is a power that courts can bend.

In this respect, *Asahi* is important. It is also not alone. Other personal jurisdiction outcomes prove something similar—some in response to questions about “continuous and systematic” contacts,<sup>178</sup> others that address choice-of-law issues<sup>179</sup> and external effects<sup>180</sup> in an economically dynamic world. But if personal jurisdiction’s questions sometimes vary, its flexibility stays much the same. Central concepts, like “contacts,” remain undefined and uncertain. Doctrinal motives sit at best in quarrelsome counterpoise.<sup>181</sup> Court rhetoric occludes more than it enlightens. And a fixed “point” between “unconstitutional” and “merely undesirable” proves impossible to find.<sup>182</sup> Courts can thus do more than fashion “highly particularized” solutions for personal jurisdiction and forum non conveniens puzzles.<sup>183</sup> They can use malleable devices to reach desired jurisdictional conclusions, even as they repeat jurisdiction’s inflexible code.<sup>184</sup>

Some personal jurisdiction decisions will still seem plainly right. Some will still seem obviously wrong. But decisions like *Asahi* capture something more than a good or bad result. They capture a critical feature of modern personal jurisdiction. Personal jurisdiction is not some inevitable limit on judicial authority, some categorical “set of practices”<sup>185</sup> that all lawyers come quickly to know. It is a tool of subtle pliability and quiet discretion, a legal compass that can steer courts away from places they do not wish to go. Subject-matter jurisdiction can do much the same.<sup>186</sup>

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178. See, e.g., *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984).

179. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481-82 (1985).

180. See, e.g., *Calder v. Jones*, 465 U.S. 783, 788-89 (1984).

181. The analytical proximity of federalism and fairness, particularly in the Court’s “reasonableness” inquiry, has not lead to happy coexistence. It has instead confused jurisdiction’s constitutional lineage, animated aggressive academic dialogue, and destabilized results. Cf. *supra* Part I.

182. Albright, *supra* note 89, at 388 (emphasis omitted).

183. Berman, *supra* note 63, at 331. Two notes about forum non conveniens bear additional emphasis: First, forum non conveniens may seem more candid about its pliability than personal jurisdiction is; like standing, that is, forum non conveniens may shoulder an uncertainty more transparently than personal jurisdiction does. Second, forum non conveniens finds an analogy in federal-court abstention. Both operate, in short, as back-end checks on jurisdiction’s front-end measures.

184. See Albright, *supra* note 89, at 388; Brilmayer, *supra* note 158, at 1462; Stein, *supra* note 26, at 701 (“The expectation justification is . . . circular and always satisfiable.”).

185. Ford, *supra* note 13, at 856; see also *Shaffer v. Heitner*, 433 U.S. 186, 201-02 (1977) (discussing the persistence of strict and categorical jurisdictional review).

186. I borrow this metaphor from Professor Cohen, *supra* note 5.

## 2. Subject-matter jurisdiction

Subject-matter jurisdiction makes its own impressive promise. It vows to limit the types of “cases and Controversies” that come within the federal courts’ “Power” to hear—and there are (again) good reasons why it would. Fidelity to text, respect for constitutional structure, attention to history, recognition of congressional prerogative: All are sensible objectives, in theory at least. All seem compatible with subject-matter jurisdiction’s stated goal.

But like personal jurisdiction’s pledge before it, subject-matter jurisdiction’s promise is often met in strange ways.<sup>187</sup> Subject-matter jurisdiction may claim a steadfast focus on federal issues, state citizenships, and amounts-in-controversy. It may call itself “inflexible,” a precondition that never relents.<sup>188</sup> But this doctrine is loyal less to its tests “without exception” than to other “considerations” that the courts seldom confess.<sup>189</sup>

In truth, subject-matter jurisdiction may be better for what goes unstated. A bit of practical leeway may be necessary to accommodate jurisdiction’s “kaleidoscopic situations.”<sup>190</sup> Its hard rules may be best tempered by (judicial) “common sense.”<sup>191</sup> But subject-matter jurisdiction does not make room for that “sense” plainly. It purports instead to demand unflinching application of its time-honored mandates. Yet what it produces is not formal precision. What it produces is a roster of intriguing results.

Some may deem these results atypical. They may argue that “[r]outine” subject-matter questions raise only minor analytical “problem[s]”—or no real difficulty at all.<sup>192</sup> But the measure of jurisdiction’s “inflexible” rhetoric is not how it fares in cases that seem easy. It is how firmly it holds in cases that seem hard. These hard cases show inflexible mandates flinching. And they prove subject-matter jurisdiction’s unflagging obligations subject to considerable court control.

Two familiar cases make subject-matter jurisdiction’s flexibility more concrete. One case is older, about federal questions, and now largely consigned to casebook afterthoughts. The other is newer, about diversity, and still often

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187. Which is not to say that it is necessarily “honored in the breach.” *Cf.* *Alliance to End Repression v. City of Chi.*, 742 F.2d 1007 (7th Cir. 1984), noting:

[A]lmost everyone today thinks that “a custom more honored in the breach than the observance” means a custom that is not observed. That is what the expression viewed in isolation seems plainly to mean. But if you go back to the passage in *Hamlet* from which the expression comes (Act I, sc. iv, lines 8-20), you will see that the custom referred to is that of getting drunk on festive occasions, and that what “a custom more honored in the breach . . . ” actually means is better disregarded than observed.

*Id.* at 1013 (citation omitted).

188. Fitzgerald, *supra* note 93, at 1214 (citation omitted).

189. *Id.* (citation omitted); *see also* Cohen, *supra* note 5, at 906

190. *Gully v. First Nat’l Bank*, 299 U.S. 109, 117 (1936).

191. Cohen, *supra* note 5, at 905 (citation omitted).

192. *Id.* at 905-06.



read in full. But this pair is less awkward than at first it might seem. Both recall subject-matter jurisdiction's basic rules. And both show that those rules bend.

The first case starts with an angry shareholder—or at least one unexcited by farm loan bonds. The defendant in *Smith v. Kansas City Title & Trust Co.* was a financial institution wishing to invest in such instruments.<sup>193</sup> The plaintiff was a shareholder hoping to prohibit such sales. Charles Smith's concern was not all about profit. He believed that the federal law authorizing such investments, the Federal Farm Loan Act of 1916,<sup>194</sup> was unsustainable.<sup>195</sup> So Smith sued Kansas City Title in federal court, seeking an injunction on (superficially) state-law grounds.<sup>196</sup> He lost.<sup>197</sup>

But Smith lost for a reason that not everyone thought the courts should reach: the merits of his suit.<sup>198</sup> He prevailed on subject-matter jurisdiction, even if it hardly seemed like he would. Smith's complaint alleged no diversity. It seemed to fail federal-question's "well-pleaded complaint" rule too. Still, the Court found valid jurisdiction over Smith's lawsuit—not because it fit smoothly with preexisting doctrine, but because an exercise of subject-matter jurisdiction was deemed appropriate nonetheless. Smith's suit did not "arise under" federal law. But his "right to relief depend[ed] upon the construction or application of the Constitution or laws of the United States"<sup>199</sup>—and this, for the Court, was sufficient. For subject-matter jurisdiction, that is, Smith's claims were somehow "federal" enough.

And perhaps this conclusion was prudent.<sup>200</sup> Federal constitutional issues were sure to be "significant" in *Smith*, if not entirely well-pled.<sup>201</sup> Smith's case was also sure to benefit from an "expert and sympathetic" federal forum, something the Court could provide without overburdening the federal docket.<sup>202</sup>

193. 255 U.S. 180, 195 (1921).

194. Federal Farm Loan Act, July 17, 1916, ch. 245, 39 Stat. 360, *amended* January 18, 1918, ch. 9, 40 Stat. 431.

195. *Smith*, 255 U.S. at 195 ("The relief was sought on the ground that these acts were beyond the constitutional power of Congress.").

196. *Id.*

197. *Id.* at 213.

198. *Id.*

199. *Id.* at 199. Smith's claim, that is, "colorabl[y]" and "reasonabl[y]" questioned the "constitutional validity of an act of Congress"—and it did so in a way that either won or lost his case. *Id.* at 199, 201.

200. See Cohen, *supra* note 5, at 906. Of course, *Smith* has its problems. Not long ago, in fact, the Court paused to explain how the doctrine's well-pleaded "rule" and its *Smith*-like variation could be reconciled. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312-14, 317 & n.5 (2005). But if the Court sometimes stops for clarification, it never seems to refute its basic (formal) approach.

201. Cohen, *supra* note 5, at 906.

202. *Id.*

But weight and expedience are not part of federal-question's explicit formula. That formula professes instead to look only for well-pleaded federal claims, a requirement that *Smith* at best obliquely satisfies.<sup>203</sup> Only by the nebulous importance of some federal interest, then, did subject-matter jurisdiction seem at all appropriate. And only by some creative, curious, and (perhaps) capricious jurisdictional accommodation could *Smith*'s claim meet subject-matter's established terms. *Smith* still pledges fidelity to longstanding subject-matter "principles."<sup>204</sup> But its decision rests on something else—a court-crafted release from inflexible limits and a range of intuitions that remain unsaid.

The Court is more candid elsewhere. In fact, its tone seems almost confessional in *Caterpillar, Inc. v. Lewis*,<sup>205</sup> a second illustration of subject-matter's flexible forms. The central event in *Caterpillar* was a bulldozer accident, one that left David Lewis, a citizen of Kentucky, severely burned.<sup>206</sup> Lewis eventually sued Caterpillar and Whayne Supply Company—the first a citizen of Illinois and Delaware responsible for the tractor's manufacture, the second a citizen of Kentucky accountable for its upkeep.<sup>207</sup> In time, Liberty Mutual Insurance intervened as a plaintiff, seeking relief from both Caterpillar and Whayne.<sup>208</sup> Liberty Mutual was a citizen of Massachusetts, but for subject-matter jurisdiction that should not have mattered. No claim satisfied federal-question's "well-pleaded complaint" mandate—or *Smith*'s noteworthy exception to that rule. Nor were the parties sufficiently diverse, since Lewis and Whayne were both citizens of Kentucky at the moment the case entered federal court. As *Caterpillar* started, then, subject-matter jurisdiction did not exist.

But the federal district court missed this crucial detail. It refused to dispose of the case for lack of subject-matter jurisdiction, even when Lewis asked.<sup>209</sup> *Caterpillar*'s subject-matter jurisdiction defect was thus left to fester until it found another cure. And that cure did come, but only through litigant choice: Whayne settled with both plaintiffs, withdrawing from the litigation and erasing any problem with incomplete diversity. By the time the case reached jury trial, then, both of diversity's requirements were met: the plaintiffs asked for more than the required amount-in-controversy, and diversity among

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203. See *Smith*, 255 U.S. at 214 (Holmes, J., dissenting) ("The whole foundation of the duty is Missouri law . . .").

204. *Id.* at 201.

205. 519 U.S. 61 (1996).

206. See *Lewis v. Caterpillar, Inc.*, No. 94-5253, 1995 WL 600590, at \*1 (6th Cir. Oct. 11, 1995) ("[P]laintiff received burns over approximately 48% of his body.").

207. 519 U.S. at 64-65.

208. Liberty Mutual joined on Lewis' employer's behalf. *Id.* at 65.

209. Lewis asked through a motion to remand to the state court where the case was initially filed. The defendants removed just before the time to do so elapsed, and this removal triggered *Caterpillar*'s central subject-matter jurisdiction question. *Id.* at 65-66.

opposing parties was complete. The question in *Caterpillar* was whether this belated—and by rule inadequate—correction was still somehow enough.<sup>210</sup>

The Supreme Court held that it was.<sup>211</sup> Not that the Court endorsed the district court's error. A more attentive district court, Justice Ginsburg conceded, would have spotted the jurisdictional problem and disposed of the case at the start.<sup>212</sup> But since then things had changed: the “jurisdictional defect” had been remedied; a jury had reached a rational verdict; “considerations of finality, efficiency, and economy” had come clearly into view.<sup>213</sup> These changes counseled something less drastic than outright dismissal, even if that is what jurisdiction otherwise required. They counseled a late, permissive, and unexpected twist on jurisdiction's hard rules. So the Court let judgment stand in *Caterpillar*. Subject-matter jurisdiction belatedly, and unpredictably, did bend.

And perhaps (again) it should have. The costs of a late dismissal in *Caterpillar* may well have been “exorbitant.”<sup>214</sup> The inconvenience of starting over may have been both deeply and widely felt.

But cost and convenience—like weight and expedience—are not part of diversity's calculation. That calculation claims to have only two variables, each to be assessed when a case enters federal court. By this plain measure, *Caterpillar* fails. The Court may well have been smart to tweak this calculation, to look beyond amounts-in-controversy and complete diversity at a particular time. Its result may be narrow<sup>215</sup> and shrewd. But *Caterpillar* suggests more than that the Supreme Court is occasionally prudent. It suggests that subject-matter jurisdiction is not an isolated and “absolute precondition” of federal judicial power<sup>216</sup>—but rather something else.

On this critical point, *Smith* and *Caterpillar* run together. Other cases do too. Some of those cases ask about federal interests,<sup>217</sup> employing a language ingrained with imprecision—here in the idiom of “time of filing” and “federal elements,” not in the code of “contacts” and “convenience.” Other cases prove policy “orthodoxy” overstated and incomplete.<sup>218</sup> And still others open jurisdictional exceptions with little warning and less direction,<sup>219</sup> leaving subsequent cases to “grop[e]” from one rule to the next.<sup>220</sup> Still, all of these

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210. *Id.* at 67.

211. *Id.*

212. *Id.* at 70.

213. *Id.* at 73, 75 (emphasis omitted).

214. *Id.* at 77.

215. See *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 572-74 (2004) (effectively—or at least arguably—confining *Caterpillar* to its facts).

216. Fitzgerald, *supra* note 93, at 1214.

217. See *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 814 & n.12 (1986).

218. Borchers, *supra* note 101, at 110.

219. These turns may be at once exceptional and inevitable. They may be necessary, that is, for the judicial system to work.

220. Cf. Ehrenzweig, *supra* note 67, at 292 (suggesting that what “choice-of-law” doctrine needs is not “new ‘logical’ formulas,” but rather “the result of patient groping from

cases make a point now plain: Subject-matter jurisdiction is not an obligation that never flinches, but a duty of real flexibility.

Courts still take this duty seriously. But courts know too that subject-matter jurisdiction makes demands that they can resist.<sup>221</sup> Subject-matter jurisdiction is thus like personal jurisdiction before it—a legal map that courts can carefully redraw.<sup>222</sup> Subpart C folds these two maps into one.

### C. *Lessons from the Evidence*

An accurate map of jurisdiction can be difficult to follow. Tangled lines and “hidden” recesses clutter its corners.<sup>223</sup> Gaps and exceptions “obscure [its] topography.”<sup>224</sup>

But jurisdiction’s map still has its lessons, and there are things to gain from its twists and turns. One lesson is now obvious: Modern jurisdictional tests sometimes prove more pliable than jurisdictional rhetoric suggests. Cases like

case to case”).

221. There may be a Bickelian ring to this claim. If courts are using jurisdiction to avoid problematic cases—or at least to postpone addressing them until more opportune moments—they may well be displaying precisely the kind of (passive) virtue Professor Bickel had in mind. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 143-56 (2d ed. 1986). They may also be doing precisely what Professor Gunther and Professor Wechsler thought they should not. See Gerald Gunther, *The Subtle Vices of the “Passive Virtues” – A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 13-16 (1964) (criticizing Bickel’s tolerance of unprincipled certiorari and justiciability practice); Herbert Wechsler, Book Review, 75 YALE L.J. 672, 674-76 (1966) (same). Professor Gunther and Professor Wechsler may well be right to criticize Professor Bickel’s position, at least for its normative implications. But Professor Bickel was certainly correct about court practice, and as Part III shows, that practice might not be entirely flawed.

222. Not long ago, the Supreme Court admitted as much. “There is,” the Court wrote, a “longstanding, if less frequently encountered, variety of federal ‘arising under’ jurisdiction, th[e] Court having recognized for nearly 100 years that in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues.” *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005) (citing *Hopkins v. Walker*, 244 U.S. 486, 490-91 (1917)). That doctrine finds voice in *Smith*, and it “captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.” *Id.* at 312-13 (noting that “[i]t has in fact become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum”). Even there, though, the court need not exercise jurisdiction automatically. “For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of §1331.” *Id.* at 313-14. It is interesting, if not entirely revealing, that *Grable* was a unanimous decision. Even Justice Thomas, who wrote separately to endorse clear jurisdictional rules, agreed with *Grable*’s pragmatic result. *Id.* at 320.

223. Fallon, *supra* note 16, at 635.

224. Berman, *supra* note 63, at 442 (citation omitted).

*Asahi*, *Smith*, and *Caterpillar* may wrap their results in the language of inflexibility, proclaiming “clear[.]” categorical conclusions, “principle[d]” analyses, and “evident” outcomes.<sup>225</sup> They may purport to advance common and commendable goals. But like cases before and after, these decisions reveal something else.

This lesson has a caveat—or at least a likely critique. Some may say that these cases are too easy, merely the rare and inelegant exceptions that prove jurisdiction’s hard rule.<sup>226</sup> And perhaps *Asahi*, *Smith*, and *Caterpillar* do make things seem slightly too simple and the argument seem a bit too clean. But these cases are not useful merely because they are convenient. Nor were they chosen because they seem unusual. They are useful because they are now famous and familiar. And they were chosen because they best illustrate a straightforward theme: Jurisdiction’s firm and inflexible rules are in some cases neither, even as courts repeat them vigorously.

*Asahi*, *Smith*, and *Caterpillar* were also chosen for a second reason, a second lesson jurisdiction’s map can teach: They suggest that jurisdiction’s flexibility is no accident. In these (and other) cases, the Supreme Court has done more than disprove its own rhetoric of strict jurisdictional limits.<sup>227</sup> It has even done more than stake jurisdictional positions readily turned upside down. It has fashioned jurisdictional tests and tools with precisely that potential in mind. Courts are not hampered by jurisdictional rules that admit exceptions. Nor are they vexed by jurisdictional devices that only occasionally hold firm. They are rather empowered by tests they know to be malleable and shielded by escape valves they can subtly rework.

Echoes of these lessons can be heard in other places. Some of jurisdiction’s most insightful students have called attention to the doctrine’s “fuzziness around the edges,”<sup>228</sup> its seemingly “arbitrary and inconsistent decisions,”<sup>229</sup>

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225. See *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 113 (1987); *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 201 (1921).

226. See *supra* note 14.

227. Not that the cases are perfectly identical, even on this pivotal point. Some, like *Smith*, reveal a kind of two-step dynamic: the Court makes broad claims of rigor in one case and then disregards them in the next. Others, like *Caterpillar*, compress these two steps into one: the Court invokes the language of jurisdictional inflexibility and then bends the law in the same breath. See *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233-41 (1998) (disclaiming the existence of a “roving public policy exception” only to decide as if one controlled) (internal quotation marks omitted); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-21 (1976) (citing the federal courts’ “virtually unflagging obligation” to “exercise the jurisdiction given them” only to abstain from that duty); see also *Shaffer v. Heitner*, 433 U.S. 186 (1977). In both settings, of course, one might argue that the Court’s declaration of strict and unyielding rules is mere excess—an opinion-writing flourish that no careful student of the doctrine will believe. But the Court’s stern language is scarcely so disposable. It is often the most durable legacy of the doctrine, for it is often these grand statements that get reiterated and relayed. It is also the crux of jurisdiction’s lie. See *infra* Part IV.

228. Shapiro, *supra* note 142, at 562.

and its sometimes “sloppy” approach.<sup>230</sup> Still more have declared jurisdiction a “solution in search of a problem”<sup>231</sup>—and perhaps a “dull and pompous” one at that.<sup>232</sup> But amid the charges of tedium and incoherence, few have paused to wonder why those labels so doggedly fit.<sup>233</sup> *Asahi*, *Smith*, and *Caterpillar* suggest that the answer is not some run of inadvertent court blunders or some string of unwitting judicial gaffes. Nor is it that the Supreme Court is too dim or too stubborn to adopt one of the academy’s many proposed cures. The answer is that jurisdictional flexibility is something the courts covet, despite their rhetoric. Part III examines why and when they might prefer this flexibility—and it asks why and when we might welcome it too.

### III. MOTIVES, THEORY, AND BENEFITS

There are costs to jurisdictional flexibility. It threatens needless expense and inefficiency—judicial resources wasted and great effort rendered “meaningless” at the last possible step.<sup>234</sup> It risks judicial overreaching too—careless judges “beguiled” into reaching “indefensible result[s].”<sup>235</sup> But federal courts may still prefer jurisdictional pliability. And we might favor it too.

This Part examines why and where we would. It outlines two reasons—one concrete and functional, the other more theoretical and abstract—to sustain jurisdictional rules that are sometimes more flexible than unflagging. It also offers some guarded suggestions about where jurisdictional flexibility might best be used. Some of these arguments will seem conjectural, even diffuse in parts—and thus impossible to prove in the most rigorous sense. None purports to be an all-healing jurisdictional cure. But these arguments still offer valuable perspective, not just on what courts can do with jurisdiction’s pliable pieces, but when and whether they should be doing it.

Subpart A frames one reason to favor jurisdictional flexibility. It sets jurisdiction in broader litigation context, traces its interaction with substantive rights and remedies, and assesses the courts’ ability to align the three.<sup>236</sup> As it

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229. Stein, *supra* note 7, at 795.

230. Stewart, *supra* note 53, at 1324. For an even harsher assessment of abstention doctrine, see Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 542 (1989) (noting that abstention doctrines are “particularly perverse as applied”).

231. Perdue, *supra* note 158, at 530.

232. Little, *supra* note 23, at 132.

233. To quote Professor Althouse: “To merely observe that the field is chaotic, arcane, or incoherent is to decline the work of understanding.” Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993, 1001 (1994).

234. See Field, *supra* note 8, at 684; see also Redish, *supra* note 97, at 1794 (“[J]urisdictional uncertainty can surely lead to both a waste of judicial time and added expense and litigation.”).

235. See Cohen, *supra* note 5, at 907.

236. See Fallon, *supra* note 16; Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (“[R]ights and remedies are inextricably

does, Subpart A advances the idea of jurisdictional “equilibration,” exploring the ways malleable jurisdictional standards help shape desirable legal “composite[s].”<sup>237</sup> Subpart B turns to a second reason. It expands jurisdiction’s conceptual vision, explores jurisdiction’s status as a “meaning-producing” instrument, and reviews the often overlooked power of legalized “space.”<sup>238</sup> In the process, Subpart B forwards a notion of (federalist) jurisdictional harmony, examining the ways jurisdictional malleability helps balance local interests with national unity.

### A. Jurisdiction and Equilibration

Most say that lawsuits have three stages. First a court determines if it can hear a dispute. Next it addresses that dispute’s merits, provided they can be heard. Then the court assesses remedies, if any are deserved.<sup>239</sup>

Things might be easy if litigation were always this simple. Parties could polish their pleadings to perfection. Courts could concentrate on detached and discrete legal projects. Scholars could identify the true “stuff” of jurisdiction, rights, and remedies—and then debate which “stuff is better.”<sup>240</sup>

But litigation’s three stages are not always so distinct. “[H]idden judgments”<sup>241</sup> about appropriate remedies influence the “cash value” of legal rights.<sup>242</sup> “[C]oncealed” worries about threshold justiciability requirements reflect judicial intuitions about substantive outcomes.<sup>243</sup> And covert conclusions about rights and remedies lead courts to “manipulate” legal jurisdiction in both its personal and its subject-matter forms.<sup>244</sup>

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intertwined. Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”).

237. Fallon, *supra* note 16, at 686; *see also id.* at 647 (discussing “overall [litigation] package[s]”).

238. *See* BLOMLEY, *supra* note 17; Berman, *supra* note 63; Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210 (2007); Ford, *supra* note 13. Professor Cohen is careful to distinguish between four different types of “spaces”: utopias, isotopias, dystopias, and heterotopias. Cohen, *supra*, at 214 (citation omitted). She deems cyberspace a heterotopia, *id.* at 221, and many other (legal) spaces seem likely to fall into that category as well.

239. Fallon, *supra* note 16, at 634.

240. Levinson, *supra* note 236, at 858. Professor Wasserman has argued persuasively in favor of a “categorical” division between jurisdiction and merits. *See* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 693, 701 (2005). He may be right about what courts ought to be doing, though this is not (I think) what they actually do.

241. Fallon, *supra* note 16, at 634; *id.* at 637 (adding that this practice is especially prevalent at the Supreme Court).

242. *See* Levinson, *supra* note 236, at 887-88; *see also* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 678-79 (1983).

243. Fallon, *supra* note 16, at 635; *see also* Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 59 (1982).

244. NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 59 (Martha Minow, Michael Ryan, & Austin Sarat eds., 1992) [hereinafter NARRATIVE].

That jurisdiction can be “mangle[d]”<sup>245</sup> may now seem an unremarkable, even “self-evident[.]” point.<sup>246</sup> Judges are “notorious[.]” for reaching claims that appeal to them on the merits—and for refusing to engage those that do not.<sup>247</sup> By this uncharitable measure, jurisdictional doctrine can seem cynical: *Asahi* may simply use flexible “reasonableness” factors to mask the Court’s indifference to a foreign indemnity action. *Smith* may simply “reinterpret” malleable doctrine to suit the Court’s interest in federal bonds.<sup>248</sup>

But there is more to jurisdictional manipulation than suspicious self-dealing. And there is more at stake than the concerns of judging “[one’s] own cause.”<sup>249</sup> There is also a potentially fruitful interaction among jurisdiction, rights, and remedies—a relationship expressed in three (overlapping) ways.

One of these ways can be called *jurisdictional pragmatism*<sup>250</sup>—the careful incorporation of more functional concerns. Cases of every jurisdictional type turn on practical considerations: the need for “expert” legal fora, the predicted impact on judicial workload, the obviousness of anticipated outcomes.<sup>251</sup> A few decisions, like *Caterpillar*, address these factors explicitly, confessing the Court’s interest in expertise, expedience, efficiency, and comity. Most others, like *Smith*, are scarcely so frank. But both the candid and the quiet share a distinctive mark: they fit more readily with pragmatic explanations than with the strict rules they purport to endorse.<sup>252</sup>

A second way might be labeled *jurisdictional context*—the attentiveness of jurisdictional analysis to connected issues of remedies and rights. This relationship can ring of simple economics: the “price” of legal violations will rise and fall as jurisdiction, rights, and remedies do.<sup>253</sup> It can also work in both

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245. Lee, *supra* note 21, at 1631.

246. Fallon, *supra* note 16, at 661.

247. *Id.* at 640, 684-85.

248. Fitzgerald, *supra* note 93, at 1245.

249. *Id.* at 1274 (citing THE FEDERALIST NO. 10, at 56 (James Madison) (Jacob E. Cooke ed., 1961); see also NARRATIVE, *supra* note 244, at 100 & n.23 (dubbing the fact that “[e]very denial of jurisdiction . . . is an assertion of the power to determine jurisdiction” an “irony”) (emphasis omitted).

250. I borrow this term from Professor Cohen, *supra* note 5, at 906, and the italicized style from Professor Levinson, *supra* note 236, at 884-88.

251. See Cohen, *supra* note 5, at 906-07.

252. Put slightly differently, *Caterpillar* could rely on its preference for “finality, efficiency, and economy”—at least until its progeny threatened to flood the federal docket. See *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004) (quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996)). *Smith* could stand on the importance of its federal “interests” – so long as they asked no arcane legal questions and added little to the business of the federal courts. *Cf. Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900) (reaching a decision incompatible with *Smith* except when considered through a practical lens).

253. Professor Levinson made a version of this “economic” argument first—and I rely heavily on that argument here. See Levinson, *supra* note 236, at 889 & n.126.



directions: jurisdiction can shrink as readily as it can grow.<sup>254</sup> A court convinced that a particular remedy is necessary or that a particular right is vulnerable may expand its judicial power, even if “jurisdictional obstacles” seem to prevent judicial intervention.<sup>255</sup> *Smith*’s version of federal-question jurisdiction fits this model. So too does the “bald legal fiction” of *Ex parte Young*.<sup>256</sup> A court assured that a remedy is undesirable or a right is unthreatened, by contrast, can scale back its authority, disclaiming jurisdiction and avoiding undesired substantive results. *Asahi*’s “reasonableness” analysis fits this pattern. So too do forum non conveniens, federal-court abstention, and the habeas corpus riddle of *Stone v. Powell*.<sup>257</sup>

Not that any of these jurisdictional choices change the content of substantive law, at least in an immediate sense.<sup>258</sup> Their influence is subtler, less direct. But jurisdiction is hardly isolated from rights or remedies. It interacts and overlaps with them—and sometimes serves as a counterbalance.

A third way that jurisdiction interacts with rights and remedies, then, could be dubbed *jurisdictional accommodation*—the use of jurisdiction to fill remedial gaps and ungainly rights-based knots. These adaptations may reflect the exigencies of particular cases, whether the urgency of particular remedies or the worrisome consequences of particular results. *Asahi*’s quiet concern about a flood of foreign litigation fits here—as does much of forum non conveniens doctrine.<sup>259</sup> Or these accommodations may imply commitments to larger principles, whether sovereign state prerogative, individual liberty, or holding court power close.<sup>260</sup> *Smith*’s ostensible interest in federal-court expertise fits here—as does most comity-based and competence-focused abstention case law.<sup>261</sup> Yet there is little question in any case that the courts’ goal is not a series of “self-contained” legal stages, but an “acceptable overall alignment” of litigation’s three parts.<sup>262</sup> Nor is there much doubt that, in the pursuit of “overall” equilibrium, flexible jurisdictional standards help.

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254. It can also affect rights and remedies as much as it can be affected by them. *See* Fallon, *supra* note 16, at 685.

255. Fitzgerald, *supra* note 93, at 1245.

256. *Id.* at 1210; *see Ex parte Young*, 209 U.S. 123 (1908). *Grable* is another example of the Court expanding jurisdiction to include a case that fit with “commonsense” notions of federal judicial authority. *See Grable & Sons Metal Prods, Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 311-14 (2005).

257. 428 U.S. 465 (1976).

258. *See* Wells, *supra* note 152, at 505.

259. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

260. *See* Wells, *supra* note 152, at 540; *see also id.* at 519 (calling more familiar policy ideas—like federalism—just “convenient rationalization[s]”). These commitments could work in specific cases, like *Asahi*, or along more general lines, like the split between *Smith* and other “federal interest” lawsuits. *See* Cohen, *supra* note 5, at 905-06.

261. *See* Fallon, *supra* note 16, at 688; Mullenix, *supra* note 122, at 103-04.

262. Fallon, *supra* note 16, at 647; *see also id.* at 647, 686 (using the terms “composite package” and “overall package” to describe the same idea).

There is no magic in this process—or in the labels assigned. Pragmatism, context, and accommodation are not salves or solutions, but mere signals. They are overlapping cues for a set of (positive and empirical<sup>263</sup>) claims about how legal jurisdiction interacts with rights and remedies, and they are clues to how jurisdictional flexibility helps this interaction work.

They also invite a (normative) follow-up: is any of this *good*? If courts can manipulate legal jurisdiction for any (or all) of these reasons, do we think that they should?

Some will think courts surely shouldn't. Critics of jurisdictional flexibility will see something unpredictable and unprincipled in pragmatism, context, and accommodation. Jurisdiction, they will say, is not meant to counteract overextended rights or to compensate for inadequate remedies. Nor is it meant to mitigate docket pressures or to bend to judicial preference, however well-devised. Jurisdiction is meant to be a fixed and unfailing obligation, a duty faithful to "separation and equilibration of powers" in the most formal sense.<sup>264</sup> Any attempt to manipulate jurisdiction thus requires more than caution. It demands "abandon[ment]" outright.<sup>265</sup>

But we should pause before discarding "reasoned" jurisdictional leeway altogether.<sup>266</sup> And we should note how "equilibration" might guide smart court use of jurisdiction's more pliable parts. It might, for one, draw clearer contrasts between matters that may justify jurisdictional deviation and those that do not, distinguishing severe docket pressures and respect for state prerogative, say, from a disdain for particular litigants. It might also permit a bit of judicial self-protection, shielding courts against "unnecessary and unintended burdens"<sup>267</sup>—against more work, that is, than even Congress meant to assign. And it might allay deep structural concerns too, allowing courts to "avoid undue interference with the states and with the other branches of government."<sup>268</sup>

We may still favor greater court candor.<sup>269</sup> We may prefer *Caterpillar's* jurisdictional bluntness to *Smith's* and *Asahi's* bluffs. But if courts "deal responsibly" with jurisdiction's many standards—abiding its focus, adhering to

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263. To be clear, I do not pretend to have done that (surely difficult) empirical work here. A small handful of cases may be useful, but it hardly suffices to sustain a rigorous empirical claim. I mean simply to acknowledge that there are multiple strands in the arguments I make, and some of those strands could (and perhaps should) undergo more proper empirical evaluation.

264. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998); *see also id.* at 94 (noting that proceedings without jurisdiction "offend[] fundamental principles of separation of powers").

265. Fallon, *supra* note 16, at 692.

266. Shapiro, *supra* note 142, at 588.

267. *Id.*

268. *Id.*

269. *See infra* Part IV; *see also* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

its general turns<sup>270</sup>—there need be no reflexive opposition to its pliable forms. Nor need there be any “categorical resistance” to its pragmatic, contextual, and accommodating promise. That promise may remain somewhat unpredictable and indistinct—and thus too elusive for some. It may also go a long way toward “produc[ing] good results.”<sup>271</sup>

But jurisdiction produces more than results, good or bad. It also produces community, identity, and federalist interplay. Subpart B discusses how it does and whether it should.

### B. *Jurisdiction and Space*

Some say that a lawsuit’s forum is as important as the merits of the dispute. Timing also matters. So too do access to evidence and conduct before the court. But few things are more critical than where a plaintiff files suit.<sup>272</sup> Anyone who has gone forum shopping thinks this to be true.<sup>273</sup>

This perception has many explanations. One is rooted in prejudice, the unfortunate fact that certain courts dislike particular litigants and disdain particular laws.<sup>274</sup> Another is linked to parity, the long-debated question of whether state courts are as capable their federal peers.<sup>275</sup> A third is grounded in distributive priority, the range of allocative choices made among and between judicial “hierarch[ies].”<sup>276</sup> And still another involves the importance of place, the elusive notion of borders and boundaries within the context of jurisdictional space.<sup>277</sup>

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270. Fallon, *supra* note 16, at 691.

271. *Id.* at 690.

272. *See, e.g.*, Friedman, *supra* note 230, at 530.

273. For a thoughtful discussion of what lies behind forum shopping—that “strategic behavior” so many cases now witness and so many lawyers now exploit—see NARRATIVE, *supra* note 244, at 58-59.

274. *See, e.g.*, William Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 606-611 (1999) (explaining how certain state courts prove more hospitable than federal courts to certain kinds of civil rights claims).

275. *See* Testa v. Katt, 330 U.S. 386, 394 (1947) (holding that a state court must enforce federal law, provided it has “jurisdiction adequate and appropriate under established local law to adjudicate [the] action”); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); *see also* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 2 (Michie Co. 1990) (1980) (“[I]t would be difficult to devise a system of measurement which could be used to answer” whether federal courts are “better equipped to guard federal interests than their state counterparts.”); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 235 (1988) (“The debate over parity continues with little sign of abatement or resolution.”); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1223-24 (2004) (arguing that reliance on parity has made a “mess of the law of federal jurisdiction”).

276. Shapiro, *supra* note 142, at 546.

277. *See, e.g.*, Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 581 (2006); *see also* Johnson v. Eisentrager, 339 U.S. 763, 769 (1950) (Jackson, J.) (noting that

It is easy to ignore jurisdictional space. More of our legal attention runs to time and to history—to the “richness” of originalism and the “fecundity” of the common law.<sup>278</sup> Jurisdictional space seems by comparison inert, neutral, and banal—little more than the “dead” and “immobile” rudiment of lawful government.<sup>279</sup>

But jurisdictional space is neither passive artifact nor “empty vessel.”<sup>280</sup> It is an active and evocative “process,”<sup>281</sup> a legal “dare[]”<sup>282</sup> as calculating as the shrewdest forum-shopper and as demanding as the sternest judicial result.<sup>283</sup> And legal jurisdiction is in turn a power that produces meaning,<sup>284</sup> validates judicial flexibility, and invites real fights.

Some of these fights track longstanding sovereign borders. Others follow lines that seem excitingly new. Some carve our “micro-spaces” in larger (less hospitable) regions.<sup>285</sup> And still others transcend national boundaries. But the people in these sundry places—the sometimes-disenfranchised former felon,<sup>286</sup> the self-made denizen of cyberspace,<sup>287</sup> the inspired (and inspiring) lunch-counter sitter,<sup>288</sup> the so-called enemy detainee,<sup>289</sup> the legally-ambiguous transsexual<sup>290</sup>—have something important in common. They are defined in

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the concept of territorial power “was old when Paul invoked it in his appeal to Caesar”).

278. EDWARD W. SOJA, *POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY* 4, 10 (1989) (internal quotation marks omitted).

279. *Id.* at 4 (internal quotation marks omitted); see also BLOMLEY, *supra* note 17, at xii (“Space, like law, is not an empty or objective category . . . .”); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1857 (1994). For an incisive and essential (sociological) review of borders and spaces, see JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 257-71 (1961) (“Often borders are thought of as passive objects, or matter-of-factly just as edges. However, a border exerts an active influence.”).

280. Ford, *supra* note 13, at 854.

281. See LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* 198 (2006).

282. William Ian Miller, *Sanctuary, Redlight Districts, and Washington, D.C.: Some Observations on Neuman's Anomalous Zones*, 48 STAN. L. REV. 1235, 1235 (1996).

283. BLOMLEY, *supra* note 17, at 43 (“Space is not a scientific object removed from ideology or politics; it has always been political and strategic. . . . It is a product literally filled with ideologies.”).

284. Berman, *supra* note 63, at 543 (“Conceptions of jurisdiction become internalized and help to shape the social construction of place and community.”).

285. Nicholas Blomley, David Delaney & Richard T. Ford, *Preface: Where is Law?*, in *THE LEGAL GEOGRAPHIES READER*, at xiii, xviii (Nicholas Blomley, David Delaney & Richard T. Ford eds., 2001) [hereinafter READER].

286. See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1169 (2004) (“Lifetime disenfranchisement . . . is a relic of an era in which exclusion from self-government was the norm for most citizens.”).

287. Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1135 (2000) (“[C]yberspace enabled me to present myself as a Black man, something I could not do face to face.”).

288. See READER, *supra* note 285, at xviii.

289. See Raustiala, *supra* note 40.

290. See Tina Kelley, *Through Sickness, Health and Sex Change*, N.Y. TIMES, Apr. 27,

part by jurisdiction. They prove, that is, that jurisdiction can answer two questions, not one. It can tell us where law is. It can also tell us who we are.

An example helps make this abstract notion more concrete. The example is *Williams v. North Carolina*,<sup>291</sup> a case now obscured by decades of inattention and overwhelmed by waves of social change.<sup>292</sup> But *Williams* is more than an outdated parable about the (supposed) evils of migratory divorce.<sup>293</sup> It is an illustration of the power of jurisdictional space and an indication of the importance of jurisdictional flexibility.

*Williams*' story starts almost meekly. It opens in May of 1940, when Otis Williams and Lillie Hendrix began the long drive from North Carolina to Las Vegas. Both Williams and Hendrix were then in search of a divorce—though not from each other: Hendrix hoped to split from a husband of twenty years, Williams from a wife of even longer.<sup>294</sup>

At the time, Nevada law required that a person “reside[] [only] six weeks in the state before suit [for divorce could] be brought.”<sup>295</sup> So, between early

2008, at 1ST. A portion of this article, excerpted from a petition for certiorari, captures the idea well:

Taking this situation to its logical conclusion, Mrs. Littleton, while in San Antonio, Texas, is a male and has a void marriage; as she travels to Houston, Texas, and enters federal property, she is a female and a widow; upon traveling to Kentucky she is female and a widow; but, upon entering Ohio, she is once again male and prohibited from marriage; entering Connecticut, she is again female and may marry; if her travel takes her north to Vermont, she is male and may marry a female; if instead she travels south to New Jersey, she may marry a male.

*Id.*

291. *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945). I take much of this summary, often verbatim, from Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 516-26 (2008).

292. So faint is *Williams*' once-familiar ring, in fact, that the authors of our modern “family law canon” have opted largely to ignore it. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004) (omitting all mention of *Williams v. North Carolina*); cf. Gerhart Husserl, *Some Reflections on Williams v. North Carolina II*, 32 VA. L. REV. 555, 555 (1946) (noting the story's “familiar ring”).

293. See Joseph Walter Bingham, *Song of Sixpence: Some Comments on Williams v. North Carolina*, 29 CORNELL L.Q. 1, 13 (1943) (“[F]or our American judges, as well as our social workers, long have appreciated sympathetically the plight of deserted wives . . . .”); see also WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 194-210 (1942) (discussing at length the choice-of-law puzzle presented by cases similar to *Williams*); Willis L. M. Reese, *Does Domicil Bear a Single Meaning?*, 55 COLUM. L. REV. 589, 589 (1955) (citing *Williams* for the proposition that “only the state in which at least one of the spouses is domiciled has jurisdiction to terminate their marriage by divorce”).

294. See NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 180-81 (1962).

295. See *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 293 n.3 (1942) (citing §§ 9460 & 9467.02, Nev. Comp. L. 1929, as amended L.1931, pp. 161 & 277). To state the obvious, North Carolina had a more demanding standard at the time—and for Williams and Hendrix themselves this mattered. That it was more demanding is not what remains important, however. What remains important is that it was *different*—and that the Court permitted (or encouraged) it to be.

May and late June, Williams and Hendrix waited together in a Nevada “auto-court for transients.”<sup>296</sup> As soon as the seventh week arrived, each claimed Nevada domicile and filed a petition for divorce in Nevada’s state courts. By October 4, both petitions had been granted.<sup>297</sup> And by October 4, Williams and Hendrix were married—this time to each other.<sup>298</sup>

Within days, the newlyweds returned to North Carolina. But if the pair had any hopes for “happy domesticity,” their dreams were quickly dashed.<sup>299</sup> Not long after the couple’s return, North Carolina indicted them for “bigamous cohabitation.” Both were convicted by a state jury, notwithstanding Nevada’s seemingly-valid divorce and marriage decrees.<sup>300</sup> Both were sentenced to three-year prison terms—even though, by then, “one of their former spouses was dead and the other had remarried.”<sup>301</sup> Both appealed.<sup>302</sup> And both lost.<sup>303</sup>

For Williams and Hendrix, this defeat brought a long legal voyage to an unhappy end. Since a North Carolina court could—and *did*—declare their divorce decrees invalid, the couple went to jail as bigamists, even though they remained lawfully wed elsewhere.<sup>304</sup>

296. See *Williams II*, 325 U.S. at 236.

297. *Williams I*, 317 U.S. at 289-90.

A decree of divorce was granted petitioner Williams by the Nevada court on August 26, 1940, on the grounds of extreme cruelty, the court finding that the plaintiff has been and now is a bona fide and continuous resident of the County of Clark, State of Nevada, and had been such resident for more than six weeks immediately preceding the commencement of this action in the manner prescribed by law. The Nevada court granted petitioner Hendrix a divorce on October 4, 1940, on the grounds of wilful neglect and extreme cruelty and made the same finding as to this petitioner’s bona fide residence in Nevada as it made in the case of Williams. Petitioners were married to each other in Nevada on October 4, 1940.

*Id.* (citation and internal quotation marks omitted); see also BLAKE, *supra* note 294, at 181 (noting that neither defendant—i.e., neither *original* spouse—took any action in Nevada).

298. *Williams I*, 317 U.S. at 290.

299. BLAKE, *supra* note 294, at 181.

300. *Williams II*, 325 U.S. at 241 (Murphy, J., concurring).

301. *Id.* at 266 (Black, J., dissenting); see also Thomas Reed Powell, *And Repent at Leisure: An Inquiry into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder*, 58 HARV. L. REV. 930, 964 (1945) (“[N]either the acquiescence of earlier companions nor their later death or remarriage has any legitimate bearing on whether North Carolina can penalize what she has penalized here. . . . Punishment is a handmaiden of prevention . . .”).

302. *Williams I*, 317 U.S. at 289-91.

303. The story is actually slightly more complicated. *Williams* made two trips to the Supreme Court. On the first, the Justices overturned the couple’s bigamy convictions, granting the pair a temporary reprieve. But any resolution the Court may have offered was strictly and expressly “limited,” *id.* at 292, so much so that North Carolina promptly ignored Nevada’s decrees a second time, trying and convicting the couple again. See BLAKE, *supra* note 294, at 182. Soon thereafter, *Williams* made a second visit to the Supreme Court. This time, the Court sided with North Carolina, affirming the couple’s bigamy convictions and consigning the pair to time in state jail. See *Williams II*, 325 U.S. at 239.

304. *Williams II*, 325 U.S. at 247 (Rutledge, J., dissenting) (“So the marriage is good in Nevada, but void in North Carolina . . .”).

And *Williams*' relevance may seem to end there. The case could recount nothing more than the risks of inexpert "travel evasion"—of visiting one state, that is, simply to avoid restrictions imposed by another.<sup>305</sup> It could also impart but an outmoded lesson about slippery "full faith and credit" and an outdated moral about self-serving choice of law.<sup>306</sup>

But there is more to *Williams* than this batch of obsolete lessons. And there is more to its story than two matrimonial scofflaws. There is an instructive portrait of legal jurisdiction, one that reveals jurisdiction's oppressive potential,<sup>307</sup> its valuable flexibility, and its mode of "social and political control."<sup>308</sup>

Jurisdiction does many things in *Williams*. It resolves an uncomfortable criminal matter. It poses a "domicile" riddle for an uneasy Supreme Court. And it defines two communities, setting their terms of membership and imposing (unwanted) identities on those who transgress. Nevada's exercise of jurisdiction made *Williams* and *Hendrix* lawful spouses. North Carolina's remade them as criminal bigamists. These exercises of jurisdiction thus answered *where* law was in *Williams*—Nevada, North Carolina, or elsewhere. They also defined *who* *Otis Williams* and *Lillie Hendrix* were.<sup>309</sup>

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305. See Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 861 (2002) (arguing that "states have inherent power to regulate their citizens' extraterritorial conduct"); cf. Seth F. Kreimer, Response, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 982 (2002) (disagreeing with Professor Rosen and contending that "each citizen may take advantage of the liberties offered by any state"); Laurence H. Tribe, Comment, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 152 (1999) ("No state may enclose its citizens in a legal cage that keeps them subject to the state's rules of primary conduct . . . as they travel to other states . . ."). Though Professor Rosen differs from Professor Kreimer and Professor Tribe in his conclusion, his general topic of study is no different. All three concentrate on difficult questions of conflicts of law. I am no conflicts scholar, and I allude to the topic only vaguely here—not because I think it "dead—killed by a realism intended to save it," Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1407 (1996), but because I believe Professor Laycock is right: It makes sense only by territorial rules (however pre-modern) and thus by common jurisdictional terms. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 318-19 (1992). For a brilliant assessment of the role in identity-shaping played by the Greek "polis," see KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 217 (2005) ("[Polis] are sources of law for their inhabitants . . . and they define their identities when they travel away from home."). And for a harrowing account of the plight of 20<sup>th</sup> century "apatrides"—persons of no state membership and thus no protection of law—see RICHARD L. RUBENSTEIN, *THE CUNNING OF HISTORY: MASS DEATH AND THE AMERICAN FUTURE* 12-35 (1975).

306. See Bloom, *supra* note 291, at 516-26.

307. BLOMLEY, *supra* note 17, at xii.

308. Zick, *supra* note 277, at 581.

309. See READER, *supra* note 285, at xv (noting that these "where" and "who" questions are mere "versions of each other"); see also KWAME ANTHONY APPIAH, *COSMOPOLITANISM*, at xviii (2006) ("Loyalties and local allegiances determine more than what we want; they determine who we are."); APPIAH, *supra* note 305, at 243 ("By accident,

Similar things occur in other cases. *Pennoyer* marks Neff as an outsider, free of Oregon's jurisdictional control. *Asahi* excludes a corporation from another legal community, (re)setting boundaries on the go. Forum non conveniens acknowledges the virtue and vice of foreign adjudication. Federal-court abstention links discretion and deference in the context of federalist "space."

In *Williams*, that "space" gave rise to a delicate conflict. It turned a simple episode of domestic unhappiness into a long-running federalist feud. Worse still, pliable jurisdictional limits may have seemed to cause this quarrel. Pliable jurisdictional limits, after all, permitted Nevada and North Carolina to define the same litigants in dramatically different ways.

But pliable jurisdictional limits offered something else too. They offered a way to cabin cultural disagreements, to achieve interstate accommodation, and to fold federalist tension into a kind of (precarious) national equipoise. Pliable jurisdictional limits let Nevada define its community—and then let North Carolina protect its own. Better still, pliable jurisdictional limits let this federalist fight end there. Nevada and North Carolina could disagree vigorously, shape discrete jurisdictional "spaces," and still coexist.<sup>310</sup> More than cause a feud among related sovereigns, then, pliable jurisdictional limits allowed Nevada and North Carolina to craft (part of) their own identities within a broader union. They allowed Nevada and North Carolina, that is, to find some *unum* in *pluribus* and some *pluribus* in *unum*.

Not that this process works without hiccup. Judges are not all gifted legal "geographer[s]."<sup>311</sup> Nor are jurisdictional decisions immune from deepening long-held animosity and inciting sovereign rifts of the most dangerous kind.<sup>312</sup> So identifying the promise of "space" and jurisdictional pliability brings no guarantee of perfection. It does not even ensure effective use. But *Williams*' story is still compelling for what it shows, both about the power of jurisdictional "space" and the potential of courts to direct jurisdictional pliability to valuable ends.

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I am who I am."). I do not mean to suggest that state identities are everything, though even the New Deal's Federal Writing Project featured the distinctiveness of (and loyalties inspired by) particular states. Nor do I mean to suggest that our residences are entirely accidental, but they are not as freely chosen as pure theory might imply. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (arguing that an individual will move from one community to the next until she finds the place that maximizes her utility); see also Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1047 (1996) ("Everyone knows where they don't belong.").

310. It may even enhance deliberation and dialogue, thus improving jurisdictional outcomes over time. Cf. LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001).

311. See BLOMLEY, *supra* note 17, at 45 n.15 (citation omitted).

312. See ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 226-56 (1975).



It is also as instructive as the “equilibration” portrait outlined above. “Space” and “equilibration” strike different theoretical chords. One seems abstruse and conceptual, the other more practical. One sounds more in fractious federalism, the other in judicial pragmatics. But if courts have found flexibility in jurisdiction’s strict mandates, both “space” and “equilibration” offer reasons why they would. Courts know the power of jurisdiction. More than that, courts know how jurisdictional flexibility can permit them to find smart balances among litigation’s three stages and to shape legal “space” in accommodating ways. So though “space” and “equilibration” may complicate jurisdiction’s story, they add more than they confuse. They show how malleable jurisdictional measures may prove quite useful, and they hint at where those measures might best be used. They also raise a crucial question: If jurisdiction is truly better for its flexibility, what should we make of its false rigid front? Part IV offers a preliminary response.

#### IV. A NOBLE LIE

So what should we make of jurisdiction’s false inflexible front? One answer is direct and clear-cut: Jurisdiction’s false front is an edifice that should be taken down. Courts should stop making misleading claims about jurisdiction’s inflexibility—claims that misstate jurisdictional reality, distort jurisdictional doctrine, and compromise judicial integrity, all while fooling very few. Judges should concentrate their efforts instead on reaching smart jurisdictional ends by less troubling jurisdictional means—precisely drafted rules, immaculately crafted exceptions, perfectly weighted presumptions, and a more transparent (if restricted) flexibility.<sup>313</sup>

A second answer is more cautious and counterintuitive: Jurisdiction’s false front is a problem with its own quiet rewards. This Part aims to show as much. It does not argue that jurisdiction’s false front is faultless. Nor does it contend that this second answer is preferable to (or incompatible with) the first. This Part argues instead that jurisdiction’s false front presents a strange kind of falsehood: a sometimes constructive, largely open, and subtly noble lie. Subpart A sets this legal oddity in definitional context, briefly comparing jurisdiction’s lie to classic legal fictions and judicial subterfuges. Subpart B then posits a preliminary and provisional explanation of jurisdiction’s curious falsehood, discussing why it so long endures, even if we know it false. Subpart C then addresses the costs of jurisdiction’s untruth, using a brief and familiar example to review both potential benefits and inevitable costs.

By any measure, of course, much of this discussion will be preliminary in nature and provisional in support. It hopes more to question, upset, and refine a conventional dialogue than to state its unassailable form. But even this initial argument merits making. It can shed new light on time-honored tests, long-

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313. *Cf.* FED. R. CIV. P. 60(b).

standing doctrine, and a durable falsehood. And it can help explain a feature of jurisdiction others have only sought to cure.<sup>314</sup>

#### A. Fictions, Subterfuges, and Legal Lies

It is not easy to classify jurisdiction's false claims of inflexibility. Nor is it easy to distinguish those claims from other types of legal untruths. But much as jurisdiction's claims resemble other kinds of falsehoods, they are in some ways a peculiar legal ruse.

Part of that ruse looks like a "classic legal fiction," a legal device with deep roots in the common law.<sup>315</sup> Classic legal fictions are not plain or pernicious swindles. They are "statement[s] propounded with a complete or partial consciousness of [their] falsity"—but still thought to have some "utility."<sup>316</sup> Attractive nuisance claims are a kind of classic legal fiction, at least to the extent they say that a defendant "invited" others to "visit his premises."<sup>317</sup> So too are those doctrines that treat corporations as "natural persons."<sup>318</sup>

Jurisdiction's false claims share some fiction-like characteristics. They too seem like statements made with a "consciousness of [their] falsity"<sup>319</sup>—and an interest in wrapping "new law in the guise of old."<sup>320</sup> They too seem like "the product of the law's struggles with new problems"<sup>321</sup>—whether modern means of transportation,<sup>322</sup> the rapid expansion of federal regulation, or the occasional disobedience of state courts.<sup>323</sup> And they too seem focused on something other than deception—as I discuss in more detail below.

314. See *supra* note 5.

315. See Smith, *supra* note 12, at 1465. Professor Smith has compiled a compelling and creative study of what he calls "New Legal Fictions"—false factual suppositions used (and abused) by courts. The notion that jurors give perfect weight to limiting instructions is a new legal fiction. *Id.* at 1450. Jurisdiction's lie has little to do with fact suppositions, and so it is something else.

316. See LON L. FULLER, LEGAL FICTIONS 9 (1967). Of course, the definition of a legal fiction is still somewhat elusive. See Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 2 (1990) ("None of the participants in the historical debate could agree [on a shared definition]."). And the value of such fictions is unsettled too. Some, like Bentham, find them a kind of "syphilis." 5 JEREMY BENTHAM, *The Elements of the Art of Packing, as Applied to Special Juries, Particularly in Cases of Libel Law*, in THE WORKS OF JEREMY BENTHAM 61, 92 (John Bowring ed., 1843). Others, like Blackstone, find them often harmless and occasionally "highly beneficial." 3 WILLIAM BLACKSTONE, COMMENTARIES \*43, \*267-68.

317. FULLER, *supra* note 316, at 12, 66 (emphasis omitted).

318. Fuller, *supra* note 12, at 372.

319. FULLER, *supra* note 316, at 10.

320. *Id.* at 58.

321. *Id.* at 94; see also *id.* at 21-22 ("[F]ictions are, to a certain extent, simply the growing pains of the language of the law.").

322. The demise of *Pennoyer's* border-focused regime, for example, coincides with the emergence of interstate rail travel.

323. See, e.g., Bloom, *supra* note 26.

But the analogy to legal fictions works only to a point. It does not capture a key difference of fact: Classic legal fictions concern what Kenneth Culp Davis once called “adjudicative facts.”<sup>324</sup> They ask courts to acknowledge some specific factual premise—like an “invitation” extended by an attractive- nuisance defendant—that reality does not support.<sup>325</sup> Jurisdiction’s lie, by contrast, often involves what Professor Davis labeled “legislative facts.”<sup>326</sup> It allows courts to fashion overarching legal rules—like subject-matter jurisdiction’s “well-pleaded” limits and personal jurisdiction’s “contacts”-based categories—that shape judicial reasoning in entire classes of cases, not merely in the specific “litigation before the court.”<sup>327</sup>

Not that this “fact” distinction is conclusive. Jurisdiction’s false claims may intersect with legal fictions as much as they diverge. But the point is not that these two types of legal untruths are entirely different in motive, form, or function. The point is that they do not match in all parts.

Nor do jurisdiction’s false claims and legal “subterfuge[s].”<sup>328</sup> Legal subterfuges are not mere games or fictions. They are “useful—if dangerous—lie[s],” falsehoods that advance socially desirable ends while obscuring true decision-making means.<sup>329</sup> Euthanasia frames a kind of legal subterfuge, for the law proscribes the act of “mercy killing” but allows juries to excuse it.<sup>330</sup> The courts’ disparate treatment of “cults” and “religions” is a subterfuge as well, for courts divide the groups analytically though “no principled distinction can be made” between the two.<sup>331</sup>

Jurisdiction’s false claims have some subterfuge-like traits. They too seem to obscure courts’ true decision-making processes. They too allow judges to say the law requires one thing as they do something else.<sup>332</sup>

But the analogy to legal subterfuges has its limits as well. Jurisdiction’s false claims do not purport to draw lines where “no principled distinction can be made,” as subterfuges often do.<sup>333</sup> They pretend instead to draw principled distinctions in one place but then sketch them somewhere else.<sup>334</sup> Nor does

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324. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942).

325. I borrow this example from Professor Smith’s careful analysis, *supra* note 12, at 1468.

326. Davis, *supra* note 324, at 402-03.

327. Smith, *supra* note 12, at 1468. I do not mean to rely too heavily on the notion of legislative facts. It is a category elusive in definition and “ambiguous [in] status.” *Id.* at 1473.

328. See CALABRESI, *supra* note 12, at 60; see also GUIDO CALABRESI AND PHILIP BOBBITT, *TRAGIC CHOICES*, 26, 78, 195-96 (1978).

329. CALABRESI, *supra* note 12, at 60.

330. *Id.* at 88-89.

331. *Id.* at 60-61.

332. See Smith, *supra* note 12, at 1471.

333. CALABRESI, *supra* note 12, at 60-61.

334. See, e.g., *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180 (1921) (sidestepping

jurisdiction plainly implicate “tragic choices”—decisions in which “beliefs and moralisms of like sorts clash.”<sup>335</sup> Jurisdictional matters are no doubt important, and sometimes intensely so.<sup>336</sup> They touch on the scope of judicial power, the force of institutional prerogative, the availability of legal relief, and the shape of individual identities. But if cases like *Asahi*, *Smith*, *Caterpillar*, and *Williams* raise pressing issues, there are still critical questions they do not touch. Not one implicates what Judge Calabresi and Professor Bobbitt define as “tragic choices.” Not one, that is, concerns deeply moralized issues of “life or death.”<sup>337</sup>

Jurisdiction’s ruse and legal subterfuges still connect in key places, just as jurisdiction and classic legal fictions do. But the point, again, is not to show that these falsehoods are entirely different. The point is to show that they do not perfectly overlap.

In the end, then, jurisdiction’s lie is an odd legal entity—part fiction, part subterfuge, and part something else. It masks implicit judicial choices made in the application of explicit jurisdictional rules. It seems at once durable<sup>338</sup> and shallow—likely to persist in the doctrine but still thin enough for most to see straight through. It splits jurisdictional rhetoric from jurisdictional reality. And it seems to sustain that split for reasons other than deceit.<sup>339</sup> What courts say about jurisdiction is different than what the doctrine shows. In that sense the courts tell a lie. But what courts say about jurisdiction is also different than what we already know. Jurisdiction’s lie thus does not seem designed to deceive us.<sup>340</sup> It seems directed at something else—at securing, perhaps, a set of functional, deliberative, and structural benefits that do not require us to be fooled. Subpart B examines how this strange lie might work.

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the “well-pleaded complaint” rule from *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908)).

335. CALABRESI, *supra* note 12, at 87-88.

336. *See supra* Part III.B; *see also supra* note 273.

337. *Smith*, *supra* note 12, at 1470-71 (citation omitted). I do not wish to overstate this claim. Jurisdiction may at times implicate the most severe issues of morality—and even life. *See, e.g.*, COVER, *supra* note 312; *supra* Part III.B. But if Judge Calabresi is “deeply skeptical about the frequency with which an argument about tragic choices ought to succeed in overcoming the presumption in favor of judicial candor,” *Smith*, *supra* note 12, at 1488, he may also be deeply skeptical of extending the “tragic choice” label too far.

338. This durability may itself distinguish jurisdiction’s form of untruth from classic legal fictions. *See* Shapiro, *supra* note 269, at 740 (“I cannot help thinking that there is now less need for these [classic fiction-like] devices, and more awareness of their flimsiness, than in the past.”).

339. This still presents a problem of candor, albeit one of a peculiar sort. *See id.* at 736 (“The problem of candor . . . arises only when the individual judge writes or supports a statement he does not believe to be so.”).

340. Plenty of judges, students, and scholars have, after all, not been fooled. *See, e.g.*, BLOMLEY, *supra* note 17; Cohen, *supra* note 5; Field, *supra* note 8; Wells, *supra* note 152.

### B. *The Value of a Strange and Open Lie*

Few endorse legal lies.<sup>341</sup> Tricks of the “basest sort,” legal lies spread the worm of “moral turpitude”<sup>342</sup> and carry the taint of errant thought. Absolute candor may itself be problematic—a “fetish”<sup>343</sup> to some, a “debilitating” ideal to others.<sup>344</sup> But legal lying is a pestilence,<sup>345</sup> of no greater use to justice than “swindling is to trade.”<sup>346</sup>

Jurisdiction’s lie is different. Or at least it has the potential to be. Jurisdiction’s strange and open lie has the potential to be a kind of positive deception—not a trick that merits unqualified endorsement, but still a ploy that persists understandably.

One reason for that persistence is practical, administrative: Jurisdiction’s lie channels cases into well-known categories. Even more, jurisdiction’s hard rules are easy to apprehend and straightforward to apply. Section 1331’s “well-pleaded” complaint rule is simpler than *Smith*’s more nuanced (pragmatic) analysis. Diversity jurisdiction’s “time of filing” rule is plainer in application than *Caterpillar*’s more elaborate review. Such clear and predictable rules help streamline litigation and discourage costly “game[s] of [jurisdictional] skill.”<sup>347</sup> They also allow parties to coordinate their jurisdictional efforts—or to seek other sorts of (private) solutions.<sup>348</sup> And they permit courts to focus on more discrete jurisdictional matters, whether explicitly stated rules or quietly permitted exceptions. Of course, focus and clarity hold only minimal (aesthetic)

341. See Shapiro, *supra* note 269, at 738 (“[W]ho, after all, would be Grinch-like enough to argue for lack of candor?”); see also SISELLA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978).

342. 6 JEREMY BENTHAM, *Rationale of Judicial Evidence*, in THE WORKS OF JEREMY BENTHAM 582 (Russell & Russell 1962) (1843); 9 JEREMY BENTHAM, *Constitutional Code*, in THE WORKS OF JEREMY BENTHAM, *supra*, at 77.

343. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 358 (1960) (noting that Justice Cardozo, “within the limits of possibility[,] came close to making a fetish of judicial candor”).

344. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 351 (1990).

345. 5 JEREMY BENTHAM, *Scotch Reform, Real Property, Codification Petitions*, in THE WORKS OF JEREMY BENTHAM, *supra* note 342, at 235 (“[A] fiction is a syphilis, which . . . carries into every part of the system the principle of rottenness.”).

346. 7 JEREMY BENTHAM, *Rationale of Judicial Evidence*, in THE WORKS OF JEREMY BENTHAM, *supra* note 342, at 283.

347. *Conley v. Gibson*, 355 U.S. 41, 48 (1957); see Currie, *supra* note 97, at 298 (calling jurisdiction an “expensive habit”); Redish, *supra* note 97, at 1794 (“[J]urisdictional uncertainty can surely lead to both a waste of judicial time and added expense to the litigants.”).

348. Contract law may be important here. Should parties detect jurisdiction’s malleability, they may turn to choice-of-forum and choice-of-law clauses to mitigate any uncertainty that follows. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (assessing whether a particular choice-of-forum clause served as consent to jurisdiction); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482 n.24 (1985) (reading a choice-of-law clause as a sort of tacit jurisdictional consent). This turn to contract law may itself be wise—or at least a promising way to allocate scarce resources and leverage judicial capital.

value if the results they bring are frequently flawed. But if jurisdiction's hard rules are overstated, they are also far from uniformly wrong. Often jurisdiction's rigid rules are enough to resolve jurisdictional disputes, meeting uncomplicated problems on relatively uncomplicated terms. And often what these terms produce are well-directed jurisdictional energies and sure-footed jurisdictional results.<sup>349</sup>

Another reason follows directly from the first: Jurisdiction's lie helps sustain a valuable "connection with the past."<sup>350</sup> Old lies are hardly better than new ones simply by virtue of age. Bad "tradition[s]" do not necessarily improve through years of faithful "transmi[ssion]."<sup>351</sup> But untangling jurisdiction's lie might both help and harm: It might inspire greater respect for and "trust in" the judiciary, subjecting jurisdictional decisions to more accurate (and thus more valuable) review.<sup>352</sup> But it might also unravel long strands of useful doctrine and undo long-set patterns of helpful thought. Worse still, it might stifle jurisdiction's ability to engage (or "domesticate") new forms, leaving courts to answer new and unruly jurisdictional questions—about the Internet, say, or globalized trade—without the confidence of time-tested frameworks and comfort of familiar decision-making constructs. Personal jurisdiction's established categories may fumble some facts in cases about new kinds of contacts<sup>353</sup>—but still structure jurisdictional analysis in helpful ways. Subject-matter jurisdiction's two "original" options may seem at times like imprecise relics<sup>354</sup>—but still allocate cases effectively.

A third reason involves deliberation and self-limits: Jurisdiction's lie helps tether courts to a solid jurisdictional mast. This may help preserve the "integrity" of underlying rules<sup>355</sup> and promote greater jurisdictional coherence

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349. Or at least the same result that a court would reach if it engaged in more thoroughgoing considerations of pragmatic equilibration and legalized space.

350. Shapiro, *supra* note 269, at 739; *see also* Smith, *supra* note 12, at 1486 ("In rare cases, the need for legal continuity might justify dispensing with candor.").

351. LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 13 (1940).

352. In some ways, I merge a deontological claim with a consequentialist one here. Professors Shapiro and Fuller elaborate more of the former. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-72 (1978); Shapiro, *supra* note 269, at 736-37 ("[L]ack of candor often carries with it the implication that the listener is less capable of dealing with the truth, and thus less worthy of respect, than the speaker."); *id.* at 737-38, 750 ("[C]andor is to the judicial process what notice is to fair procedure. . . . [T]he fidelity of judges to law can be fairly measured only if they believe what they say in their opinions and orders . . . ."). John Rawls considers more of the latter. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 115 & n.8 (rev. ed. 1999) (contending that principles of justice must be known and defensible publicly for democratic government to thrive).

353. *See, e.g.*, *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1078-90 (9th Cir. 2003) (trying to fit new Internet-type contacts into old personal jurisdiction categories).

354. *See* Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979).

355. Shapiro, *supra* note 269, at 747. This idea is also quite similar to what Professor Shapiro has called a "fear of the effect of truthfulness." *Id.* at 747 n.75.

in the long term.<sup>356</sup> But it may do more than that too. It may encourage judicial discipline, counsel jurisdictional caution, and rebuff cynical efforts to skirt formal jurisdictional lines. Jurisdictional gaps will still emerge, no doubt—as they do in *Caterpillar*, *Smith*, and *Asahi*. But even courts (and parties) unfooled by jurisdiction's claims of inflexibility will understand the signals those claims send. Those signals demand careful justification of any jurisdictional deviation. And they tilt strongly against any cavalier or casual jurisdictional bends. Even courts aware of jurisdiction's pliability will thus resort to old jurisdictional gaps more sparingly, create new ones with greater caution, and limit their discretion to narrower bounds. Cases like *Caterpillar*, *Smith*, and *Asahi* will remain known-but-narrow jurisdictional exceptions—not widely applied jurisdictional rules.

As will forum non conveniens and federal-court abstention. Both of these devices shape jurisdiction from without, not from within. Both act, that is, as external common-law controls on jurisdiction's strict mandates: Forum non conveniens gives courts more visible discretion to temper the demands of personal jurisdiction. Federal-court abstention does much the same for the duties that subject-matter jurisdiction seems to set.<sup>357</sup> But neither forum non conveniens nor federal-court abstention is as commonly used as we might expect: Neither has swallowed hard jurisdictional rule by malleable exception. Many abstention "types" have been invoked only in their original cases.<sup>358</sup> Forum non conveniens dismissals are similarly uncommon, even if a recent rise in international litigation carries potential for real growth.<sup>359</sup> This pattern of non-use may reflect judicial discomfort with these doctrines—or a lack of interest in their tools. It may also reflect the judicial discipline, concern, and caution that jurisdiction's lie helps to impose.

A fourth reason builds largely on the third: Jurisdiction's lie may reflect admirable court humility—a kind of prudent judicial self-awareness. Jurisdiction's rules do not exist in a vacuum. New social pressures arise. Facts

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356. To borrow Professor Dan-Cohen's famous phrasing, jurisdiction's false front may operate as a kind of "conduct rule"—a rule, that is, "designed to govern behavior." See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). What sits behind that front is more like a "decision rule"—a rule, that is, "designed to guide the person who is judging." Shapiro, *supra* note 269, at 744. This analysis is fascinating but only tangentially relevant here, not least since I suggest that the "conduct rule" is as knowable and known as the "decision" one.

357. See *supra* Part I.

358. See, e.g., *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

359. See Lear, *supra* note 27, at 1152 (citing GARY B. BORN WITH DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 1 (2d ed. 1992); Daniel J. Dorward, Comment, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 142 (1998)).

change in unanticipated ways.<sup>360</sup> Even the most carefully compiled list of exceptions to jurisdiction's strict duties may thus omit something crucial. It might miss the federalist accommodation so useful in *Williams* or neglect the pragmatic balancing so helpful in *Smith*. Courts may thus opt to state jurisdictional rules succinctly and rigorously, but incompletely. They may trade the hazards of an imperfect list, that is, for the risks of no list at all. This choice may limit some opportunities to bend jurisdiction's hard rules or to stray from its (seemingly) solid mast. But if courts know those rules are overstated—if jurisdiction's lie, that is, is one that does not actually fool—the choice may actually leave more room for courts to adapt wisely over time. Judges will not need to fit new and necessary jurisdictional bends—like *Caterpillar* or *Smith*—into preset boxes. They will need instead to cleave tightly to existing jurisdictional mandates, varying only with special attention, explanation, and care.<sup>361</sup>

A final reason is more structural, power-focused, and court-protective: Jurisdiction's lie may help keep Congress mollified and inactive, even if not deceived. Congress may not believe jurisdiction's superficially innocuous image. It may see through the institutionally dispassionate and structurally selfless picture courts often paint. But jurisdiction's lie may still do more than dampen courts' eagerness to inflate their own authority. It may assure Congress that federal courts are not unrestrained or power-mad. *Caterpillar* may break a jurisdictional rule, but its reiteration of strict jurisdictional limits may dispel legislative worries and make its (narrow) deviation easier to ignore. *Smith* may recast a jurisdictional mandate, but its return to jurisdictional "principle" may signal judicial caution—and thus keep Congress satisfied. In this way jurisdiction's lie might prevent legislative (over)reaction and ease structural tension. It might also preserve a useful range of jurisdictional flexibility<sup>362</sup> and judicial discretion<sup>363</sup> without running afoul of pertinent statutory or constitutional commands.

This last point is important. Nothing that courts do with or behind jurisdiction's lie is necessarily incompatible with controlling constitutional provisions—whether Full Faith and Credit, Due Process, or the whole of Article III. Nor is it plainly inconsistent with pertinent statutory law. Due

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360. This observation points both forward and backward. Forward because it connects to other devices—like originalist methods of interpretation—discussed briefly in the conclusion. See *infra* Conclusion. Backward because it recalls the shift from *Pennoyer* to *International Shoe*. See *supra* Part I.

361. Judge Calabresi has argued that we use subterfuges to “keep us from expanding too far those narrow exceptions to our constitutional aspirations which we simply cannot avoid making.” CALABRESI, *supra* note 12, at 61 (citation omitted). Part of my claim about jurisdiction's lie is similar, if less idealized.

362. See *supra* Part III.

363. Shapiro, *supra* note 142, at 588. Even more, that discretion stays within the confines of Article III.



process leaves ample room, for example, for *Asahi's* pragmatic assessment. Section 1331 says nothing that prohibits the innovative logic of *Smith*.

Important as this compatibility is, of course, it should not be overstated. Some jurisdictional “mangl[ing]”<sup>364</sup> may go too far, even if it appears self-denying.<sup>365</sup> In some places, in fact, it may already have.<sup>366</sup>

Nor should this explanation be taken as a conclusive (or fulsome) defense of jurisdiction’s lie. It is framed in conditional language and contingent terms—and intentionally so. Not one of the “benefits” listed is sure to accrue in any particular instance. Not one of the “benefits” listed implies that a lie outshines judicial candor. And not one of the “benefits” listed is without flaw. Those flaws occupy the beginning of Subpart C.

### C. A Lie’s Costs

Jurisdiction tells a troubling lie. It invites moral condemnation, as so many legal lies do.<sup>367</sup> It risks a loss of respect from parties, scholars, and even courts.<sup>368</sup> And it reeks of elitism and paternalism—as if learned insiders get special legal insight and naïve outsiders should be glad “to be duped.”<sup>369</sup>

Jurisdiction’s lie may be more troubling still because it is told by courts. Judicial decision making demands more than brusque exertion of legal power. It requires “reasoned response to reasoned argument”—a forthright account of sources and “grounds . . . that can be debated, attacked, and defended.”<sup>370</sup> This kind of statement does more than provide a basis for judgment. It makes apparent a judge’s choices, permitting others to “measure the descriptive validity of [her] factual claims”<sup>371</sup> and to “detect, criticize, and thus deter” normative conclusions that seem unwise.<sup>372</sup>

364. Lee, *supra* note 21, at 1631.

365. Some applications of jurisdiction’s lie will certainly seem like judicial self-denial, a means for courts to cut against their own power and discretion. See, e.g., *Colorado River Water Conservation Dist. v. Akin*, 424 U.S. 800, 817 (1976). This version of the lie may seem a kind of institutional self-sacrifice. But not all self-denial is so charitable. See Bloom, *supra* note 10. Nor is every application of jurisdiction’s lie court-limiting. Both *Smith* and *Caterpillar*, for example, permit jurisdiction where inflexible doctrine would seem to prevent it. See *supra* Part II.

366. A possible example: *Colorado River* abstention. If any abstention doctrine is particularly curious in origin and “perverse” in application, *Colorado River* is it. See Friedman, *supra* note 230, at 543.

367. See Shapiro, *supra* note 269, at 740.

368. *Id.*

369. *Id.* at 746 & n.73 (quoting BOK, *supra* note 341, at 215).

370. *Id.* at 737.

371. *Smith*, *supra* note 12, at 1483.

372. *Id.*; see also Dan M. Kahan, *Ignorance of the Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 154 (1997) (“When . . . moral judgments are camouflaged in seemingly nonjudgmental rhetoric, decisionmakers are freed from the constraints of public accountability, and citizens are denied the opportunity to examine, criticize, and reform the

By this measure, jurisdiction's lie cuts precisely the wrong way. It may mask decisions that seem otherwise defensible—*Smith* and *Caterpillar* for reasons of pragmatic “equilibration,” *Asahi* and *Williams* for reasons of federalist “space.”<sup>373</sup> It may persist for reasons that seem partly just.<sup>374</sup> But jurisdiction's lie obscures both grounds and choices. Its endurance thus comes at the expense of honesty, frankness, and transparency. Its endurance thus comes, that is, at a serious price. The remaining question, then, is not whether jurisdiction's lie is somehow better than judicial candor—for I do not suggest that it is. The remaining question is whether jurisdiction's lie can ever justify its heavy costs.<sup>375</sup>

A brief illustration helps answer that question—or at least helps show how elusive its answer may be. This example tracks the familiar lines of *New York Times Co. v. Sullivan*,<sup>376</sup> a case more famous for its First Amendment substance than for its jurisdictional backdrop. But this illustration is not intended to obscure by brisk accumulation of reminiscent facts. Nor is it meant to make any statement on the merits of modern First Amendment law. It is instead intended to show how difficult it is to untangle the possible benefits of jurisdiction's lie from its inevitable faults.

So imagine that the New York Times ran a provocative advertisement in early 1960. Hoping to generate sympathy for the cause of civil rights, the ad catalogued a number of events important to the “Struggle for Freedom” in the American South.<sup>377</sup> No specific official or offender was identified in the ad's text, but at least one person felt particularly impugned. L.B. Sullivan, a City Commissioner in Montgomery, Alabama, felt individually slighted. So he sued, naming the newspaper and four Alabama ministers as co-defendants. His claim of libel sounded in state law.

As it happened, Sullivan filed his libel claim in Alabama state court—motivated, no doubt, by the prospect of a friendly jury and an even friendlier judge. And the real battle in *Sullivan* played out there, at least until the Supreme Court accepted the case for review. No defendant even attempted to remove the lawsuit to federal district court. No defendant even tried, that is, to transplant the case from state court to a federal one at the very start.

And there are good reasons why none did. By jurisdiction's familiar rules, federal district court was inaccessible. Diversity subject-matter jurisdiction was lacking because Sullivan and the four ministers shared “state citizenship.”<sup>378</sup>

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judgments that their law reflects.”).

373. See *supra* Part III.

374. See *supra* Part IV.B.

375. See Shapiro, *supra* note 269, at 745.

376. 376 U.S. 254 (1964).

377. *Id.* at 256-57.

378. The statutory bar against “home-state” defendants removing cases to federal court would stand in the way only if the basis of removal were diversity jurisdiction. See 28 U.S.C. § 1441(b) (2006). Since the basis of this (fictitious) removal story would instead

Federal-question seemed absent because Sullivan's libel action "arose" out of state law.<sup>379</sup> So though a federal district court may well have been more hospitable to *Sullivan's* five defendants, none even tried to get there. Alabama was left to resolve Sullivan's libel suit (initially) for itself.

Yet things could have been different, even at the start. A federal district court could have exercised subject-matter jurisdiction in *Sullivan*—if by slightly innovative turn. Even in 1960, of course, *Sullivan* seemed a subject-matter jurisdiction misfit. *Sullivan* did, like *Smith*, involve a "right to relief [that] depend[ed] upon the construction or application of the Constitution or laws of the United States"<sup>380</sup>—but it framed a federal issue responsive to, not embedded in, the predicate state-law claim. Still, if *Smith* misses *Sullivan* in one way, it connects in yet another. *Smith* confirms that federal courts adapt and adjust jurisdiction's strict mandates. It confirms, that is, that the Court could have reworked subject-matter jurisdiction in *Sullivan* as readily as it had in *Smith*—and would again in *Caterpillar*. The parties in *Sullivan* surely knew of this possibility. But still they refrained from seeking any jurisdictional accommodation—not, perhaps, because they believed jurisdiction's inflexible rhetoric, but because they were still persuaded by the signals that rhetoric sends. One possible lesson of *Sullivan*, then, is that jurisdiction's lie may have some influence, even if parties and courts are not fooled.

And a second lesson is that there may be good reason why that lie endures. *Sullivan* suggests that jurisdiction's lie may be useful in ways both conditional and concrete: It may constrain judicial power, keeping variations like *Smith* (and *Caterpillar*) narrow in focus and form. It may also accommodate local interests within a national conversation,<sup>381</sup> leaving space for the instructive voices of state courts. It may channel adjudicative resources, discouraging unnecessary jurisdictional conflict<sup>382</sup> and focusing attention on narrower

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likely be federal-question jurisdiction, the "home-state" bar would be inapposite. *Id.*

379. Personal jurisdiction over the *Times* may have looked tenuous at the time. In 1960, after all, the paper had few direct subscribers in Alabama—and no permanent offices or employees there. But a federal court would have followed the same rules Alabama's state court did—and likely reached the same result.

380. *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 199 (1921). Put another way, both *Smith* and *Sullivan* could be said to involve a "state-law claim [that] necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

381. Because arising-under jurisdiction to hear a state-law claim always raises the possibility of upsetting the state-federal line drawn (or at least assumed) by Congress, the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction.

*Grable*, 545 U.S. at 314 (citation omitted).

382. *Sullivan* certainly arose in a time and place of significant (federalist) ferment. It may thus be a good illustration of malleable jurisdictional devices helping courts to sidestep contentious political disputes. *See Bloom*, *supra* note 26. It may also illustrate the reliability

jurisdictional concerns. And it may integrate pragmatic interests, reading jurisdiction into broader “composite[s]”<sup>383</sup> of remedies and rights—First Amendment or otherwise. Jurisdiction’s lie still fails the test of candor, for judges write things about jurisdiction that they “do[] not believe.”<sup>384</sup> But even an unlikely case like *Sullivan* suggests that judges may write these things for reasons other than deceit.

So behind this brief rendition of *Sullivan* is an odd and important jurisdictional point. There are costs to jurisdiction’s lie—no fewer than any other legal falsehood, and perhaps more than most.<sup>385</sup> But there are also explanations and potential rewards. There may be reasons for the persistence of jurisdiction’s long-running untruth. And there may be something good that comes from jurisdiction’s strange and open lie.

### CONCLUSION

This Article began with a stern accusation. It charged that jurisdiction pretends to be something it is not. Even worse, it suggested that there is something calculated about the ruse.

But this Article also started with a promise—not for simple solution or uncomplicated answer, but for careful explanation of why jurisdiction’s lie endures. We may want to fix legal jurisdiction. We may hope to wipe away its shallow pretense. But we should still make sense of jurisdiction’s curious falsehood. And we should still ask if there is anything defensible in how it now works.<sup>386</sup>

To meet its initial promise, this Article has no doubt swept broadly. It has looked at legal jurisdiction in full image—and, as a consequence, occasionally substituted breadth for detail. My aim was not to be quick or superficial. Nor was it to probe every nuance of the (many) academic traditions I have invoked. My aim was simply to bring these varied traditions together, allowing typically divergent conversations to weave (temporarily) into one. Post-modern geographers may not devote much attention to diversity jurisdiction. Personal jurisdiction scholars may not consider the equilibration of rights and remedies at much length. One goal of this Article is to suggest, however modestly, that perhaps they should.

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of Supreme Court appellate review.

383. See Fallon, *supra* note 16, at 686 (“[C]ourts do not make determinations of justiciability, substantive rights, and available judicial remedies in abstraction from one another, but instead with an eye toward achieving desirable results overall.”) .

384. Shapiro, *supra* note 269, at 736.

385. See BOK, *supra* note 341, at 88, 103, 188-89 (noting that the dissembler often feels very different from the dissembled).

386. A slight extension: we might also ask if the lie’s replacement, should we craft one, adds candor without sacrificing the lie’s potential benefits.

Another goal of this Article is more direct. It attempts to reveal how jurisdictional rhetoric breaks from jurisdictional reality—and then to explain why it would. Legal jurisdiction claims to be fixed and inflexible, “as natural and inevitable as the ground we stand on.”<sup>387</sup> But the story of legal jurisdiction reveals something different. It reveals pockets of pliability and places where firm rules bend.

That story is important, instructive in its outlines and distinctive in its details. It shows how jurisdiction’s rigid rhetoric informs other doctrines, shaping common-law escape valves like *forum non conveniens* and federal-court abstention. It shows too how that rhetoric pushes judicial power in two ways at once. And it shows how jurisdiction lies for reasons other than deceit. Jurisdiction may trade on a deception, but it hardly leaves us fooled. It rather focuses adjudicative energy, encourages judicial caution, constrains jurisdictional discretion, and eases structural tension—even if we know it false.

This may seem a strange diagnosis. It may leave some (formalist) readers uneasy, and it may disappoint our hopes for a dashing jurisdictional hero or a perfect legal end.<sup>388</sup> But I do not mean to paint jurisdiction’s lie as flawless. Nor do I mean to contend that it is the best that courts can do. I mean merely to suggest that there may be something noble behind its many faults.

Other legal tools may claim a similar kind of nobility. Originalism may be an interpretive method less rigorous in its reality than in its rhetoric—but still useful in constraining judicial discretion and narrowing judicial choice.<sup>389</sup> Textualism may promote judicial restraint in similar ways.<sup>390</sup> And certain standards of appellate review—like abuse of discretion—may flip this picture over, pledging looser appellate appraisal than some doctrine would suggest.<sup>391</sup>

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387. Ford, *supra* note 13, at 866.

388. *See id.* at 930 (concluding with a similar, if somewhat more pessimistic, turn).

389. *See, e.g.,* ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 45 (Amy Guttmann ed., 1997) (“There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court.”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (contending that originalism will do better than other interpretive methods at avoiding the “main danger in judicial interpretation”—namely that “judges will mistake their own predilections for the law”).

390. *See, e.g.,* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 648 (1990) (suggesting that textualism helps “prevent judicial usurpation of legislative power”); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1087-88 (1992) (rehearsing the claim that textualist methodology “allows judges to follow the law and not their own view[s] of justice”).

391. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982) (“There are a half dozen different definitions of ‘abuse of discretion,’ ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance . . . .”); *id.* (“[W]e should recognize that ‘abuse of discretion,’ like ‘jurisdiction,’ is a ‘verbal coat of . . . many colors.’” (omission in original) (citation

These analogies may make jurisdiction's story seem less atypical, if still significant. But they also underscore the importance of having that story retold. Careful examination of jurisdiction does more than expose a split between rhetoric and reality. It does more too than link jurisdictional flexibility to notions of pragmatic "equilibration" and legalized "space." It questions what we think about other legal untruths, and it revises our understanding of jurisdiction itself.

So in the end we may study the same cases. We may read *Asahi*, *Smith*, *Caterpillar*, and (perhaps) *Williams* for the same reasons as before. But as we revisit these doctrinal highlights, we should be conscious of what else they may show. These cases shape our most foundational jurisdictional frameworks, repeating familiar jurisdictional language as they do. But these cases also offer a chance to rethink a persistent problem. And they help make sense of why jurisdiction lies even when we are not fooled.

