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The Complexity of Jurisdictional Clarity

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[C]ertainty generally is illusion, and repose is not the destiny of man.[1]
– Oliver Wendell Holmes, Jr.

INTRODUCTION

THE Supreme Court's October Term 2009 was a banner one for federal jurisdiction buffs. Even apart from its usual handful of standing cases, the Court decided no fewer than eight cases that directly implicated questions of statutory subject-matter jurisdiction.[2]

[1] Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 466 (1897).

[2] See Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2877–78 (2010) (considering jurisdictionality of questions of the extraterritorial reach of a statute); Dolan v. United States, 130 S. Ct. 2533, 2538–39 (2010) (determining jurisdictionality of the ninety-day deadline to order restitution under the Mandatory Victims Restitution Act, 18 U.S.C. § 3664(d)(5) (2006)); United Student Aid Funds v. Espinosa, 130 S. Ct. 1367, 1379 (2010) (assessing jurisdictionality of the precondition to a bankruptcy discharge of a student loan debt that the court find "undue hardship"); Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1245–47 (2010) (analyzing jurisdictionality of 17 U.S.C. § 411(a)); Hertz Corp. v. Friend, 130 S. Ct. 1181, 1194–95 (2010) (considering how to determine a corporation's principal place of business for diversity citizenship purposes); Kucana v. Holder, 130 S. Ct. 827, 833–40 (2010) (examining appellate jurisdiction over discretionary actions by the Attorney General in immigration proceedings); Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of

In each case, the Court adopted rules regarding jurisdiction that were founded upon the value of clarity. For example, in *Hertz Corp. v. Friend*, the Court chose a simplified factual test for corporate citizenship under the diversity-jurisdiction statute.[3] The Court intentionally opted for that particular test because of the need for clear and simple jurisdictional rules, a need that the Court and its members have recognized in past Terms as well.[4]

There are good reasons to applaud the Court's push for clarity in areas of subject-matter jurisdiction. Jurisdictional uncertainty causes litigants and courts to spend time and resources establishing the propriety of the forum when they might be better spent litigating the merits. Uncertainty also leads to mistaken jurisdictional assumptions and exercises of authority, which, if later discovered, will undo all of the effort expended in that improper forum. For these reasons, one commentator recently asserted that "[j]ust about nobody, it seems, thinks that jurisdictional rules should be fuzzy."[5]

Call me a skeptic. Although I generally agree with the value of jurisdictional clarity as an ideal, the reality is that jurisdictional clarity is largely a chimera, done in by its own inherent complexities. Worse, these complexities are either missed or ignored, leading to the routine assumptions that clarity in jurisdictional rules is both attainable and an unalloyed good. This Article calls those assumptions into question and offers a more refined understanding of the surprising complexity and obscurity of jurisdictional clarity. It does so in five parts.

Part I makes and defends the descriptive claim that there is a wide gap between the rhetoric of courts and commentators favoring clarity and simplicity in areas of subject-matter jurisdiction and the pervasive uncertainty in those doctrines today. In other words, although judges and commentators often invoke jurisdictional clar-

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Adjustment, 130 S. Ct. 584, 595–96 (2009) (deciding jurisdictionality of the Railway Labor Act's conference requirement); Mohawk Indus. v. Carpenter, 130 S. Ct. 599, 606–07 (2009) (assessing appellate jurisdiction over an interlocutory appeal from a privilege order).

[3] *Hertz*, 130 S. Ct. at 1192.

[4] See infra text accompanying notes 25–27.

[5] John F. Preis, Jurisdiction and Discretion in Hybrid Law Cases, 75 U. Cin. L. Rev. 145, 167 (2006).

ity and appear committed to it, jurisdictional doctrine is, in many instances, neither clear nor simple. Reality defies ideality.

Part II then turns to the nature of jurisdictional clarity and situates it within two great conversations on jurisdictional doctrine: the ageless debate between rules and standards and the more recent, but no less rich, debate between mandatory and discretionary jurisdiction, most prominently forged by Martin Redish and David Shapiro. This Part argues analytically that these debates are related to, but mostly dissociated from, the push for jurisdictional clarity. A standard, for example, can be clear, while a rule may be unclear. Similarly, a discretionary doctrine can be clear, while a mandate may not be. To be sure, jurisdictional clarity tends to have attributes of rules and mandates, but it is both wider and more complex than the existing conversations capture. That has left jurisdictional clarity severely underexplored.

Part III begins to fill that gap by unpacking jurisdictional clarity and laying bare the first assumption inherent in the rhetoric described in Part I, that jurisdictional rules can be simple and clear. In truth, jurisdictional clarity is a byzantine complex of at least three interrelated intricacies.

First, clear and simple jurisdictional lines are often extremely difficult to draw. The policies underlying jurisdiction and jurisdictional allocation are difficult to ascertain and are often antithetical to each other. As a result, accommodating those competing policies through a clear jurisdictional rule is no easy task. In addition, neither of the institutions (Congress or the courts) that develop jurisdictional doctrine is particularly good at it. Congress lacks the institutional expertise of dealing with jurisdiction, while the courts lack the institutional capacity to develop clear ex ante rules. The suboptimality of the rulemaker leads to confusion and uncertainty in rule promulgation. Further, the ideal of "clear and simple" rules leads to the unanswered question, "Clear to whom?" Different target observers have different vantage points. Lay observers, because of their inexperience with the intricacies of jurisdiction, need more clarity than do lawyers and judges and respond more forcefully to clarity in results as opposed to clarity in abstract doctrine. Consequently, even when jurisdictional doctrine is clear and simple for one group, it may be unclear or appear distorted to another. Finally, when clear jurisdictional lines are available and easily dis-

cernible, difficulty arises in choosing where to establish that clear boundary, for that decision itself implicates a thorny set of jurisdictional policies. For these reasons, the task of crafting a clear rule can present formidable obstacles.

Second, jurisdictional clarity is complicated by the implementation process. Even the clearest and simplest rule has fuzziness at the margin, and that fuzziness often becomes magnified by judicial interpretation. Further, the factual application of even a clear rule can be exceedingly convoluted, particularly if the inquiry is dependent upon facts that, as is often the case, are difficult to ascertain or prove at the outset of the litigation. In short, implementation can cloud the best attempts at clarity and simplicity.

Third, the instrumental value of jurisdictional clarity depends upon its particular goals, which have never been fully stated. True, the regular mantra is that jurisdictional clarity is important to conserve litigation and judicial resources and to enhance judicial legitimacy. But there are different ways to structure jurisdictional clarity to achieve these goals. And there are unstated goals of streamlining inter- and intra-branch relationships that complicate the use of jurisdictional clarity considerably. Together, these three difficulties demonstrate that the ability to attain the ideal of jurisdictional clarity and simplicity should not be presumed.

Part IV then tackles the second assumption of the rhetoric, that jurisdictional clarity is an unalloyed good. Jurisdictional clarity can be attained, but only at a price. That price includes jurisdictional clarity's unavoidable vices and the opportunity cost of reaping jurisdictional uncertainty's attractive virtues. The price of jurisdictional clarity may ultimately be worth it, but there are reasons to appreciate the limits of jurisdictional clarity and the benefits of more nuanced doctrine, particularly when getting the forum right matters significantly.

Part V uses the previous Parts' exploration of jurisdictional clarity to advance two observations. First, it suggests an answer to the divergence between reality and rhetoric noted in Part I: the ideal of jurisdictional clarity is practically unattainable. Second, it argues normatively that, in any case, jurisdictional clarity ought not be overvalued; the inherent complexity and uncertainty in jurisdictional doctrine can be harnessed to forge a better jurisdictional landscape through hybrid rules.

I conclude by asserting that, at the very least, simply repeating the mantra that jurisdictional rules should be simple and clear—as both courts and commentators often do—is unhelpful and potentially misleading without a full appreciation of the complexity of jurisdictional clarity.

I. THE GAP BETWEEN RHETORIC AND DOCTRINE

Martha Field once wrote, "One of the first things we teach entering law students is the importance of clarity in rules governing courts' jurisdiction."[6] Courts and commentators widely share this sense of the importance of jurisdictional clarity. Surprisingly, however, the doctrines themselves do not reflect it.

A. The Rhetoric of Jurisdictional Clarity

Because of the special nature of jurisdiction,[7] the need for clarity in jurisdictional rules is different from the need for clarity in substantive, or even procedural, law. Jurisdiction allocates judicial authority between the federal and state judicial systems, between the judicial system and executive agencies, among courts within a judicial system, and even between an adjudicatory system and no adjudicatory system.[8] On a practical scale, it is a component of court access.[9] Because jurisdiction circumscribes a court's adjudicatory authority,[10] a court that determines that it lacks subject-matter jurisdiction has no authority to do anything but dismiss the case.[11]

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[6] Martha A. Field, The Uncertain Nature of Federal Jurisdiction, 22 Wm. & Mary L. Rev. 683, 683 (1981).

[7] I note that "jurisdiction" is a word of many meanings. See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88–90 (1998) (noting the importance of precision in applying the "jurisdictional" label). Here and throughout, I mean to refer only to subject-matter jurisdiction rather than personal jurisdiction.

[8] See Alex Lees, Note, The Jurisdictional Label: Use and Misuse, 58 Stan. L. Rev. 1457, 1460 (2006).

[9] See Gene R. Nichol, The Roberts Court and Access to Justice, 59 Case W. Res. L. Rev. 821 (2009).

[10] See Kontrick v. Ryan, 540 U.S. 443, 455 (2004). For excellent expositions of jurisdiction as distinguished from merits and procedure, see Evan Tsen Lee, The Dubious Concept of Jurisdiction, 54 Hastings L.J. 1613 (2003); Howard M. Wasserman, Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy, 102 Nw. U. L. Rev. 1547 (2008).

[11] I note that the Court has held that a court can dismiss a case on non-jurisdictional grounds before it determines if it has subject-matter jurisdiction. See, e.g., Sinochem

Policies underlying federal-jurisdiction doctrine primarily focus on societal, rather than litigant, values: protection of federal rights and interests, comity and federalism, allocation of judicial resources and docket control, and uniformity.[12] Because jurisdiction goes to a court's basic authority over the case and protects underlying societal values,[13] defects in jurisdiction "can be raised by any party or the court sua sponte; may not be consented to by the parties; are not subject to principles of estoppel, forfeiture, or waiver; and may be raised at any time, including for the first time on appeal."[14]

These features of jurisdiction entail significant costs for courts and litigants. A jurisdictional defect raised late in the proceedings can undo all of the litigation time and effort the parties and court have spent. But the idea is that the policies underlying jurisdiction are too important to trust to litigants, and so the costs are accepted as part of the price of protecting those values.

Jurisdictional clarity can mitigate some of the litigant costs by enabling litigants to file in the proper forum more often.[15] A clearer

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Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 436 (2007). For more on the implications of decisional sequencing on jurisdictional issues, see Kevin M. Clermont, Decisional Sequencing: Limitations from Jurisdictional Primacy and Intrasuit Preclusion (Cornell Law Faculty Working Papers, Paper No. 77, 2010), available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1080&context=clsops_papers.

[12] See Barry Friedman, A Revisionist Theory of Abstention, 88 Mich. L. Rev. 530, 550–54 (1989). That said, and as I argue below, private values can be important to jurisdictional demarcations as well. In addition, the costs to individual litigants from harsh jurisdictional effects are private concerns that inform jurisdictional thinking. These private values further complicate the ideal of jurisdictional clarity. See infra text accompanying notes 137–48.

[13] For more detailed explorations of jurisdictionality, see Perry Dane, Jurisdictionality, Time, and the Legal Imagination, 23 Hofstra L. Rev. 1, 36–37 (1994); Scott Dodson, In Search of Removal Jurisdiction, 102 Nw. U. L. Rev. 55, 60 (2008); Lee, supra note 10, at 1613–21.

[14] Dodson, supra note 13, at 56. It appears that, in the early years of American courts, subject-matter jurisdiction was waivable in certain instances, and courts relied almost exclusively on the pleadings to determine jurisdiction without holding detailed factual hearings. See Michael G. Collins, Jurisdictional Exceptionalism, 93 Va. L. Rev. 1829, 1836–43 (2007).

[15] See Eric Kades, The Law & Economics of Jurisdiction 4 (William & Mary Law Sch., Working Paper No. 09-11, 2009), available at http://ssrn.com/abstract=1431959 ("[T]he complexity of federal jurisdiction likely results in many *unintentional*, erroneous federal court filings."). I should note that if the parity between federal and state courts is high, jurisdictional uncertainty may simply cause plaintiffs to choose state

doctrine also should cause parties to challenge jurisdiction less often and decrease the likelihood that a jurisdictional defect will unravel the litigation[16] or even preclude the claim if a limitations period has run in the interim.[17] Jurisdictional uncertainty can do the opposite. One study, for example, reported a sixty-six percent error rate in invocation of federal jurisdiction under the relatively unclear "substantiality" component of federal "arising under" jurisdiction.[18] By contrast, jurisdictional clarity generally reduces litigant costs.[19]

Jurisdictional clarity can also reduce judicial costs because, when jurisdiction is at issue, courts will be able to resolve the issue more easily. Because jurisdiction must be policed by the court sua sponte and often without diligent briefing by the parties (particularly if both parties wish to remain in federal court), a clear jurisdictional rule has great appeal to the judge. And, when the court does resolve a jurisdictional issue under clear doctrine, that decision is likely to be accurate, causing fewer appeals and fewer reversals.[20]

Jurisdictional clarity also can enhance judicial legitimacy. The transparent judicial enforcement of a clear statutory rule of jurisdiction negates the democratically problematic perception of unauthorized judicial lawmaking.[21] Clear jurisdictional doctrine also re-

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court, where concurrent jurisdiction exists, to avoid the risk of an erroneous jurisdictional filing. As a result, jurisdictional uncertainty may not result in substantially more filing errors. But, "these same convoluted rules of jurisdiction, turning as they frequently do on facts known by one party and difficult to discover by their adversary, create opportunities to exploit this asymmetric information *intentionally* and obtain two bites at the apple." Id.

[16] Field, supra note 6, at 683–84.

[17] Cf. Catherine T. Struve, Time and the Courts: What Deadlines and Their Treatment Tell Us About the Litigation System, 59 DePaul L. Rev. 601, 629–31 (2010) (discussing the importance of deadlines to lawyers and litigants).

[18] See Preis, supra note 5, at 166. This study was based on circuit court determinations that federal jurisdiction was improperly invoked. Id. at 159.

[19] See Daniel J. Meltzer, *Jurisdiction and Discretion* Revisited, 79 Notre Dame L. Rev. 1891, 1906 (2004) (discussing litigant need for predictability in jurisdictional rules). Some of this prospective waste is overstated because parties who litigate deep into the merits may know enough about each other's cases that settlement, rather than relitigation, becomes the most likely scenario.

[20] Conversely, uncertainty tends to foster inaccuracy. One study, for example, found that roughly fifty-five percent of appellate cases on the "substantiality" component of federal "arising under" jurisdiction were reversals. See Preis, supra note 5, at 165.

[21] Cf. Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1176 (1989) ("Statutes that are seen as establishing rules of inadequate clarity or pre-

duces the legitimacy cost of a court erroneously exercising jurisdiction when it cannot.[22] Unclear jurisdictional doctrine, by contrast, can lead to manipulation of that doctrine for merits-based ends, again leading to an erosion of public confidence in the courts.[23]

These are powerful arguments. It is no surprise, then, that they lead to the conventional wisdom about jurisdictional rules. Jurisdictional rules should be simple and clear, the mantra goes, to allow jurisdiction to be determined early, easily, and cheaply, and to avoid the potential waste of litigant and court resources.[24] Courts and commentators regularly invoke this easy rhetoric.

A good expression of this mantra in jurisdictional doctrine, and one to which I will return throughout this Article, is the well-pleaded complaint rule for federal statutory "arising under" jurisdiction under 28 U.S.C. § 1331. The Supreme Court has held that the jurisdictional basis for Section 1331 jurisdiction must appear on the face of the plaintiff's well-pleaded complaint, thus excluding from that statute's jurisdictional grant federal counterclaims and defenses.[25] The primary motivation for the rule is that whether the plaintiff's complaint raises a federal question is (usually) clear, simple, and readily ascertainable.[26]

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cision are criticized, on that account, as undemocratic—and, in the extreme, unconstitutional—because they leave too much to be decided by persons other than the people's representatives.").

[22] See Lee, supra note 10, at 1622 (tying jurisdiction to legitimacy).

[23] See Edward A. Purcell, Jr., Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958, at 244–48 (1992).

[24] See, e.g., Zechariah Chafee, Jr., Some Problems of Equity 310–16 (1950) (arguing that jurisdiction should be easily and readily ascertainable); Field, supra note 6, at 683 ("One reason for jurisdictional rules to be clear and simple is that litigating at length over the proper forum in which to litigate is a poor use of limited judicial resources, expensive to the parties and to the public."); 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.").

[25] Holmes Group v. Vornado Air Circulation Sys., 535 U.S. 826, 832 (2002) (extending the rule to federal counterclaims); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (applying the rule to federal defenses).

[26] See Jack H. Friedenthal et al., Civil Procedure 22 (2d ed. 1993) ("The well-pleaded complaint rule fulfills a useful and necessary function. Given the limited nature of federal subject matter jurisdiction, it is essential that the existence of jurisdiction be determined at the outset, rather than being contingent upon what *may* occur at later stages in the litigation."); Arthur R. Miller, Artful Pleading: A Doctrine in

This rhetoric is not unique to the well-pleaded complaint rule. The Supreme Court and individual Justices, from Brennan to Thomas, have urged jurisdictional clarity in a variety of other contexts using similar rhetoric.[27] One example from just this past Term is *Hertz Corp. v. Friend*, in which the Court considered what test to use to determine a corporation's principal place of business for citizenship purposes under the diversity-jurisdiction statute.[28] Determining principal place of business had proved difficult in some cases, and courts of appeals had crafted a number of different tests. Some followed the "nerve center" test, finding principal place of business where the corporation had its corporate headquarters.

Search of Definition, 76 Tex. L. Rev. 1781, 1783 (1998) (explaining that the well-pleaded complaint rule "prevents the disruption, to both the system and the litigants, of shifting a case between state and federal fora in the middle of an action as federal issues arise or fall out").

[27] See, e.g., Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 320–22 (2005) (Thomas, J., concurring) (urging a return to the simpler Holmes test for statutory "arising under" jurisdiction); Grupo Dataflux v. Atlas Global Group, 541 U.S. 567, 582 (2004) ("Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful."); *Holmes Group*, 535 U.S. at 829–32 (extending the well-pleaded complaint rule to the exclusive patent jurisdiction of the Federal Circuit because a contrary rule "would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine, which serves as a 'quick rule of thumb' for resolving jurisdictional conflicts" (quoting Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 11 (1983))); Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, 621 (2002) (explaining, in adopting a bright-line waiver test for state sovereign immunity, that "jurisdictional rules should be clear"); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 549–56 (1995) (Thomas, J., concurring in judgment) (seeking a clear test for admiralty jurisdiction); Missouri v. Jenkins, 495 U.S. 33, 50 (1990) (expressing a concern for "the stability and clarity of jurisdictional rules"); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 350 n.27 (1985) (Brennan, J., dissenting) ("[J]urisdictional rules must be clear cut and cannot turn on indefinite notions of 'importance' or 'wide-ranging impact.' '[L]itigants ought to be able to apply a clear test to determine whether, as an exception to the general rule of appellate review, they must perfect an appeal directly to the Supreme Court.'" (quoting Heckler v. Edwards, 465 U.S. 870, 877 (1984))); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 510 & n.7 (1975) (Rehnquist, J., dissenting) (seeking clarity for the finality rule in appellate jurisdiction and asserting that "[c]larity is to be desired in any statute, but in matters of jurisdiction, it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case" (quoting United States v. Sisson, 399 U.S. 267, 307 (1970))).

[28] 130 S. Ct. 1181, 1190–95 (2010) (discussing 28 U.S.C. § 1332(c)(1), which deems a corporation to be a citizen of both its state of incorporation and the state "where it has its principal place of business").

Others followed the "business activity" test, finding principal place of business where the corporation had most of its operations. Others followed the "total activity" test, a hybrid of the two.[29]

The Supreme Court in *Hertz* basically adopted the "nerve center" test and held that "principal place of business" refers to the place where the corporation's high-level officers "direct, control, and coordinate the corporation's activities," which in most cases will likely be its "nerve center," or where its headquarters is located.[30] The Court adopted this test in large part because of its clear and simple application:

> [A]dministrative simplicity is a major virtue in a jurisdictional statute. Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it. So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.
>
> Simple jurisdictional rules also promote greater predictability [for both plaintiffs and defendants].[31]

Thus, the rhetoric urging clarity and simplicity in jurisdictional rules is alive and well in both academic and judicial circles. And, for the reasons noted above, the rhetoric is powerful and well-justified.

B. The Lack of Clarity in Existing Doctrine

It is perhaps surprising, then, that existing jurisdictional doctrine largely does not reflect the clarity and simplicity that the rhetoric

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[29] Id. at 1191.
[30] Id. at 1192.
[31] Id. at 1193 (citations omitted); see also id. at 1185–86 ("[W]e place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible.").

urges.[32] A classic example is the well-pleaded complaint rule's sister doctrine—the meaning of "arising under" in Section 1331. In 1916, Justice Oliver Wendell Holmes famously incorporated the value of clarity into a simple and characteristically pithy test by proclaiming that "[a] suit arises under the law that creates the cause of action."[33] Yet the Supreme Court promptly departed from that formulation just five years later, leaving Justice Holmes in dissent.[34] Instead, the Court adopted (some might say, returned to[35]) a more malleable standard[36] that, under modern doctrine, extends federal-question jurisdiction to state-law claims implicating an important and substantial federal interest.[37] As Justice Thomas has noted, such a standard for nonfederal claims "is anything but clear."[38]

Another useful example is the test for admiralty tort jurisdiction. The traditional test for such jurisdiction asked only whether the tort occurred on navigable waters.[39] Congress subsequently codified that rule in the Extension of Admiralty Jurisdiction Act.[40] The Court nevertheless interpreted this grant to require "that the wrong bear a significant relationship to traditional maritime activity."[41] This interpretation led to the following two-part test for admiralty jurisdiction: "whether the incident has 'a potentially disruptive impact on maritime commerce,'" and "whether 'the general

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[32] Cf. Laura E. Little, Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions, 46 UCLA L. Rev. 75, 114 (1998) (finding empirical evidence that federal-jurisdiction opinions have more obfuscatory linguistic devices than do substantive law opinions).

[33] Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916). Notably, though, some have criticized even Justice Holmes's formulation as unclear. See Field, supra note 6, at 687–88 (making this point based on "the great flexibility that exists in determining whether a federal cause of action exists").

[34] Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 199 (1921); id. at 214–15 (Holmes, J., dissenting) (adhering to his *American Well Works* formulation).

[35] See Ann Woolhandler & Michael G. Collins, Federal Question Jurisdiction and Justice Holmes, 84 Notre Dame L. Rev. 2151, 2153 (2009) (claiming that *Smith*-type claims were the norm before the early 1900s).

[36] *Smith*, 255 U.S. at 199 (allowing federal jurisdiction over a state claim dependent on the construction of federal law).

[37] See Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 313–14 (2005).

[38] Id. at 321 (Thomas, J., concurring).

[39] See, e.g., Thomas v. Lane, 23 F. Cas. 957, 960 (Story, Circuit Justice, C.C.D. Me. 1813) (No. 13,902).

[40] 46 U.S.C. § 30101 (2006).

[41] Executive Jet Aviation v. City of Cleveland, 409 U.S. 249, 268 (1972).

character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"[42] As Justice Thomas again has noted, such a standard is "[v]ague and obscure," resulting in "wasteful litigation."[43] He would return to the "simple, clear" locality test.[44]

Other examples abound. The finality rule for appellate jurisdiction,[45] abstention doctrines,[46] discretionary decline of supplemental jurisdiction,[47] and standing[48] all are jurisdictional doctrines notable for their lack of clarity and simplicity. True, a few jurisdictional rules could be characterized as clear or at least moving in that direction.[49] In the main, though, jurisdictional doctrine is riddled with

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[42] Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995) (quoting Sisson v. Ruby, 497 U.S. 358, 364–65 (1990)). In *Executive Jet Aviation* and *Grubart*, the Court was interpreting the original language of the Extension of Admiralty Jurisdiction Act; the language has since changed stylistically. Compare Pub. L. No. 695, 62 Stat. 496, 496 (1948) (extending admiralty jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land"), with 46 U.S.C. § 30101 (2006) (stating that admiralty jurisdiction "includes cases of injury or damage, to a person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land").

[43] *Grubart*, 513 U.S. at 549, 556 (Thomas, J., concurring in judgment).

[44] Id. at 550 (Thomas, J., concurring in judgment).

[45] See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 485–86 (1975) (articulating standards-based exceptions to the finality rule); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949) (articulating standards-based interpretations of "final"). For an indictment of the opacity of the current appellate-jurisdiction doctrine, see Adam N. Steinman, Reinventing Appellate Jurisdiction, 48 B.C. L. Rev. 1237, 1237–39 (2007).

[46] See Field, supra note 6, at 696–98, 720 (arguing that the abstention doctrines are unclear).

[47] 28 U.S.C. § 1367(c) (2006) (listing four factors courts should consider when determining whether to retain or decline supplemental jurisdiction).

[48] See William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221, 290 (1988) (stating that the requirements of standing are difficult to apply and "cannot be made easy"); cf. Field, supra note 6, at 709–10 ("[T]he criteria for justiciability are sufficiently elastic that it is ultimately unpredictable [in certain cases involving constitutional challenges to state criminal statutes].").

[49] The well-pleaded complaint rule above is a good example. See supra text accompanying notes 25–26. Others have suggested that diversity jurisdiction is largely defined and clear. See Field, supra note 6, at 694 ("[D]iversity jurisdiction generally is unlike federal question jurisdiction in that many of its basic issues are clear and easy to apply."); Jonathan R. Nash, Instrument Choice in Federal Court Jurisdiction: Rules, Standards, and Discretion 13 (Emory Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-92, 2009), available at http://ssrn.com/abstract=1553584 (arguing that, with a few exceptions, "it is very safe

uncertainty and complexity.[50] Indeed, virtually every jurisdictional doctrine contains opacity that the Court continues to defend, despite its simultaneous rhetoric to the contrary.

This gap between rhetoric and reality has a number of possible explanations. Stare decisis,[51] a silent penchant for flexibility and discretion,[52] a muted dissatisfaction with jurisdictional rules in certain areas,[53] a genuine belief that Congress intended such uncertainty,[54] and more creative explanations[55] are all possibilities. My aim is not to disprove these but rather to suggest an additional possibility: that jurisdictional clarity can be self-defeating. Despite the oversimplified rhetoric urging clarity and simplicity in jurisdictional rules, the concept itself is inherently complex, uncertain, and difficult. As a result, attaining jurisdictional clarity is practically impossible, and it is no small wonder that attempts to do so have fallen short or been abandoned.

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to say that rules dominate the boundaries of federal diversity jurisdiction under section 1332").

[50] See Field, supra note 6, at 684 ("[T]he more one studies federal jurisdiction, the more forcefully one must conclude that much uncertainty surrounds the decision of many federal jurisdictional issues.").

[51] Stare decisis may help explain *Grable* and *Grubart*, or at least why certain Justices joined in those decisions. See Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 317 (2005); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 554 (1995) (Thomas, J., concurring in judgment).

[52] See Field, supra note 6, at 724 ("[T]he flexibility the jurisdictional rules provide in their undeveloped state can prove useful to judges, allowing them to dispose of difficult cases without having directly to discuss the moral, social, or political value judgments behind those dispositions.").

[53] See Richard D. Freer, Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction, 82 Ind. L.J. 309, 342 (2007) ("Though many still clamor for application of the Holmes test for centrality, that test just does not work. . . . [It] fail[s] . . . to ensure a federal trial forum, with federal expertise, for the sensitive interpretation of federal law, free from state-court biases.").

[54] Longstanding congressional silence in the face of a consistent judicial interpretation of a statute can imply a congressional intent that the statutory language continue to be interpreted that way. See Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 593–94 (2004). In addition, some statutes seem themselves to be invitations for jurisdictional uncertainty. See, e.g., 28 U.S.C. § 1367(c)(4) (2006) (allowing courts to decline to exercise supplemental jurisdiction if, in "exceptional circumstances," there are "compelling reasons").

[55] See Frederic M. Bloom, Jurisdiction's Noble Lie, 61 Stan. L. Rev. 971, 995–96 (2009) (arguing that jurisdictional rhetoric can be intentionally misleading, but for salutary purposes); Little, supra note 32, at 129–39 (suggesting several explanations for the high level of obfuscatory language in federal jurisdiction opinions).

II. DISSOCIATING CLARITY

Explaining why clarity can be so complex and unclear begins with explaining why the existing discourse does not capture the concept. Two major conversations are relevant to jurisdictional clarity: rules versus standards and mandate versus discretion. These are useful to the issues of jurisdictional clarity, but jurisdictional clarity is both broader and more complex. Clarity, in other words, is its own conversation.

A. Rules and Standards

The debate between rules and standards has a rich pedigree.[56] Although commentators have struggled to define and separate rules and standards with precision,[57] at a basic level, there are large areas of agreement. A rule is a norm that is enforced according to its terms rather than the policies animating it.[58] A standard, by con-

[56] For a very small sampling of the rich literature exploring rules and standards generally, see Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991); Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557 (1992); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976); Scalia, supra note 21; Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379 (1985); Seana Valentine Shiffrin, Inducing Moral Deliberation: On the Occasional Virtues of Fog, 123 Harv. L. Rev. 1214 (2010); Kathleen M. Sullivan, The Justices of Rules and Standards, 106 Harv. L. Rev. 22 (1992); Cass R. Sunstein, Problems with Rules, 83 Cal. L. Rev. 953 (1995). For recent attempts to adapt that debate to jurisdictional doctrine, see Freer, supra note 53; Preis, supra note 5, at 167–92; Nash, supra note 49.

[57] See Margaret Jane Radin, Presumptive Positivism and Trivial Cases, 14 Harv. J.L. & Pub. Pol'y 823, 828–32 (1991) (stating that rules and standards themselves lack precise definition or categorization); Jeffrey R. Lax, Political Constraints on Legal Doctrine: How Hierarchy Shapes the Law 10–11 (June 9, 2009) (unpublished manuscript, available at www.columbia.edu/~jrl2124/Rules%20vs%20Standards.pdf) (asserting that academic attempts to distinguish between rules and standards are inherently difficult). Often, the terms are conceptualized not as binary but rather as nodes on a continuum, existing with other nodes as well. See, e.g., Sunstein, supra note 56, at 963–64 (including "factors"); Legal Theory Lexicon 026: Rules, Standards, and Principles, http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_3.html (Mar. 7, 2004) (including "principles").

[58] Larry Alexander, Incomplete Theorizing: A Review Essay of Cass R. Sunstein's *Legal Reasoning and Political Conflict*, 72 Notre Dame L. Rev. 531, 541 (1997). In this Part, I use the term "rule" in the narrow sense of the term as it is used in the rules versus standards conversation. Elsewhere, though, I use it in the generic sense that legal "rules" generally encompass all kinds of norm codification, including tests based upon standards.

trast, is the attempt to enforce those policies more directly.[59] Thus, "Speed Limit 65" is a rule; "drive at a safe speed" is a standard.[60]

Rules and standards have different effects. Rules restrict the discretion of the decisionmaker to determining if a predetermined set of facts exists.[61] By contrast, standards are more inclusive about the particular facts the decisionmaker can consider based on the individualized circumstances of the case.[62] To illustrate, "Speed Limit 65" specifies the facts to be considered, while "drive at a safe speed" is relatively open-ended and allows for considerable flexibility in application. As a normative matter, the more one trusts lower courts' ability to accurately assess and enforce jurisdictional policies, the more one should favor standards.[63] By contrast, those who favor rules tend to be pessimistic about judicial discretion.[64]

These differences lead to a fairly well-accepted set of pros and cons for rules and standards. Because rules set a predetermined condition that allows for little discretion, they generally provide better ex ante certainty, predictability, and fairness across cases, leading generally to fewer cases of primary actor failure.[65] They also often are easier for courts to apply.[66]

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[59] See Sullivan, supra note 56, at 58.

[60] See Alexander, supra note 58, at 541–42.

[61] Freer, supra note 53, at 311 ("A rule affords the decisionmaker no discretion, but cabins its inquiry to whether a given set of facts exists. A standard, in contrast, affords the decisionmaker greater discretion by prescribing a series of relevant factors to be weighed in view of a policy goal."); Sullivan, supra note 56, at 58 (explaining that a rule "binds a decisionmaker" to a particular outcome if certain delimited facts are established).

[62] See Sullivan, supra note 56, at 58–59 (asserting that a standard allows for consideration of all facts); Sunstein, supra note 56, at 965 (explaining that the application of a standard can only be done post hoc).

[63] See Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 398 (2005).

[64] Alexander, supra note 58, at 543. The normative positions are generally regarded as "formalist" (those who urge judges to decide cases based on rules) and "instrumentalist" (those who urge judges to decide cases based on standards). See, e.g., Larry Alexander, "With Me, It's All er Nuthin'": Formalism in Law and Morality, 66 U. Chi. L. Rev. 530, 531 (1999).

[65] See Russell B. Korobkin, Behavior Analysis and Legal Form: Rules vs. Standards Revisited, 79 Or. L. Rev. 23, 36–39 (2000). But see Shiffrin, supra note 56, at 1220–21 (suggesting that, at least in some contexts, standards can reduce primary actor failure by forcing primary actors to think more carefully about their conduct).

[66] See Schauer, supra note 56, at 229–30; Alexander, supra note 58, at 542–43; Kaplow, supra note 56, at 571, 581.

But standards have their advantages. Standards usually are more closely aligned with their underlying norms because standards incorporate those norms directly.[67] Rules, by contrast, suffer from both overinclusion and underinclusion because they capture the underlying policies inaccurately.[68] In addition, standards are easier and cheaper to develop ex ante.[69] Standards also are likely to be fairer as applied to any given case and are more adaptable to changing circumstances that might make a rule obsolete.[70] Standards generally are less susceptible to manipulation by litigants.[71] Finally, standards regulating primary conduct can induce salutary "moral deliberation" within primary actors.[72] At first blush, one might think that the debate between rules and standards fully captures the issues of jurisdictional clarity. Rules, after all, seem to be the paradigm of clarity and simplicity because of their better predictability and ease of application.

But that is not necessarily the case. Rules may be neither clear nor simple, and standards can be both. Recall that a rule mandates an outcome based on predetermined facts; a norm can fit that description while also being both uncertain and complex. Indeed, as Peter Schuck has demonstrated, rules can be extremely complex due to the cumulative effect of "density, technicality, differentiation, and indeterminacy."[73] This often occurs when the desire to maximize accuracy in rules leads to conditions and exceptions (even if those conditions and exceptions are themselves rules).[74]

Sticking with the driving example, a complex rule might be:

> Speed Limit 65, except (a) if you are driving a truck after sundown, Speed Limit 55; (b) if you are a police officer in pursuit of a suspect, Speed Limit 85, but you must have sirens and lights on; (c) drive five miles per hour slower for each inch per hour of

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[67] Sullivan, supra note 56, at 58–59.

[68] Id.; see also Sunstein, supra note 56, at 957, 992–93.

[69] Kaplow, supra note 56, at 591.

[70] See Sunstein, supra note 56, at 992–96.

[71] Id. at 995. The well-pleaded complaint rule, for example, can lead to artful pleading attempts by plaintiffs, a form of jurisdictional manipulation to avoid removal. Miller, supra note 26, at 1783.

[72] Shiffrin, supra note 56, at 1217.

[73] Peter H. Schuck, Legal Complexity: Some Causes, Consequences, and Cures, 42 Duke L.J. 1, 3 (1992).

[74] See Sunstein, supra note 56, at 962.

> rainfall; (d) drive five miles per hour slower for each inch of accumulated snow; (e) yield for all official emergency vehicles; (f) do not drive at all if your blood alcohol level is 0.08% or higher, and so on.

The tax code is an easy real-world example,[75] and diversity jurisdiction under the Class Action Fairness Act ("CAFA"), with its numerous requirements and exceptions, is a good jurisdictional example.[76] In short, if accuracy is a concern, then the more rule-like the rule, the more complex it will have to be.

Rules also can be unclear. To take the driving example from the preceding paragraph, it might be extremely difficult for a driver, enforcing officer, and criminal jury to determine what the inch-per-hour rainfall was at a particular time and place. A good jurisdictional illustration is the requirement for diversity jurisdiction that the amount in controversy exceed $75,000.[77] Courts have struggled to determine how non-monetary relief is valued in that threshold amount,[78] and it often cannot be predicted clearly whether a suit seeking primarily injunctive relief will satisfy this rule. Another jurisdictional example is the CAFA requirement that a district court decline jurisdiction if greater than two-thirds of the proposed class members are citizens of the state in which the action was originally filed,[79] a calculation that could be extremely difficult if the class members are numerous and largely unknown. In other words, as the facts prescribed by the rule become numerous or difficult to ascertain or apply, the rule becomes less clear.[80]

By contrast, the standard "drive at a safe speed" could be far clearer, particularly if all actors have similar baseline assumptions about what that standard means for the situation at hand and if the

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[75] Schuck, supra note 73, at 5–6.

[76] 28 U.S.C. § 1332(d) (2006). One court described CAFA as an "opaque, baroque maze of interlocking cross-references." Lowery v. Ala. Power Co., 483 F.3d 1184, 1198 (11th Cir. 2007), abrogated in part by Pretka v. Kolter City Plaza II, 608 F.3d 744, 747 (11th Cir. 2010).

[77] 28 U.S.C. § 1332(a) (2006).

[78] See Erwin Chemerinsky, Federal Jurisdiction § 5.3 (5th ed. 2007).

[79] See 28 U.S.C. § 1332(d)(4)(A)(i)(I) (2006).

[80] See Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257, 261 (1974) (arguing that clarity and determinacy can be gauged from the number and simplicity of the facts to which legal consequences attach).

facts necessary to prove those assumptions are readily ascertainable. We all know, for instance, that driving 100 miles per hour in slick conditions at night on a curvy road is not "safe." As Justice Scalia has admitted, even the famous "reasonableness" standard from torts can, at the margins, become an issue of law that is just as clear as any rule purports to be.[81] For the same reasons, at least one commentator has argued that the standard for statutory "arising under" jurisdiction as elaborated in *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*[82] is relatively clear and predictable to apply.[83]

Things are complicated further by the interpretive process, which tends to move both rules and standards to a middle ground. As Pierre Schlag has argued, rules tend to become less clear as courts generate exceptions, define terms with resort to underlying policies, and give case-specific explanations.[84] "[N]o law" in the First Amendment[85] does not actually mean "no law" but instead means a standard of policies that must be balanced.[86] Similarly, standards tend to become clearer as limits are established by specific application and as clearer summaries are substituted for complex or uncertain elements.[87] Negligence per se is a good example of the clarifying effect of the "reasonableness" standard in particular application. For jurisdictional illustrations, the appellate-

[81] Scalia, supra note 21, at 1181. For a classic statement of this principle, see Oliver Wendell Holmes, Jr., The Common Law 113 (Belknap Press of Harvard Univ. Press 2009) (1881) ("A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury.").

[82] 545 U.S. 308, 313–14 (2005).

[83] Freer, supra note 53, at 343 ("*Grable* does not countenance an indeterminate ad hoc jurisprudence. Rather, it seems likely that cases will fall into rather discernible categories. . . . Rather than throwing the centrality assessment into chaos, the *standard* set forth in *Grable* seems workable and appropriate.").

[84] Schlag, supra note 56, at 429.

[85] U.S. Const. amend. I.

[86] See Schenck v. United States, 249 U.S. 47, 52 (1919); see also Dennis v. United States, 341 U.S. 494, 521 (1951) (Frankfurter, J., concurring in judgment) ("[T]here are those who find in the Constitution a wholly unfettered right of expression. . . . The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest.").

[87] Schlag, supra note 56, at 429.

jurisdiction rules requiring a "final" judgment or decision[88] have been interpreted to have several uncertain exceptions and applications,[89] while the statutory "arising under" standard for federal-question jurisdiction has been interpreted to be covered by the clearer well-pleaded complaint rule.[90]

As I explain in Part III, things get far more complicated than even this in matters of federal jurisdiction. Suffice it to say for now that clarity is different than rulism. Rules do generally tend to be clearer and simpler than standards, but that is not always the case. As a result, although the rules versus standards debate is informative, jurisdictional clarity must be unpacked on its own terms.

B. Mandates and Discretion

Before getting to that, though, there is another debate that must be discussed: mandates versus discretion. It is important not only because it touches upon issues of clarity but also because it has moved full-tilt to the area of federal subject-matter jurisdiction.

The mandate versus discretion dichotomy has two different applications. The first is in the facts. How much discretion does a judge have to consider and weigh available facts? This application merges with the rules versus standards dichotomy discussed above,[91] and, as I demonstrated there, jurisdictional clarity is distinct from it.

The second application is in the law, where the debate has distinguished itself from the rules versus standards debate and has moved prominently into the arena of federal jurisdiction. The questions are these: Does or should a federal court have discretion (and, if so, how much) to determine the boundaries of its jurisdiction, and whether to decline to exercise it? Some cases are easier than others. For example, Congress expressly gave federal courts

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[88] 28 U.S.C. § 1291 (2006).

[89] See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 485–86 (1975) (listing exceptions); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949) (characterizing certain interlocutory orders as "final"); see also David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543, 565–66 (1985) ("The word 'final' has an authoritative and crisp ring to it, but questions arise in its application. . . . [E]ven words that appear sharp turn out, on close examination, to be fuzzy around the edges.").

[90] For a detailed discussion of the history of the Court's interpretation of the statutory language, see Freer, supra note 53, at 311–17.

[91] See supra text accompanying notes 61–64.

discretion to decline to exercise supplemental jurisdiction if compelling reasons exist.[92] Similarly, Congress expressly gave federal courts discretion to decline to exercise CAFA diversity jurisdiction over certain class actions in the interest of justice and under the totality of the circumstances.[93] But there is a vigorous and ongoing debate about the propriety of judicial discretion in matters of federal jurisdiction when Congress has not been so explicit.

That debate prominently features the respective work of Martin Redish and David Shapiro.[94] Redish, on the one hand, has argued that judicially created abstention doctrines and judicially created exceptions to congressional grants of jurisdiction constitute illegitimate judicial lawmaking and make for bad policy.[95] Shapiro, on

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[92] 28 U.S.C. § 1367(c) (2006).

[93] Id. § 1332(d)(3) (2006).

[94] By highlighting Redish and Shapiro, I do not mean to suggest that this is an exclusive dialogue; other prominent voices have made important contributions to the conversation. See, e.g., Laura S. Fitzgerald, Is Jurisdiction Jurisdictional?, 95 Nw. U. L. Rev. 1207, 1256–74 (2001) (exploring the historical legitimacy of judicial discretion to shape jurisdiction); Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 Nw. U. L. Rev. 1, 48–49 (1990) (arguing that the boundaries of federal jurisdiction and the authority to define it evolve through a dialogue between Congress and the courts); Meltzer, supra note 19, at 1892–95 (generally agreeing with Shapiro but charting a more middle-of-the-road approach); Gene R. Shreve, Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law, 1991 BYU L. Rev. 767, 788–89 (arguing that courts can help shape jurisdictional contours for judicial administration reasons); Nash, supra note 49, at 46 (arguing that jurisdictional grants should be rule-based and unsusceptible to discretion and that abstention doctrines should be discretionary based on standards). I hasten to add that the debate widens as the constitutional limits on congressional control of jurisdiction are considered. For a sampling of that related discussion, compare, for example, Martin H. Redish, Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager, 77 Nw. U. L. Rev. 143, 145 (1982) (arguing that Congress has extremely broad power to control the jurisdiction of the federal courts), and William W. Van Alstyne, A Critical Guide to Ex Parte McCardle, 15 Ariz. L. Rev. 229, 260 (1973) (same), with, for example, Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 243 (1985) (arguing that federal courts have some jurisdiction that cannot be removed by Congress), and Tara Leigh Grove, The Structural Safeguards of Federal Jurisdiction, 124 Harv. L. Rev. (forthcoming 2011) (arguing that bicameralism and presentment requirements limit Congress's power).

[95] See, e.g., Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71, 105–14 (1984) (arguing for little to no judicial authority over jurisdictional doctrine). To be clear, Redish's work challenges federal-court discretion to decline jurisdiction despite a lack of congressional authorization to do so. He does not challenge (at least not on institutional lawlessness grounds) federal-court discretion to decline jurisdiction when authorized by Congress.

the other hand, has argued that federal courts should exercise discretion both to define jurisdictional boundaries and to decline to exercise jurisdiction that is admittedly conferred.[96] He argues that such judicial discretion is "desirable in giving room for flexibility, fine-tuning, recognition of difference, and accommodation of unforeseen developments,"[97] and that courts are better at drawing accurate jurisdictional lines than Congress.[98] He also suggests that judicial discretion is legitimate because the statutory language that Congress uses to draw jurisdictional boundaries is often (and is intended to be) discretion conferring.[99]

The mandate versus discretion debate is relevant to jurisdictional clarity because both implicate questions of judicial legitimacy, lawful authority, hierarchical order, institutional capacity, and inter-branch conversations. In addition, it seems to be true that broad judicial discretion tends to lead to complex and unclear doctrine.[100] But these implications are mainly orthogonal to jurisdictional clarity. The mandate versus discretion debate is directed primarily at the singular institutional question of which branch (Congress or the courts) is lawfully authorized or normatively superior for drawing jurisdictional boundaries. That question is quite different from—though not entirely unrelated to—the question whether those boundaries are clear and simple.

That difference is emphasized by the fact that a discretionary doctrine may be clear,[101] while a mandate may not. The congressional authorization for courts to exercise discretion to retain or decline supplemental jurisdiction, for example, is guided by some relatively clear factors, including when the state claim substantially predominates over the original-jurisdiction claims and when the

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[96] Shapiro, supra note 89, at 574–79; see also David L. Shapiro, Reflections on the Allocation of Jurisdiction Between State and Federal Courts: A Response to "Reassessing the Allocation of Judicial Business Between State and Federal Courts," 78 Va. L. Rev. 1839, 1844–46 (1992) (amplifying the argument).

[97] Shapiro, supra note 96, at 1841.

[98] Shapiro, supra note 89, at 574.

[99] David L. Shapiro, Foreword: A Cave Drawing for the Ages, 112 Harv. L. Rev. 1834, 1843 (1999).

[100] Meltzer, supra note 19, at 1904; Schuck, supra note 73, at 10–11.

[101] Indeed, those who argue in favor of discretion and standards tend to argue that the vaguest and most complicated balancing test will tend to become clear over time by the simple process of precedent-building. See Shapiro, supra note 89, at 546–47, 589; see also Kaplow, supra note 56, at 577–79 (acknowledging the argument).

district court has dismissed all of the original-jurisdiction claims.[102] By contrast, Article III standing is a mandatory jurisdictional prerequisite, but its requirements are uncertain in application and unpredictable in result.[103] Similarly, the *Burford v. Sun Oil Co.* and *Younger v. Harris* abstention doctrines are mandatory,[104] but they have been maligned as unclear and uncertain.[105] In short, whether a jurisdictional norm is mandatory or discretionary is separate from whether it is clear and simple.

III. COMPLEXITIES OF CLARITY

Because neither the rules versus standards nor the mandate versus discretion discourse captures it, jurisdictional clarity needs its own conversation. To date, however, such a separate discourse has consisted entirely of the thoughtless mantra that jurisdictional rules should be clear and simple. As a result, jurisdictional clarity is severely underexplored.

This Part takes up that challenge by tackling several complicating facets of jurisdictional clarity: design difficulties, obscurities of interpretation and application, and the multi-functionality of clarity. Each of these, I argue, adds layers of uncertainty and intricacy to the otherwise naïve ideal that jurisdictional rules can be clear and simple.

A. Design Difficulties

Cass Sunstein has stated, "The first problem with rules is that it can be very hard to design good ones."[106] The same is true for designing clear jurisdictional doctrine. There are at least four reasons. First, competing policies underlying jurisdiction make clear contours problematic. Second, suboptimal institutional capacities

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[102] See 28 U.S.C. § 1367(c) (2006).

[103] See Field, supra note 6, at 709–10; Fletcher, supra note 48, at 221 & n.4 (arguing that standing doctrine is incoherent because the requirements are difficult to apply).

[104] See New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (stating that federal courts "must" abstain under the circumstances identified in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and its progeny); Younger v. Harris, 401 U.S. 37, 41 (1971).

[105] Field, supra note 6, at 696 n.60, 720. But see Meltzer, supra note 19, at 1902–03 (expressing more sympathy for *Younger*).

[106] Sunstein, supra note 56, at 992.

hamper the promulgation of clear jurisdictional rules. Third, disparate perceptions of target actors—those observing the effects of the jurisdictional rules—create tensions that are difficult to resolve. Fourth, even when clear jurisdictional rules are possible, the choice between viable options can be uncertain and difficult. Each design difficulty clouds the ideal of a clear and simple jurisdictional doctrine.

1. Competing Jurisdictional Policies

An inescapable feature of jurisdictional clarity is the complex character of subject-matter jurisdiction. Subject-matter jurisdiction comes in many shapes and sizes, including standing, various types of original jurisdiction, and appellate jurisdiction. Within the various types of original jurisdiction are federal "arising under" jurisdiction, diversity jurisdiction, removal jurisdiction, supplemental jurisdiction, admiralty jurisdiction, bankruptcy jurisdiction, and individual jurisdiction-conferring statutes. There are constitutional and statutory grants. There are constitutional, statutory, and common law limits, such as immunity, abstention, deadlines, and preconditions.

These myriad forms of jurisdiction are tied to the differing—and sometimes conflicting—goals that jurisdiction promotes. Jurisdictional lines usually are based upon the need for the protection of federal rights and interests, comity and federalism, judicial resources and docket control, and uniformity.[107] Thus, for example, diversity jurisdiction is largely viewed as necessary to provide a neutral federal forum to adjudicate interstate conflicts.[108] Federal-

[107] See Friedman, supra note 12, at 550–54.

[108] See Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809); cf. Henry J. Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483, 496–97 (1928) (arguing that a principal basis was to "protect creditors against legislation favorable to debtors"); Robert L. Jones, Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction, 82 N.Y.U. L. Rev. 997, 1049–52 (2007) (recounting the belief of some Framers that diversity jurisdiction would check the "unrestrained majoritarianism" of state juries). Modern justifications include preventing bias against out-of-state litigants, the desire to have federal courts contribute to the development of state law, the desire to alleviate overburdening state court dockets, and the availability of a forum that is perceived to be of a higher quality for the dispensation of justice. Redish, supra note 24, at 1800. But see Thomas D. Rowe, Jr., Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for

question jurisdiction is needed to commit important federal rights and interests to the experience and solicitude of the federal courts.[109] Standing and supplemental jurisdiction promote litigation efficiency. At the same time, limitations and discretionary declinations of jurisdiction often protect state interests and scarce federal judicial resources. Jurisdiction also helps demarcate boundaries of institutional authority among law-speaking organs: Original, appellate, and removal jurisdiction separate federal-court authority from state-court authority; federal appellate jurisdiction separates trial-court authority from appellate-court authority; and justiciability and statutory limits separate judicial authority from political or agency authority.[110]

These divergent policies and goals are difficult to unite under one overarching, clear jurisdictional rule because they are often in tension with each other. As an easy example, the tension between separation-of-powers and federalism values often plays out in jurisdictional doctrine. A clear jurisdictional grant might make it easier for a court to adhere to the will of Congress and thus promote separation-of-powers values.[111] But it might also tread on the prerogative of states if the congressional grant is overbroad. The courts have long exercised authority to decline jurisdiction in those contexts out of concern for federalism.[112] But this practice then runs up against the criticism that such declination is unlawful, violates separation of powers, and creates too much discretion.[113]

Things get much more complicated when the other jurisdictional values get added into the mix. Consider federal "arising under" ju-

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Further Reforms, 92 Harv. L. Rev. 963, 969–84 (1979) (pointing out significant benefits from abolishing general state-citizen diversity jurisdiction).

[109] See, e.g., Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005).

[110] Lees, supra note 8, at 1478–86.

[111] See Kontrick v. Ryan, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction."); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 549 (1995) (Thomas, J., concurring in judgment) ("Vague and obscure rules may permit judicial power to reach beyond its constitutional and statutory limits . . . .").

[112] See Shapiro, supra note 89, at 547.

[113] See Field, supra note 6, at 718–19; Redish, supra note 24, at 1831. For a novel argument for the concurrent sharing of jurisdiction in such cases, see Barry Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211 (2004).

risdiction, for example. The Holmes test—that the case arises under the law that creates the cause of action—is a relatively clear jurisdictional test that captures the basic policy of ensuring that federal district courts can hear federal claims out of concerns for accuracy and uniformity.[114] But some state causes of action nonetheless raise important federal issues that, for the same reasons, ought to be heard by federal courts.[115] These limitations of the Holmes test for original, district-court federal-question jurisdiction lead to a broader and relatively less clear rule for the Supreme Court's federal-question appellate jurisdiction.[116] And, to control its own docket, the Supreme Court has interpreted original, district-court federal-question jurisdiction to be broader than the Holmes test, creating more uncertainty at those edges.[117]

Conversely, because the Holmes test is overinclusive and intrudes upon the very federalism values that animate federal jurisdiction, abstention doctrines on the back end allow an escape hatch for certain cases. But, because they take the form of policy-laden exceptions to an imperfect rule, they are themselves generally unclear and complicated inquiries,[118] and, because the courts implement them without express authorization from Congress, they are often criticized as unlawful exercises of judicial lawmaking.

The point is that an attempt to design a relatively clear jurisdictional line in one area for one policy value often leads to such inaccuracies and disconnects with competing policies that correction quickly follows in the form of express exceptions or fact-specific application.

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[114] See *Grable*, 545 U.S. at 312 (asserting that most federal questions arise from federal causes of action).

[115] See Freer, supra note 53, at 342 (arguing that the Holmes test fails "to ensure a federal trial forum, with federal expertise, for the sensitive interpretation of federal law, free from state-court biases"); Lumen N. Mulligan, A Unified Theory of 28 U.S.C. § 1331 Jurisdiction, 61 Vand. L. Rev. 1667, 1677–82 (2008) (recasting § 1331 jurisdiction as dependent upon either a federal cause of action or a federal right).

[116] See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 479–83 (1975) (creating exceptions to the finality rule for appellate jurisdiction to broaden opportunities for federal issues to be heard in federal court).

[117] *Grable*, 545 U.S. at 312 ("The doctrine 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 . . . .").

[118] See, e.g., Field, supra note 6, at 720 (maligning *Younger* abstention for these reasons).

2. Institutional Incapacities

In addition to the problem of accommodating the competing jurisdictional policies, the identity of the institution making the rule has its own troubles for jurisdictional clarity. There are basically three types of institutional rulemakers: Congress, the courts, or both in collaboration. As it turns out, each type presents its own challenges for jurisdictional clarity.[119]

Congress has a difficult time crafting clear jurisdictional rules for two basic reasons: a lack of expertise in jurisdictional issues (at least as compared to the courts) and a lack of political motivation. Indeed, Congress has largely eschewed attempts to promulgate clear jurisdictional statutes, instead preferring more flexible language to allow courts to play a role.[120] There are pockets of clarity and specificity, of course,[121] but the proportion of major jurisdictional statutes that uses uncertain language and the limited role that Congress plays once courts have begun interpreting that language[122] suggest that Congress, though it has the time and resources to best attempt to create clear jurisdictional boundaries ex ante, is uncomfortable and perhaps unmotivated to do so.

Courts also have difficulty, for although they have the expertise, they lack the time, resources, and institutional structure to craft clear, ex ante boundaries.[123] The Rules Enabling Act does provide the Supreme Court, through its appointed committees, with that ability, but most rulemaking under the Rules Enabling Act cannot be jurisdictional because the Act delegates rulemaking authority only over matters relating to "practice and procedure."[124] In the

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[119] I do not take a normative position on which institution *should* draw jurisdictional lines, which has been debated at length elsewhere. See supra text accompanying notes 94–99. I explore those roles only from the perspective of their impact on jurisdictional clarity.

[120] See, e.g., 28 U.S.C. § 1331 (2006) (using the term "arising under"); id. § 1367(a) (using the term "so related").

[121] See, e.g., id. § 1332(a) (setting a dollar amount-in-controversy limit).

[122] For example, by leaving the language of § 1331 unchanged for over 100 years, Congress has acquiesced in virtually all of the interpretive gloss the Court has placed on it. See Friedman, supra note 94, at 24 (stating that although "Congress's intent has had little . . . to do with" judicial interpretation of § 1331, "Congress generally has let the Court have its way without interference").

[123] See Scalia, supra note 21, at 1182–83 (explaining these difficulties for courts).

[124] 28 U.S.C. § 2072(a) (2006); see also Fed. R. Civ. P. 1 (stating that the rules govern "procedure"); Fed. R. Civ. P. 82 (asserting that "[t]hese rules do not extend or limit

main, then, judicial line-drawing must be done ex post, in the context of a particular case, in the incremental common law fashion of building upon doctrine.[125] That can be a very poor way to develop jurisdictional doctrine clearly because it often takes a long time to develop clear and generally applicable tests. It also causes path dependence from stare decisis—it is hard for courts to correct themselves once a jurisdictional line has been drawn, resulting in doctrinal accommodations that are complicated, confusing, and unclear.[126] And courts usually offer reasons for their rules (while Congress does not),[127] inviting uncertainty in specific circumstances where a clear rule does not fit the articulated policies. Finally, courts have a weaker claim to constitutional authority in developing jurisdictional boundaries since the Constitution generally commits to Congress the power to control court jurisdiction.[128] As a result, courts may be wary of drawing clear jurisdictional lines for fear that such bold strokes will infringe upon Congress's authority.

Barry Friedman has argued that jurisdictional boundaries are created by both branches through a dialogic process.[129] Assuming Congress and the courts do not have fundamental disagreements

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the jurisdiction of the district courts"). There is an exception allowing rules to define what is "final" for purposes of appellate jurisdiction under § 1291. 28 U.S.C. § 2072(c) (2006). The Supreme Court has made clear that it prefers the formal rulemaking process to the development of rules in the context of a particular case. See Mohawk Indus. v. Carpenter, 130 S. Ct. 599, 609 (2009).

[125] See Redish, supra note 24, at 1769 (arguing that most modern jurisdictional doctrines have evolved incrementally rather than being promulgated in detail all at once).

[126] Stare decisis arguably has less force in matters of federal jurisdiction as opposed to matters involving primary actors. See id. at 1770 n.6 ("Stare decisis may be especially important when legal issues directly affect the planning of primary social or economic behavior."). But lax stare decisis in jurisdictional doctrine creates more uncertainty and instability because of the greater likelihood of an abrupt change of direction.

[127] There are exceptions. As Fred Schauer has noted, courts decide some cases without giving reasons, such as jury verdicts, trial-judge rulings on objections, and the denial of certiorari. Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. 633, 637 (1995). These are unlikely to come up often in the jurisdictional context. In addition, Congress occasionally codifies its reasons in bills. See, e.g., Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 2, 119 Stat. 4, 4–5 (2005) (codified in scattered sections of 28 U.S.C.).

[128] See U.S. Const. art III, § 1.

[129] Friedman, supra note 94, at 48–49.

about how to draw the jurisdictional lines,[130] such a process seems to have the best of both worlds: Congress's capacity for ex ante rules coupled with the judiciary's experience with jurisdiction. In practice, though, the dialogue often is quite limited and, as a result, does not appear to improve jurisdictional clarity. As discussed above, Congress usually promulgates jurisdictional statutes with open-ended terms and lets the courts interpret them as they see fit.[131] Such a process is less a dialogue than a delegation. Similarly, when the courts take the lead, Congress often responds merely by codifying existing doctrine rather than improving jurisdictional clarity.[132] As much could be said about the supplemental-jurisdiction statute, which few have argued is clearer or simpler than the pre-existing doctrine.[133] The use of clear statement rules in jurisdictional doctrine has generated some promising results, but that has its own complications, which I discuss in more detail below.[134] In sum, each institution's inadequacies make clear rulemaking complicated.

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[130] This assumption is not universally shared. See, e.g., id. at 27–28 (arguing that the courts have long tried to narrow diversity jurisdiction, while Congress has repeatedly chosen to retain it).

[131] See text accompanying supra notes 120–22. A rare counterexample is the recent back-and-forth between the Court and Congress over the scope of habeas corpus for executive detainees. See Boumediene v. Bush, 553 U.S. 723, 733–36 (2008).

[132] There are a few counter examples. The courts haphazardly defined corporate citizenship for diversity-jurisdiction purposes until Congress stepped in to define it more clearly. See 28 U.S.C. § 1332(c) (2006) (defining corporate citizenship); Field, supra note 6, at 694 (discussing the doctrinal development).

[133] See Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) (calling the statute "opaque"); Redish, supra note 24, at 1822 (arguing that the "so related" test "is plagued by a good deal of circularity and question-begging"); Thomas D. Rowe, Jr. et al., Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer, 40 Emory L.J. 943, 961 (1991) (defending the statute but conceding that "codifying a complex area like supplemental jurisdiction . . . is itself complex business" and that "[t]he statute is concededly not perfect"); Symposium, A Reappraisal of the Supplemental-Jurisdiction Statute: Title 28 U.S.C. § 1367, 74 Ind. L.J. 1 (1998) (exploring doctrinal and practical intricacies of the supplemental-jurisdiction statute). But see Nash, supra note 49, at 24–25 (arguing that supplemental jurisdiction is fairly clear).

[134] See infra text accompanying notes 164–80.

3. Disparate Perceptions of Target Actors

The design difficulty is further clouded by the rarely acknowledged question inherent in the mantra favoring "clear and simple" jurisdictional rules: "Clear and simple to whom?"

One might answer that question by asserting that jurisdictional clarity should be targeted to lawyers and judges. Federal jurisdiction, after all, is seen as "law for lawyers" because it concerns the intricate navigation of the federal-court system as opposed to the regulation of primary lay conduct.[135] This makes some sense: the cost savings and legitimacy enhancements produced by jurisdictional clarity primarily benefit litigants (through the exercised judgment of their lawyers) and judges.[136] But there is another important observer, and that is the lay public. Commentators usually marginalize the effect of jurisdictional clarity on the lay observer,[137] but I believe the effect creates three significant but overlooked divides that complicate the development of clear and simple jurisdictional doctrine.

The first is one of motivation. Although secondary legal actors do benefit from clear jurisdictional doctrine, they also may have powerful incentives to undermine that clarity. Lawyers, for example, might favor complicated doctrine to ensure a continued need for representation and might also favor uncertain doctrine to allow for maximum flexibility in argument for a preferred forum.[138] Judges may resist clarifying developments to allow for greater exercise of judicial power, to be able to write scholarly opinions, to clear dockets through nimble use of a flexible jurisdictional doc-

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[135] Little, supra note 32, at 76.

[136] See supra text accompanying notes 15–24.

[137] See, e.g., Little, supra note 32, at 78. There are some exceptions for jurisdictional doctrines, such as patent or admiralty jurisdiction, that have an impact on a specialized group of lay primary actors. See, e.g., Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 553 (1995) (Thomas, J., concurring) ("Such a test also introduces undesirable uncertainty into the affairs of private actors—even those involved in common maritime activities—who cannot predict whether or not their conduct may justify the exercise of admiralty jurisdiction."). In addition, jurisdictional statutes can be packaged in a way that is more appealing to laity, such as the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 4–14 (2005) (codified in scattered sections of 28 U.S.C.), which was pitched by some as tort reform. See, e.g., 151 Cong. Rec. S1234–35, 1241–42 (daily ed. Feb. 10, 2005) (statements of Sens. Sessions and Voinovich).

[138] See Schuck, supra note 73, at 26, 32.

trine, or to promote more subtle substantive agendas in disguise.[139] I do not mean to imply that these incentives will carry the day; I just mean to characterize as an oversimplification the idea that the legal community has a strong and uniform incentive to clarify jurisdictional doctrine. The lay public, by contrast, has a far less complicated incentive structure.

The second divide is in the degree of clarity needed. Lawyers and judges, because of their expertise and experience in law and jurisdiction, can understand doctrine at a level of complexity and uncertainty that lay persons cannot. A lay person may read the "so related" language of the supplemental-jurisdiction statute[140] and have no understanding at all of its meaning, while a seasoned lawyer can identify, with relative precision, what claims will meet that standard and what claims will not. In other words, what is clear to one observer may be unclear to another, and both observers are important in the context of doctrinal clarity.

The third divide is one in kind. For the lawyers and judges—and for legal academics and legislators, too—conceptual clarity is important to make sense of the doctrine and to tie it to broader themes and consistencies throughout the law. It is particularly important in jurisdictional contexts, which are designed to promote systemic non-litigant values. It makes sense to them to wrangle over the clarity of supplemental jurisdiction or abstention doctrines and whether the level of clarity in those doctrines is consistent with notions of judicial power or federalism values. But to the extent these individuals advocate for clear and simple jurisdictional doctrine for those reasons, they likely promote doctrinal clarity in the abstract.

But there is another form of doctrinal clarity, one that focuses on results visible to lay observers: the operational clarity of the doctrine. As Justice Scalia has noted, "When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*."[141] In other words, it is not enough

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[139] See id. at 26, 33–34 (discussing these incentives in the context of substantive law).

[140] 28 U.S.C. § 1367(a) (2006).

[141] Scalia, supra note 21, at 1178. On a related note, Justice Scalia has stated that it is "[m]uch better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to

that jurisdictional doctrine be clear; it also must clearly explain the differences in results to interested lay observers. Lay observers could not care less that the test for federal-question jurisdiction, in the abstract, might "resemble[] more the free-standing, subjective, and individualized determinations of Judge Wapner than a coherent, generalizable jurisdictional doctrine."[142] They care about consistent, fair, and sensible results (and perhaps even think that Judge Wapner does a fair job of achieving that!). To be sure, clear doctrine might lead to clear results much of the time. But that is not always the case, and the Court has had occasion to choose between an abstract doctrinal clarity that might make sense to lawyers and judges and an operational clarity in results that would make better sense to lay observers.

For example, in *Budinich v. Becton Dickinson & Co.*, the Court held that a merits determination began running the time to appeal even though a motion for attorney's fees was still pending, and even though the law authorizing attorney's fees treated them as part of the merits judgment.[143] The Court explained:

> This practical approach to the matter suggests that what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as "merits" or "nonmerits," but rather preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.[144]

Budinich thus favors predictability in results (what the Court termed "operational consistency and predictability") over doctrinal predictability (what the Court termed "conceptual consistency").[145]

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in explanation of the decision." Id.; see also Frank I. Michelman, Relative Constraint and Public Reason: What is "The Work We Expect of Law"?, 67 Brook. L. Rev. 963, 966 (2002) (arguing that decisionmakers should have several goals in mind: to resolve disputes, to establish predictable and stable legal doctrine, and to promote morally appropriate and justified outcomes).

[142] Redish, supra note 24, at 1794.

[143] 486 U.S. 196, 199–01 (1988).

[144] Id. at 202.

[145] See id.

Similarly, in *Walters v. National Ass'n of Radiation Survivors*, a lower court entered a preliminary injunction based only upon a "high likelihood of success" on the merits of the claim that a federal statute was unconstitutional.[146] The Supreme Court then considered whether that preliminary injunction was a "holding" of unconstitutionality within the meaning of Section 1252, which grants Supreme Court appellate jurisdiction over certain federal orders "holding an Act of Congress unconstitutional."[147] The Court answered in the affirmative and stated that "it should make little difference whether the court stated conclusively that a statute was unconstitutional, or merely said it was likely, so long as the injunction granted enjoined the statute's operation. This Court's appellate jurisdiction does not turn on such semantic niceties."[148] Thus, the *Walters* Court emphasized the clarity of the results of the application of the rule rather than the clarity of the legal rule's terms—in effect, results over doctrine.

These examples from appellate jurisdiction reflect the divide between doctrine and results even when the difference in results is merely a difference in the available forum. In other words, regardless of the consistency of the results of appellate-jurisdiction doctrine, there is still an available forum (that is, district court) for litigation of the merits. It seems likely that other areas of jurisdiction, such as the jurisdictionality of statutory preconditions, could reflect the same divide in a way that resonates even more strongly with the lay public because the difference in result may be the difference between an available forum and no forum at all.[149] The difference between a jurisdictional statute of limitations in the Tucker Act for claims against the federal government and a nonjurisdictional limitations period in Title VII perhaps can be explained doctrinally by a commitment to stare decisis,[150] but the lay person who sees a late Title VII claim heard on the merits but a late Tucker

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[146] 473 U.S. 305, 316 (1985).

[147] Id. at 316–18 (quoting and discussing 28 U.S.C. § 1252).

[148] Id. at 317.

[149] I thank Howard Wasserman for raising this point.

[150] Compare John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133–36 (2008) (typing the Tucker Act period as a "more absolute" and unwaivable bar), with Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982) (typing the Title VII period as a nonjurisdictional and waivable limit).

Act claim forever barred may find that rationale very difficult to swallow in light of the disconnect in the results.

The rub of all of this is that the promotion of jurisdictional doctrinal clarity has its own complications because the potential targets of that clarity have different motivations, perceptions, and interests. These differences can create tensions between observers. The difficulty of reconciling those tensions clouds attempts to develop clear and simple jurisdictional doctrine.

4. Choosing Between Clarities

One could ignore or treat cavalierly these formation complexities, but doing so does not make the formulation process easy, for the rulemaker must still choose a particular clear jurisdictional boundary. That choice implicates the difficult question of where to set the boundary, a question that entails consideration of all of the jurisdictional goals and policies. In a nutshell, jurisdictional clarity and simplicity do not avoid the need to address these complex considerations. Three examples illustrate why that is the case.

a. The Well-Pleaded Complaint Rule

The scope of the constitutional "arising under" grant[151] was established in 1824, when the Supreme Court in *Osborn v. Bank of the United States* held that any federal "ingredient" of the original cause gave rise to federal jurisdiction.[152] When the statutory grant was passed fifty-one years later in 1875 with language nearly identical to the constitutional grant,[153] it would have been perfectly reasonable for clarity purposes for the Supreme Court to have interpreted the scope of the statutory grant identically to the scope of the constitutional grant.[154] Instead, the Court imposed the well-pleaded complaint rule,[155] which the Court views as narrower than

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[151] U.S. Const. art. III, § 2.

[152] 22 U.S. (1 Wheat.) 738, 823 (1824).

[153] Act of Mar. 3, 1875, ch. 137 § 1, 18 Stat. 470, 470 (1875) (codified as amended at 28 U.S.C. § 1331 (2006)).

[154] The Court in fact did so initially. See Donald L. Doernberg, There's No Reason for It; It's Just our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction, 38 Hastings L.J. 597, 603–04 (1987) (detailing the history); Freer, supra note 53, at 313–17 (providing a similar discussion).

[155] Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 153 (1908).

the *Osborn* interpretation of the constitutional grant.[156] The well-pleaded complaint rule is, at best, a modest improvement in clarity; both tests demarcate the jurisdictional boundary in relatively clear fashion. The real import of the well-pleaded complaint rule is that it purports to shift that boundary to restrict federal-question jurisdiction.[157] The statutory choice thus is not between a clear jurisdictional boundary and an unclear one, but between two (or among more) relatively clear jurisdictional boundaries that differ in scope.

Making such a choice is not easy; it involves a difficult balancing of the need for federal jurisdiction over important questions of federal law, the need to control federal dockets, the accurate interpretation of the scope of federal judicial power, and the vindication of party preference. A recent illustration of this complex balancing is *Holmes Group v. Vornado Air Circulation Systems*, in which the Supreme Court considered whether to apply the well-pleaded complaint rule to the Federal Circuit's patent jurisdiction.[158] The Court did apply the well-pleaded complaint rule, in part because a contrary rule would broaden federal jurisdiction to the detriment of state-court competence and authority.[159] Justice Stevens concurred but noted the strong countervailing need for uniformity in federal patent law.[160] Others have noted additional relevant considerations, including a potential "pro-patent bias" in the Federal Cir-

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[156] See City of Chi. v. Coll. of Int'l Surgeons, 522 U.S. 156, 184 (1997) (stating that cases "within the meaning of § 1331 compose a collection smaller than the one fitting within the similarly worded Clause in Article III"). I note that there is some disagreement about the breadth of the *Osborn* rule, with some commentators taking an expansive view, see, e.g., John B. Oakley, Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?, 76 Tex. L. Rev. 1829, 1832–33 (1998), and others taking a narrower view, see, e.g., Anthony J. Bellia Jr., Article III and the Cause of Action, 89 Iowa L. Rev. 777, 807–09 (2004). I assume for the illustrative purposes in this Article that the well-pleaded complaint rule is, as the Court seems to view it, a narrower grant of jurisdiction than Article III's "arising under" grant.

[157] William Cohen, The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law, 115 U. Pa. L. Rev. 890, 891 (1967) (explaining that interpreting the statutory grant co-extensively with *Osborn* would have been impractical because "arising under" cases would have flooded the federal courts).

[158] 535 U.S. 826, 827 (2002).

[159] Id. at 832.

[160] Id. at 838 (Stevens, J., concurring).

cuit,[161] the need to respect the parties' choice of forum,[162] and the effect on federal dockets.[163] The point is not that the Supreme Court got it wrong in adopting the well-pleaded complaint rule in the patent context or even in *Mottley*; rather, the point is that the adoption of the relatively clear rule could not escape the complex and uncertain policy questions that underlie jurisdictional line-drawing.

b. Jurisdictional Characterization

It can be difficult to determine whether a particular statutory limitation on a claim—such as a limitations period, a suit prerequisite, or a statutory coverage condition—is jurisdictional or not.[164] To inject clarity into these jurisdictional characterization questions, the Court recently has implemented a clear statement rule and presumption. *Arbaugh v. Y & H Corp.* considered whether the employer-numerosity requirement of Title VII—the statutory coverage condition that an employer have at least fifteen employees—was a jurisdictional requirement or a forfeitable element of the claim.[165] The Court acknowledged that Congress could have made the employer-numerosity requirement jurisdictional, but it stated that it would presume that such a statutory coverage requirement was not jurisdictional unless Congress clearly demarcated it as such.[166] Similarly, in *Reed Elsevier, Inc. v. Muchnick*, one of the jurisdictional cases from last Term, the Court followed the *Arbaugh* presumption to hold that the registration requirement in Sec-

[161] Rochelle Cooper Dreyfuss, The Federal Circuit: A Case Study in Specialized Courts, 64 N.Y.U. L. Rev. 1, 25–30, 54 (1989).

[162] See Field, supra note 6, at 722 ("Simplification of much jurisdictional doctrine would result from generally espousing the position that, where Congress has given concurrent jurisdiction, the federal courts should respect the parties' choice of forum.").

[163] Justice Brennan has made this point in a different line-drawing case. See Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 349 (1985) (Brennan, J., dissenting) ("It is simply too burdensome for this Court to bear *mandatory* direct jurisdiction over every preliminary injunction, temporary restraining order, and other pretrial order in cases potentially implicating the constitutionality of federal statutes.").

[164] See Dodson, supra note 13, at 56.

[165] 546 U.S. 500, 503 (2006) (discussing 42 U.S.C. § 2000e(b)).

[166] Id. at 514–16.

tion 411(a) of the Copyright Act was a waivable precondition rather than a jurisdictional requirement.[167]

Clear statement rules and presumptions are useful doctrinal clarification devices. They help guide lower courts in their interpretation of jurisdictional characterization questions, give instructions to Congress on how to ensure that boundaries are properly typed jurisdictional, and make it clearer to litigants what is jurisdictional and what is not. And, as I explain in more detail later in this Article, they can facilitate the smooth coordination of different law-speaking institutions.[168] For these reasons, I elsewhere have supported the use of clear statement presumptions in characterizing the jurisdictionality of removal provisions.[169]

But we ought not to overvalue these clarity-facilitating features of clear statement rules and presumptions, for they raise their own uncertainties. What kind of a clear statement overcomes the presumption?[170] *Arbaugh* explained that a sufficient clear statement would "speak in jurisdictional terms or refer . . . to the jurisdiction of the district courts,"[171] but the test cannot be as simple as that, for the Court has held jurisdictional a limit that does not refer to jurisdiction,[172] has held nonjurisdictional a limit that does refer to jurisdiction,[173] and has waffled on a different limit referring to jurisdiction—calling it "more absolute" instead of "jurisdictional."[174] A similar problem arises in other jurisdictional clear statement rules, namely Supreme Court appellate jurisdiction.[175] That the Supreme Court decided four cases just this past Term involving jurisdictional

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[167] 130 S. Ct. 1237, 1241, 1244–45 (2010) (discussing 17 U.S.C. § 411(a)).

[168] See infra text accompanying notes 232–35.

[169] See Dodson, supra note 13, at 66–71.

[170] This is a common problem of clear statement rules. See generally William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593 (1992) (cataloguing variants of clear statement rules and the levels of clarity required for each).

[171] *Arbaugh*, 546 U.S. at 515 (quoting Zipes v. Trans World Airlines, 455 U.S. 385, 394 (1982)).

[172] See Bowles v. Russell, 551 U.S. 205, 209–11 (2007).

[173] See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998).

[174] See John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 135–36 (2008) (struggling to classify a statute of limitations that includes jurisdictional language).

[175] See, e.g., Florida v. Powell, 130 S. Ct. 1195, 1202 (2010) (confronting the question of how clear a state court decision has to be on whether it relies on an independent and adequate state ground to preclude Supreme Court appellate jurisdiction).

characterization inquiries suggests that its attempt to clarify jurisdictional characterization issues is succeeding only modestly at best.[176]

Further, the use of clear statement rules and presumptions masks the more complicated question of what direction they should take. In other words, should the presumption be against, or in favor of, jurisdiction? *Arbaugh* and *Michigan v. Long* imposed presumptions that broaden federal jurisdiction,[177] but they just as easily could (and perhaps should) have imposed a converse presumption against jurisdiction. Although there might be good reasons to choose one over the other, that choice necessarily entails a complex, ex ante consideration of underlying reasons and policy values.[178] *Arbaugh*, for one, did consider the efficiency and economy implications of typing statutory coverage limitations as jurisdictional,[179] but it also could (and perhaps should) have considered implications on federal docket loads, the legitimacy problems of overstepping jurisdictional boundaries if Congress actually intended the limitation to be jurisdictional, federalism effects, and the relative merits of jurisdiction-expanding decisions versus jurisdiction-restricting decisions.[180] In most cases, a full consideration of

[176] See Dolan v. United States, 130 S. Ct. 2533, 2537–39 (2010) (determining that the ninety-day time limit in 18 U.S.C. § 3664(d)(5) is not jurisdictional); United Student Aid Funds v. Espinosa, 130 S. Ct. 1367, 1377–78 (2010) (resolving whether various bankruptcy filing requirements are jurisdictional); Reed Elsevier v. Muchnick, 130 S. Ct. 1237, 1241 (2010) (resolving the jurisdictionality of 17 U.S.C. § 411(a)); Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 130 S. Ct. 584, 597 (2009) (holding that the National Railroad Adjustment Board's conferencing requirement is nonjurisdictional).

[177] See Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006) (presuming, absent a clear statement of jurisdictionality from Congress, that a statutory limitation did not restrict the jurisdiction of the federal courts); Michigan v. Long, 463 U.S. 1032, 1044 (1983) (presuming, absent a clear statement that the state court decision rests upon an independent and adequate state ground, that the state court decided the issue according to federal law, rendering the decision reviewable by the U.S. Supreme Court).

[178] For my own attempt to balance these difficult weightings in the removal context, see Dodson, supra note 13.

[179] *Arbaugh*, 546 U.S. at 513–14 (adopting the presumption "mindful of the consequences of typing the fifteen-employee threshold a determinant of subject-matter jurisdiction"). For more on the *Arbaugh* presumption, see Stephen R. Brown, Hearing Congress's Jurisdictional Speech: Giving Meaning to the "Clearly-States" Test in *Arbaugh v. Y & H Corp*., 46 Willamette L. Rev. 33 (2009).

[180] See Gil Seinfeld, The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction, 97 Cal. L. Rev. 95, 149–58 (2009) (identifying these

what direction a presumption should take will be complex and uncertain.

c. Immunity Waiver

Although it is questionable whether the state sovereign immunity exemplified by the Eleventh Amendment is a limitation on a federal court's subject-matter jurisdiction,[181] the immunity "partakes of the nature of a jurisdictional bar"[182] and thus is useful for illustration. One of the longstanding features of state sovereign immunity is that the state can waive it.[183] But what constitutes waiver? Because immunity is a question of state sovereignty that implicates sensitive federalism relations, the Supreme Court has been reluctant to find immunity waived absent a state's clear indication of intent to do so,[184] a sort of clear statement rule with a presumption in favor of immunity and against federal jurisdiction. Nevertheless, in *Lapides v. Board of Regents*, the Court held, under the well-worn aegis that "jurisdictional rules should be clear," that the state's voluntary removal of a case from state court to federal court manifested an implicit waiver of state sovereign immunity in federal court.[185]

The *Lapides* rule is relatively clear and simple (at least for removal[186]), but why the Court chose that particular rule as opposed to another is not. The Court instead could have clarified the presumption against waiver that it previously had articulated by, for example, making waiver effective only upon a clear statement in a

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factors and exploring the benefits of enlarged or contracted federal jurisdiction in general).

[181] See Scott Dodson, Mandatory Rules, 61 Stan. L. Rev. 1, 19–20 (2008) (arguing that it is not).

[182] Edelman v. Jordan, 415 U.S. 651, 678 (1974).

[183] See Clark v. Barnard, 108 U.S. 436, 447–48 (1883).

[184] College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675–81 (1999).

[185] 535 U.S. 613, 616, 621 (2002).

[186] Even in the context of removal, though, the *Lapides* rule can be uncertain. For example, does a state waive immunity if a non-state co-defendant removes the case in violation of the unanimity requirement for removal and the state fails to move to remand within the thirty-day deadline provided by the removal statute? See 28 U.S.C. § 1447(c) (2006) (imposing the thirty-day deadline for remand motions); Chi., Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 247–48 (1900) (imposing the unanimity requirement).

written court filing made by the state. Immunity waiver is, after all, a matter of federal common law,[187] and so the Court had a variety of options in crafting a clear waiver rule. Why it chose the rule that it did depended upon a number of complicating factors, including consistency, fairness, and deference to state sovereignty.[188]

d. Summary

These examples show that even when clear jurisdictional boundaries can be created, the choice to adopt one over another is not at all simple or clear. That choice, institutional inadequacies, and competing jurisdictional policies present substantial obstacles to the promulgation of clear jurisdictional rules.

B. The Effect of Implementation

The intricacies of clarity do not end with successful promulgation. The interpretation and application processes present their own challenges, each with its own effects on jurisdictional clarity. Interpretative gloss may make an otherwise clear and simple rule anything but. And, even if the rule and its interpretative gloss are clear, the application could be complicated or uncertain. Obscurity in these components of implementation can contaminate the whole doctrine.

1. Complications of Interpretation

Clear jurisdictional rules rarely do perfectly what is asked of them because the interpretive process creates obscurity. This obscurity can happen when a court interprets a rule by using more uncertain terminology, applies the rule in an odd factual setting, or creates exceptions to the rule.[189]

The finality rules of appellate jurisdiction illustrate these problems of interpretation. Two statutes are in play here: Section 1257, which limits Supreme Court jurisdiction over state decisions to cases in which the highest state court rendered a final judgment or

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[187] *Lapides*, 535 U.S. at 622–23.

[188] Id. at 622.

[189] See H.L.A. Hart, The Concept of Law 128 (2d ed. 1994); Schauer, supra note 56, at 196–206; Sunstein, supra note 56, at 986–89.

decree,[190] and Section 1291, which limits the appellate jurisdiction of courts of appeals to "final decisions" of district courts.[191] Both require a "final" decision, and the Supreme Court has admitted that that requirement is clear enough: no appellate jurisdiction when anything in the case still remains to be decided.[192] But that is not how the interpretation of "final" has gone for either statute.

Instead, the Court has recognized a number of exceptions to the finality requirement of Section 1257.[193] If exceptions in and of themselves were not confusing enough, the Court has crafted extremely complicated and difficult doctrinal tests for them. Thus, the Court's finality exceptions include (1) cases in which "the federal issue is conclusive or the outcome of further proceedings preordained," (2) cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings," (3) cases in which "the federal claim has been finally decided, . . . but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," and (4) cases in which "the federal issue has been finally decided . . . and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant [claim]."[194]

Finality under Section 1291 fares no better. The Court has given that finality requirement a "practical rather than a technical construction," leading to the characterization of some patently nonfinal judgments as final under the collateral-order doctrine.[195] Further, the test for the appealability of nonfinal collateral orders is a flabby one: whether the order is "collateral to" the merits of a nonfinal action, "too important" to be denied immediate review, and "too independent" of the underlying claims to require deferral of appellate review.[196] To make matters even worse, the Court has re-

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[190] 28 U.S.C. § 1257(a) (2006).

[191] Id. § 1291.

[192] Radio Station WOW v. Johnson, 326 U.S. 120, 124 (1945) (stating that "[c]onsiderations of English usage as well as those of judicial policy" suggest that the certiorari statute precludes review "where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue").

[193] Id. at 124.

[194] Cox Broad. Corp. v. Cohn, 420 U.S. 469, 479–83 (1975).

[195] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

[196] Id.

fused to ameliorate the uncertainty by, for example, revising its interpretative gloss or at least cabining the existing precedent. To the contrary, the Court has left open the possibility that other nonfinal decisions might be deemed to be final.[197]

Congress has acquiesced in the Court's interpretation of "final"[198] and, instead of restoring clarity through statute, has delegated the responsibility for determining what is "final" under Section 1291 to the Court's rulemaking powers.[199] Thus, in addition to illustrating the complexities of interpretation, the finality rule also highlights the difficulty of cooperative clear rule creation that I discussed above in the context of institutional capacities. In short, the interpretation of jurisdictional rules often reduces their level of clarity and simplicity,[200] and sometimes even with the acquiescence of the institution that designed them in the first place.

2. Complications of Application

Even if a relatively clear and simple jurisdictional rule comes through the interpretive process unscathed, the application of that rule can be difficult and uncertain, particularly if the facts are not easily discovered or understandable. Application difficulties arise often in jurisdictional rules because such rules are supposed to be applied early in the litigation, usually before any discovery has

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[197] See Mohawk Indus. v. Carpenter, 130 S. Ct. 599, 609 (2009) (declining to extend the collateral-order doctrine in the case at bar but expressing willingness to do so in the context of a formal rule promulgated under the Rules Enabling Act).

[198] Congress has left the relevant language unchanged since 1789, despite the interpretations that the Court has imposed. Compare An Act to Establish the Judicial Courts of the United States, ch. 20, § 22, 1 Stat. 73, 84 (1789) ("[F]inal decrees and judgments in civil actions in a district court . . . may be reexamined, and reversed or affirmed in a circuit court . . . ."), with 28 U.S.C. § 1291 (2006) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .").

[199] 28 U.S.C. § 2072(c) (2006).

[200] Cf. Sunstein, supra note 56, at 961 (stating that interpretation of rules necessarily involves discretion). There are some counterexamples. The statutory language deeming a corporation to be a citizen, for diversity jurisdiction purposes, of the state of its "principal place of business" was recently interpreted to mean, in most cases, the state where the corporation's headquarters is located. Hertz Corp. v. Friend, 130 S. Ct. 1181, 1185–86 (2010). That interpretation clarifies an ambiguous term in the statute that had produced some uncertainty in the lower courts.

changed hands and while facts are still largely unknown.[201] To compound this difficulty, the legal tests for jurisdiction have become more complex, fact-dependent, and fact-intensive.[202]

As an example, take the amount-in-controversy requirement for diversity jurisdiction. The diversity statute sets a threshold limit: no diversity jurisdiction unless the amount in controversy "exceeds . . . $75,000, exclusive of interest and costs . . . ."[203] The rule is fairly clear, and the interpretation of that rule is also fairly clear. An amount in controversy that is exactly—but not over—$75,000 will be denied diversity jurisdiction.[204] The Supreme Court has construed the amount to include non-monetary relief, and that directive is also clear.[205] But how does one calculate the value of non-monetary relief when the threshold is measured in dollars and cents? There is an open interpretive question of what legal standard should govern the valuation of injunctive relief,[206] but my focus is on the deeper application difficulties. Those application difficulties are simplified somewhat by the superimposed legal rule that the plaintiff's good-faith claim controls unless it cannot exceed the threshold to a legal certainty.[207] But the question still calls for a factual assessment that is both unpredictable and complicated, particularly when the jurisdictional amount is based on injunctive re-

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[201] For an excellent discussion of some of the issues surrounding the factual proof of jurisdiction, see Kevin M. Clermont, Jurisdictional Fact, 91 Cornell L. Rev. 973, 984–99 (2006).

[202] S.I. Strong, Jurisdictional Discovery in United States Federal Courts, 67 Wash. & Lee L. Rev. 489, 505 (2010).

[203] 28 U.S.C. § 1332(a) (2006).

[204] See State Farm Mut. Auto. Ins. Co. v. Narvaez, 149 F.3d 1269, 1272 (10th Cir. 1998) (dismissing a claim for exactly the jurisdictional amount). But see De Aguilar v. Boeing Co., 47 F.3d 1404, 1408–12 (5th Cir. 1995) (allowing federal diversity jurisdiction when the plaintiff alleged less than the threshold amount if (1) the defendant shows that the actual contested amount exceeds the jurisdictional limit and (2) the plaintiff is unable to show that "it is certain that he will not be able to recover more" than alleged).

[205] See Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347–48 (1977); Healy v. Ratta, 292 U.S. 263, 270–71 (1934).

[206] See Richard D. Freer, Civil Procedure § 4.5 (2d ed. 2009) (discussing the plaintiff-viewpoint rule, the defendant-viewpoint rule, and the either-party rule); Brittain Shaw McInnis, Comment, The $75,000 Question: What Is the Value of Injunctive Relief?, 6 Geo. Mason L. Rev. 1013, 1020–24 (1998). The choice between these viewpoint rules implicates the complexities of choice that I discuss above. See supra text accompanying notes 151–188.

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

lief, other nonmonetary relief, or punitive damages.[208] And these "cases are legion."[209]

But even relatively straightforward compensatory money damages can prove difficult to evaluate. In one typical case, for example, a personal injury plaintiff who sustained a broken thumb in an automobile accident invoked diversity jurisdiction alleging more than the jurisdictional threshold based primarily on pain and suffering.[210] Suspecting that the amount-in-controversy threshold could not be met, despite the plaintiff's allegations to the contrary, the district court held a hearing and examined "an extensive record," including the plaintiff's deposition and the testimony of three doctors who treated the plaintiff.[211] That case illustrates the difficulties of applying even a bright-line rule of a dollar threshold to complicated, fact-intensive cases.

Similar application difficulties can be found elsewhere. For example, the test for an individual's citizenship for diversity jurisdiction purposes is that individual's "domicile," which may be changed by establishing a physical presence in a new state and intending to reside there permanently.[212] The legal test is simple enough, but factually determining an individual's intent to reside permanently can be complicated. As Richard Freer has colorfully written, "Most of us do not jump up one day and cry out, 'I have formed the intent to make this state my permanent home!'"[213] Rather, the issue is nuanced and often disputed, and courts often look to a variety of factors to resolve it, including voter registration, tax payment, automobile registration, driver's license registration, home ownership, and location of bank accounts.[214] Other doctrines with potentially difficult and uncertain factual application

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[208] See Armistead M. Dobie, Jurisdictional Amount in the United States District Court, 38 Harv. L. Rev. 733, 734, 738 (1925) (noting that the determination of the amount in controversy can be "quite complex" and singling out injunctive relief as presenting a particularly difficult inquiry that is likely to yield "inconsistent and confusing" results).

[209] Id. at 738.

[210] Burns v. Anderson, 502 F.2d 970, 971 (5th Cir. 1974).

[211] Id. at 972. The district court dismissed the case for lack of jurisdiction, and the Fifth Circuit ultimately affirmed. Id.

[212] See Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir. 1974).

[213] Freer, supra note 206, § 4.5.

[214] See id.

problems include CAFA diversity jurisdiction,[215] supplemental jurisdiction,[216] and the substantiality test for federal-question jurisdiction.[217] Each of these demonstrates that difficulties in factual application can undermine the relative clarity of the governing legal rule.[218] Together with the interpretive overlays, the implementation of even a clear jurisdictional rule can lead to confusion and complexity.

C. Multi-Instrumentalism

Part of the reason for many of these formation and implementation difficulties is that jurisdictional clarity lacks a consistent and uniform purpose. The mantra seeks clear and simple rules primarily for cost savings and legitimacy gains. But there are different ways to seek these goals. And jurisdictional clarity has an additional, underemphasized purpose: facilitating institutional relationships. These instrumentalist features can be in tension with each other.

1. Cost Control

The most emphasized goal of jurisdictional clarity is the conservation of litigant and judicial resources and the enhanced judicial legitimacy that flows from proper attention to jurisdictional boundaries. The idea, described in more detail above, is that clear jurisdictional rules will result in less jurisdictional litigation, easier resolution of any litigation that does arise, and improved percep-

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[215] See 28 U.S.C. § 1332(d)(4)(A)(i)(I) (2006) (requiring the declination of CAFA diversity jurisdiction if, among other requirements, "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed").

[216] See id. § 1367(c)(2) (allowing declination of jurisdiction if the supplemental claim "substantially predominates over the claim or claims over which the district court has original jurisdiction").

[217] See Bell v. Hood, 327 U.S. 678, 682–83 (1946); see also Field, supra note 6, at 691–94 (explaining why the substantiality requirement is difficult in application).

[218] For what it is worth, the Supreme Court appears to understand this. See Hertz Corp. v. Friend, 130 S. Ct. 1181, 1185–86 (2010) (choosing a test for corporate citizenship under the diversity statute in large part because of "the need for judicial administration of a jurisdictional statute to remain as simple as possible").

tions of courts that do not overstep their jurisdictional boundaries.[219]

But the instrumentalism is more nuanced than that simple formula. For example, although jurisdictional requirements and merits requirements generally should avoid overlap because jurisdictional issues must be decided up front, while merits issues should be decided upon a fully developed record,[220] there is good reason to think that overlap is neither unworkable nor costly. Kevin Clermont, for example, has explored ways in which the competing interests of jurisdiction and merits can be accommodated in overlapping inquiries.[221] An overlap may even generate cost-saving advantages, if a quick look at the merits through jurisdiction-related hearings can induce mutually beneficial settlement or the narrowing of merits issues. I do not mean to express disagreement here with the general goal of cost-saving, but I do mean to suggest that the method of achieving it is neither certain nor fully articulated.

2. Legitimacy Enhancement

Similarly, jurisdictional clarity is said to promote the goal of enhanced judicial legitimacy, but the methods of achieving that goal are inconsistent. Because overstepping a jurisdictional boundary is to act unlawfully and call into doubt the propriety of any resulting judgment,[222] federal courts might be tempted to create clarity in ju-

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[219] See supra text accompanying notes 15–24. Here, I treat judicial legitimacy as an instrumental value that flows from jurisdictional clarity, as opposed to a normative value flowing from a conceptualization of jurisdiction as power. The latter value relies on a conceptual distinction between jurisdictionality and non-jurisdictionality that has been forcefully criticized elsewhere. See Lee, supra note 10, at 1613–21.

[220] See Holmes Group v. Vornado Air Circulation Sys., 535 U.S. 826, 838 (2002) (Stevens, J., concurring in part and concurring in the judgment) ("Requiring assessment of a defendant's motive in raising a patent counterclaim or the counterclaim's relative strength wastes judicial resources by inviting 'unhappy interactions between jurisdiction and the merits.'" (quoting Kennedy v. Wright, 851 F.2d 963, 968 (7th Cir. 1988))); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 507–09 (1975) (Rehnquist, J., dissenting) (chastising the majority for its willingness to look at the merits as an influencing factor in appellate jurisdiction); Wasserman, supra note 10, at 1548 (arguing that there should be no overlap between jurisdiction and merits).

[221] Clermont, supra note 201, at 979–80 (proposing a solution for adjudicating factual disputes that affect both jurisdiction and the merits).

[222] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978) ("It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon

risdictional rules by constructing presumptions or interpretations against federal jurisdiction.[223] In the same vein, because overstepping jurisdictional boundaries can encroach on the prerogatives of other law-speaking institutions,[224] federal courts might be tempted to decline jurisdiction when other institutions lay greater claim to the issue. The abstention doctrines are prime examples.[225] Finally, overstepping jurisdictional boundaries transgresses the constitutional commitment of separation of powers, because Congress—not the judiciary—has the primary authority for granting federal jurisdiction.[226] The idea is that judicial legitimacy is enhanced when it at least is clear that the court is not overstepping its jurisdictional authorization.

But underasserting jurisdiction also can erode legitimacy. Courts that refuse to hear the merits of an important case for questionable jurisdictional grounds can suffer in the public eye. Some of the Supreme Court's most famous standing cases are prime examples.[227] In addition, the judicial assertion of power to decline jurisdiction in the face of a clear affirmative congressional grant also erodes judicial legitimacy for some of the same separation-of-powers reasons that counsel against overstepping congressional boundaries.[228] Fi-

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federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."); Lee, supra note 10, at 1615–21 (tying proper jurisdiction to enhanced legitimacy of judgment).

[223] For examples, see supra text accompanying notes 151–88 (discussing the well-pleaded complaint rule, clear statement rules and presumptions, and waiver rules for state sovereign immunity).

[224] See Lees, supra note 8, at 1460 (restricting jurisdictionality to rules that "operate[] to shift authority from one law-speaking institution to another").

[225] See Shapiro, supra note 89, at 551.

[226] Kontrick v. Ryan, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction.").

[227] See, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17 (2004) (dismissing a constitutional challenge to the Pledge of Allegiance on a novel prudential standing ground); Neil S. Siegel, A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar, 103 Mich. L. Rev. 1951, 2009 (2005) (suggesting that the Court's legitimacy may have suffered from its artful dodge in *Newdow*); see also Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1373 (1988) ("[Some commentators] have concluded that the doctrine of standing is either a judicial mask for the exercise of prudence to avoid decisionmaking or a sophisticated manipulation for the sub rosa decision of cases on their merits.").

[228] See Eskridge & Frickey, supra note 170, at 598 (arguing that clear statement rules and interpretive presumptions suffer from countermajoritarian problems); Daniel J.

nally, underasserting jurisdiction can leave litigants in a suboptimal forum,[229] or perhaps even without a forum at all,[230] resulting in an injustice that can erode legitimacy. For these reasons, underassertion can damage legitimacy values.

Thus, to be true to the goal of enhancing legitimacy, jurisdictional clarity must be double-sided—clear both for exercising and for declining jurisdiction. Aside from making jurisdictional clarity doubly difficult, that mode of clarity rubs up against a third, understated goal of jurisdictional clarity.

3. Addressing Institutional Relationships

That third goal is the facilitation of institutional relationships. Federal appellate jurisdiction involves the functioning of the intra-branch relationship between district and appellate courts. Other jurisdictional grants involve the inter-system relationships between federal and state courts. Still others involve the inter-branch relationship between federal courts and Congress or executive agencies. Jurisdictional clarity seeks to define the demarcations of these divisions, and, in the process, promote harmony between them.[231] Good fences make good neighbors.

Meltzer, The Supreme Court's Judicial Passivity, 2002 Sup. Ct. Rev. 343, 378 (2002) (describing arguments that judicial lawmaking raises legitimacy concerns on federalism and separation-of-powers grounds); Redish, supra note 95, at 74–75 (arguing that abstention doctrines are illegitimate usurpations of congressional authority). But see Fitzgerald, supra note 94, at 1245 (arguing that Article III originally contemplated a judicial role for establishing and exercising jurisdiction). One might contend that judicial usurpation of jurisdiction is more offensive than judicial declination of jurisdiction because Congress acquiesces in—and perhaps even silently delegates to the court—a certain amount of judicial discretion to decline jurisdiction. Cf. Shapiro, supra note 99, at 1843 (suggesting that legislators may expect courts to fine-tune statutory commands through the process of interpretation). There is truth to that contention today, but it does not explain how the latter practice developed in the first place. For a novel argument attempting to reconcile some of these problems, see Friedman, supra note 94, at 2–3 (proposing a "dialogic" developmental process).

[229] The purpose of diversity jurisdiction is to provide a neutral federal forum when state court bias is likely, but abstention doctrines can funnel such cases back to state court. See Jonathan Remy Nash, The Uneasy Case for Transjurisdictional Adjudication, 94 Va. L. Rev. 1869, 1899–904 (2008).

[230] See, e.g., John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133–34 (2008) (holding the six-year limitations period for suits in the Court of Federal Claims to be a quasi-jurisdictional limitation sufficient to negate a purported waiver that would have allowed the suit to proceed).

[231] Lees, supra note 8, at 1460.

That functionality, though, runs up against the friction that results if the fences stand in the wrong place. It is not unusual for Congress to grant expansive federal jurisdiction, even over cases that might better be resolved by institutional bodies other than the federal courts.[232] Institutional jockeying and disagreements can result.[233]

Jurisdictional clarity has a role to play in these inter-institutional conversations. That role usually is manifested through underassertion doctrines such as abstention doctrines, clear statement rules and presumptions, and jurisdiction-limiting line-drawing.[234] The idea is that self-limitation of jurisdictional prerogative preserves harmonious relationships by avoiding encroachment into other institutions' spheres of authority.[235] Unfortunately, this institutional demarcation function of jurisdictional clarity is in tension with the legitimacy function of jurisdictional clarity, which condemns judicial usurpation or abdication of jurisdictional authority unless itself authorized by Congress.

IV. THE PRICE OF CLARITY

As I have argued above, difficulties in design, implementation, and instrumentalism all erode the ideal of clear and simple jurisdictional rules. Nonetheless, the ideal may be attainable if the rulemaker ignores the costs of attaining it. These include the cost of

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[232] The diversity statute is a prime example. See 28 U.S.C. § 1332(a) (2006). The solution might be for Congress just to be clearer with its jurisdictional legislation, but, as I have argued, that presents its own challenges. See supra text accompanying notes 120–22.

[233] In one memorable case wholly within the federal-court system, the Seventh Circuit and Federal Circuit went toe-to-toe over the propriety of the other's jurisdiction in a patent case. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 806–07 (1988) (discussing the procedural history and finally resolving the disagreement).

[234] See, e.g., Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985))); United States v. Bass, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

[235] I note that the Court has used presumptions to overassert jurisdiction as well, see supra note 177, which may exacerbate any inter-institutional tension.

clarity itself and the opportunity cost of underutilizing the benefits of uncertainty.[236] In this Part, I explore these costs through the lens of the well-pleaded complaint rule.

A. The Costs of Clarity and Simplicity

The well-pleaded complaint rule is a rare example of a clear and simple jurisdictional rule that has withstood the complexities and difficulties that undermine most attempts at jurisdictional clarity. But, in many ways, it is the exception that proves the rule, for it attains this clarity and simplicity at a substantial cost. That cost manifests itself in three ways.

I have discussed two of those manifestations already. Because the well-pleaded complaint rule is almost certainly the result of pragmatic judicial lawmaking for purposes of controlling the federal docket irrespective of the original meaning of the federal "arising under" statute,[237] the well-pleaded complaint rule incurs the legitimacy costs that I have articulated above.[238] And, as discussed above, the well-pleaded complaint rule is an arbitrary line largely dissociated from the complex undercurrents of policies that should inform where to set that line.[239]

Taking those undercurrents into consideration demonstrates the third cost of the well-pleaded complaint rule: its gross inaccuracy.[240] The entire basis for federal "arising under" jurisdiction (and federal jurisdiction in general) is the idea that forum matters. Federal courts are seen as experts in federal law and thus better than state courts in interpreting federal law with accuracy,[241] uniform-

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[236] I rely primarily on logic, theory, example, and—when available—empirical evidence to support these claims. Sadly, few empirical studies are available. More empirical testing should be done to bear out my theoretical assessments.

[237] See Doernberg, supra note 154, at 603–04; Freer, supra note 53, at 311–17.

[238] See supra text accompanying notes 227–28.

[239] See supra text accompanying notes 157–63.

[240] For more indictments of the well-pleaded complaint rule, see Cohen, supra note 157, at 915; Doernberg, supra note 154, at 598–99 & n.12; Redish, supra note 24, at 1794–95.

[241] See, e.g., Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) (explaining that federal-question jurisdiction would enable such issues to come before judges with more expertise in federal law); The American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 164–65 (1969) ("The federal courts have acquired a considerable expertness in the interpretation and application of federal law which would be lost if federal question cases were given to the

ity,[242] and appropriate sensitivity to federal interests.[243] Empirical studies have tended to show that a federal forum makes a difference for removed cases,[244] and the amount of wrangling over forum suggests that parties believe in its importance.[245]

If the essential purpose of federal jurisdiction is to provide a needed federal forum over disputed issues of federal law, the well-pleaded complaint rule is a poor way of doing so because it is substantially overinclusive and underinclusive.[246] Because the well-pleaded complaint rule times the jurisdictional determination before the answer, it allows federal jurisdiction over all cases in which a federal claim appears on the face of a complaint, even if the federal claim is not in dispute,[247] and even when important state claims

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state courts."); Guido Calabresi, Federal and State Courts: Restoring a Workable Balance, 78 N.Y.U. L. Rev. 1293, 1304 (2003) (asserting that state judges "are not experts on federal law and, with great respect to them, they are not good at it"); Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1105–06 (1977) (arguing that federal courts are more solicitous of federal civil rights than state courts are). But see, e.g., Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. Rev. 233, 256 (1988) (arguing that the debate over parity between state and federal courts is unclear and does not lend itself well to empirical testing); William B. Rubenstein, The Myth of Superiority, 16 Const. Comment. 599, 599–600 (1999) (arguing that "gay litigants seeking to establish and vindicate civil rights have generally fared better in state courts than they have in federal courts").

[242] See *Grable*, 545 U.S. at 312 (referring to the "hope of uniformity"); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816); see also Paul J. Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 158 (1953) (asserting that federal jurisdiction is key to establishing uniformity of federal law). But see Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567, 1639 (2008) (arguing that uniformity is overrated).

[243] See The Federalist No. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (predicting that states would not scrupulously protect federal interests); James E. Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 Harv. L. Rev. 643, 713 n.314 (2004) (describing how the Supreme Court has relied on perceptions of state-court hostility to federal interests in extending federal jurisdiction interests). But see, e.g., Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 275 (1997) ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism.").

[244] Kevin M. Clermont & Theodore Eisenberg, Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction, 83 Cornell L. Rev. 581, 593–95 (1998) (showing that plaintiff win rates are lower in removed cases).

[245] See Meltzer, supra note 19, at 1905.

[246] This is a common failing of rules (as opposed to standards). See Sullivan, supra note 56, at 58; Sunstein, supra note 56, at 992–93.

[247] See Doernberg, supra note 154, at 652–53.

remain.[248] And it shuts out of federal district court questions of federal law that arise only by way of an answer or counterclaim, even if those questions of federal law are the only disputed issues in the case.[249]

In short, the well-pleaded complaint rule's clarity-enhancing virtues—early and easy determination—are completely dissociated from the very purpose of federal "arising under" jurisdiction. The result is a costly misallocation in federal and state judicial resources, with state courts hearing many federal claims and federal courts hearing many state claims.[250]

Given the inherent complexities in jurisdictional clarity generally, it seems unlikely that clear and simple jurisdictional rules could be designed and implemented in other areas without simply ignoring—as the well-pleaded complaint rule does—those complexities and uncertainties and thus incurring similar costs. The well-pleaded complaint rule thus aptly illustrates the price of clarity and the sacrifices it entails.

B. The Value of Uncertainty and Complexity

The second cost of clarity is the missed opportunity to reap the benefits of uncertainty in jurisdictional rules. Many of these benefits have been explored in the debate between mandates and discretion in jurisdictional doctrine, but I will briefly recapitulate them here.

First, uncertainty can improve accuracy. As with the well-pleaded complaint rule, ex ante clarity and simplicity often lead to gross misalignment with the underlying jurisdictional policies.[251]

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[248] A district court does have discretion to decline to exercise supplemental jurisdiction over nondiverse state claims. See 28 U.S.C. § 1367(c) (2006).

[249] See Freer, supra note 53, at 318. It is possible that the Supreme Court would ultimately hear such a case on appeal from the state courts. *Mottley* itself is a famous example. See Louisville & Nashville R.R. Co. v. Mottley, 219 U.S. 467, 472–74 (1911) (hearing a federal defense on appeal from state court). But such cases are extremely rare given the Supreme Court's highly restricted docket.

[250] For more on the accuracy costs of federal jurisdiction over state claims, see Jonathan Remy Nash, Examining the Power of Federal Courts to Certify Questions of State Law, 88 Cornell L. Rev. 1672, 1674 n.3 (2003) (listing examples of erroneous federal-court interpretations of state law).

[251] Cf. Meltzer, supra note 228, at 383–90 (arguing that Congress has not contemplated changes in litigation, federalism, and political structure when enacting many jurisdictional statutes).

Uncertainty, however, to the extent it is coupled with judicial discretion, can provide room for "flexibility, fine-tuning, recognition of difference, and accommodation of unforeseen developments."[252] It can provide opportunities for courts to better implement and accommodate the underlying policies in given circumstances. These benefits are particularly true for the area of jurisdiction, in which the courts have a strong claim to expertise.[253]

Second, uncertainty can hold more interpretative legitimacy. Congress may have intentionally drafted a vague or ambiguous jurisdictional statute for the very purpose of delegating power to the courts to fill that ex ante uncertainty with case-specific accommodations of jurisdictional policies.[254] The refusal to develop a clear and simple jurisdictional rule in such instances furthers, rather than frustrates, congressional intent.

Third, uncertainty can promote stability in doctrine. Flexibility allows changing circumstances and norms to be accommodated without disruption or distortion of precedent. The gradual buildup of precedent may make fundamental reform more difficult in the long run,[255] but it also should make reform less necessary overall because the doctrine is crafted in small steps over a longer period of time. Uncertainty can also promote stability in inter-branch relationships. Barry Friedman has argued that uncertainty "tends to

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[252] Shapiro, supra note 96, at 1841.

[253] See Shapiro, supra note 89, at 574 ("[C]ourts are functionally better adapted to engage in the necessary fine tuning [of jurisdictional rules] than is the legislature."). But see Robert G. Bone, Who Decides? A Critical Look at Procedural Discretion, 28 Cardozo L. Rev. 1961, 1963 (2007) (questioning whether district courts can exercise broad discretion effectively in matters of procedure); Strong, supra note 202, at 558–61 (discussing some of the problems of excessive judicial discretion in resolving jurisdictional issues).

[254] See, e.g., William V. Luneburg, Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction, 58 Ind. L.J. 211, 228 (1983) ("[S]ection 1331 can be seen as a delegation of law-making power in the procedural area . . . ."); Shapiro, supra note 99, at 1843 ("[T]he legislature, in the light of centuries of experience, may have come to expect the process of interpretation to comprise elements of *both* agency (the court as applier of the legislature's mandates) and partnership (the court as fine tuner of the legislature's general, and sometimes overly general, proscriptions and commands) . . . ."). But see Scalia, supra note 21, at 1183 (arguing that the "reduction of vague congressional commands into rules that are less than a perfect fit is not a frustration of legislative intent because that is what courts have traditionally done, and hence what Congress anticipates when it legislates").

[255] See Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 395–404 (1978); Schuck, supra note 73, at 20–21.

make actors more cautious, which in the context of the dialogue would protect each branch from over-strong assertions of authority, or a failure to back down in the face of contrary views."[256]

Fourth, uncertainty can induce greater sensitivity to the judicial function. In a recent and elegant essay, Seana Shiffrin argued that clear rules can "spark complacency and automatous behavior," while uncertainty can induce salutary moral deliberation.[257] She focused primarily on the virtues of uncertainty in the regulation of primary conduct and the resulting moral deliberation of primary actors and lay citizens, rather than the relatively amoral deliberation of secondary legal actors over jurisdictional uncertainty, but her arguments suggest that such jurisdictional deliberation has its benefits as well. One virtue might be that jurisdictional uncertainty allows judges to engage the underlying policies, explore them, try them in different circumstances, discard them when they no longer make sense, and generally enhance the systemic and dynamic understanding of the law of jurisdiction.

Fifth, and perhaps related to the preceding point, uncertainty can encourage competition between legal actors that encourages healthy debate about jurisdiction. This competition is the converse of the clarity-driven functionality of streamlining inter-branch relationships. The idea here is that different systems work best when they are engaged with each other over their proper jurisdictional boundaries, as opposed to staying pacifically on their own side of the fence. Robert Cover and Alexander Aleinikoff have made this point powerfully in the context of their vision of "dialectical federalism," in which they argued that conflict between state and federal courts can promote an open-ended dialogue about legal norms.[258] The same could apply to jurisdictional issues; where clearly defined rules might stifle thoughtful discussion, competition may stimulate it.

I do not mean to propose that jurisdictional uncertainty and complexity will always lead to these benefits or that, even if they do, they are superior to jurisdictional clarity and simplicity. I mean

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[256] Friedman, supra note 94, at 56 n.260.

[257] Shiffrin, supra note 56, at 1221, 1223–25.

[258] Robert M. Cover & T. Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1048 (1977). My thanks to Jay Tidmarsh for pointing out the parallel to dialectical federalism.

instead to argue that jurisdictional uncertainty and complexity have their own competing virtues—and clarity and simplicity have their own attendant costs—that ought to be taken into account when developing jurisdictional doctrine and when evaluating the disconnect between the mantra of jurisdictional clarity and the state of jurisdictional uncertainty in existing doctrine.

V. USING CLARITY (AND COMPLEXITY)

In this Part, I consider whether the lessons of clarity's complexity and uncertainty can be put to good use. I make two observations. The first is to advance an explanation for the divergence between reality and rhetoric noted in Part I: jurisdictional clarity is, in most cases, neither clear nor simple, and thus is not realistically attainable. The second is to argue that the largely overlooked problems of jurisdictional clarity suggest that we ought not overvalue the mantra of clarity and simplicity. Instead, the development of jurisdictional doctrine should strive for ways to harness the virtues of both jurisdictional clarity and jurisdictional uncertainty to maximum advantage.

A. Explaining the Gap

The inherent complexity and uncertainty of jurisdictional clarity—from design to implementation—suggest an obvious answer to the puzzle of why existing jurisdictional doctrine largely fails to meet the rhetoric of jurisdictional clarity. Clarity is nice in theory but mostly unattainable in practice. When clarity is attained, such as in the well-pleaded complaint rule, it so deviates from its underlying purposes as to be of questionable justification.

This Article, then, explains why that existing doctrine does not reflect an unrelenting commitment to clear jurisdictional rules. Clear rules simply prove too much, and, despite good intentions of adhering to them, either rulemakers give up on designing them or courts erode them through exceptions and interpretations. Complexity and uncertainty have proven irresistible even for the simplest and clearest of jurisdictional rules, including the Holmes test

providing for federal jurisdiction over federal causes of action[259] and the clear "mandatory and jurisdictional" ninety-day deadline for filing a petition for certiorari with the Supreme Court.[260] In the end, the nature of jurisdictional clarity is itself inherently one of nuance, and the resulting embrace of uncertainty is inevitable.

B. Mixing Clarity and Uncertainty

Rather than resisting jurisdictional uncertainty and blindly adhering to the illusion of pure jurisdictional clarity, we should consider how best to accommodate, even harness, jurisdictional uncertainty. Doing so can, perhaps paradoxically, make jurisdictional clarity a new reality because it need not attempt to accomplish more than it can.

I should note at the outset that the idea of hybridizing clarity and uncertainty in crafting legal rules is not new, at least outside of the area of subject-matter jurisdiction. As just one example, Martin Redish has argued that the "clear and present danger" First Amendment test engages a clarity-furthering presumption in favor of free speech while using less certain standards to gauge when that presumption is overcome.[261]

And, recent literature on subject-matter jurisdiction has touted the role of hybrid jurisdictional rules, though it tends to center on the rules versus standards debate instead of clarity and uncertainty. Jonathan Nash, for example, argues that grants of jurisdiction should be rule-based, while certain limits on those jurisdictional grants should be standards- or discretion-based.[262] Although I believe that the success of his approach depends upon the relative scope of the grants and abstention powers, and although I question whether the particular line he draws—between grants and absten-

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[259] See Bell v. Hood, 327 U.S. 678, 681–82 (1946) (refusing to allow federal jurisdiction over a wholly meritless federal claim); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 513 (1900) (refusing to find jurisdiction when the federal claim consists solely of an incorporation of state law).

[260] See Missouri v. Jenkins, 495 U.S. 33, 45–47 (1990) (elaborating on tolling principles).

[261] Martin H. Redish, Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger, 70 Cal. L. Rev. 1159, 1182–83 (1982).

[262] Nash, supra note 49, at 10 ("I will argue that rules are more appropriate in establishing the boundaries of statutory jurisdiction, while the place for standards lies in deciding whether or not to abstain.").

tion—is the best, I do think he is right to say that "[i]t is possible, in this context, to have one's cake and eat it, too."[263]

It is possible, I think, from the vantage point of clarity and uncertainty. In most cases, questions of federal jurisdiction turn out to be pretty easy.[264] There is broad agreement that, for example, Section 1331 is a jurisdictional provision while Title VII's prohibition on "discrimination" is not. Similarly, no one disputes that a Title VII claim "arises under" federal law while a garden-variety state negligence claim does not. And it seems true today that the difficult cases, those that involve embedded questions of federal law under *Grable*, for instance, are the outliers rather than the usual cases.[265] Regardless of whether we pick a clear or an unclear jurisdictional doctrine to resolve these questions, the doctrine picked almost certainly will resolve them correctly.

When inaccuracy is less of a risk, clear and simple jurisdictional rules have substantial cost advantages over uncertain ones because they are easier to implement. For the easy cases, then, a clear jurisdictional rule usually will be best. Narrowing the scope of the clear rule to the easy cases—in which underlying policies are less in conflict and the tasks of creating and implementing a clear rule are easier—is more feasible and justifiable than attempting to fit a single clear rule to all cases.

That does not mean that one must sacrifice the hard cases to the clear rule when inaccuracy becomes more of a concern at the margins. One could imagine, instead, designing a hybrid doctrine that uses a clear rule to address the easiest cases and an uncertain rule to address the harder cases, with a multitude of resulting benefits.

The relatively narrow scope of the uncertain rule can restrict uncertainty primarily to a small subset of cases, leaving clarity over the vast majority of cases and without sacrificing accuracy overall.

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[263] Id. at 6.

[264] See 13D Charles Alan Wright et al., Federal Practice and Procedure § 3562 (3d ed. 2008) ("[T]he cases raising a serious question whether jurisdiction exists are comparatively rare."); Friedman, supra note 94, at 56 ("Uncertainty tends to play itself out around the edges."); Shapiro, supra note 96, at 1841 (arguing that "hard cases . . . exist primarily at the margins" and "that the overwhelming majority of jurisdictional questions are straightforward and readily resolved").

[265] See Freer, supra note 53, at 342. That may not always have been the case. See Woolhandler & Collins, supra note 35, at 2153 (arguing that *Grable*-type claims were the norm in the nineteenth century).

And, for the clear rule's cases, the clarity in the rule should be clear to lay persons as well and produce a similar clarity in results. The costs of uncertainty will remain for the other cases, at least for a time,[266] but those will be a small subset, and that minimal cost may be outweighed by the resulting gains in accuracy.

Institutionally, Congress and the courts can divide the burden of designing the rule into components based on their respective capacities: Congress can design the clear component that governs most cases (something that ought to be relatively easy even ex ante) and delegate to the courts the responsibility of designing the uncertain component for the hard cases, which may need more time and case-specific development.

How might this actually look? I leave a comprehensive proposal for another day, but let me offer a preliminary, if oversimplistic, illustration. Congress could incorporate the Holmes test as a test of inclusion in Section 1331 but leave the generalized "arising under" language available for other cases. Thus, the statute might include Section 1331(b), which would state, "For purposes of Section 1331(a), a claim alleging a violation of a federally created right 'arises under' federal law."[267] That would make clear the primacy of the Holmes test (and perhaps overrule troublesome cases like *Bell v. Hood*[268] and *Shoshone Mining Co. v. Rutter*[269]) while authorizing the courts to continue the rarer and less certain *Grable* line of cases[270] for more nuanced treatment of claims that might still justify the need for original federal jurisdiction.

This is an easy illustration, I confess, and no doubt the use of hybrid rules in other areas will run into its own problems and difficulties. Hybrid rules may prove to be as intractable as clear jurisdic-

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[266] It is a familiar hope that even uncertain doctrines will eventually result in greater clarity as the doctrine becomes concretized over time. See Shapiro, supra note 89, at 546–47, 589 (arguing that discretionary doctrines tend to obtain clarity through the process of precedent-building); Sunstein, supra note 56, at 965 ("It is a familiar hope that standards will receive a degree of specification as they are interpreted . . . ."); cf. Meltzer, supra note 19, at 1907 (arguing that the *Younger* abstention doctrine developed "relatively determinate boundaries" over the course of "a reasonably short time").

[267] My thanks to Jay Tidmarsh for a friendly amendment to this language.

[268] 327 U.S. 678 (1946).

[269] 177 U.S. 505 (1900).

[270] See, e.g., Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005); Smith v. Kan. City Title & Trust Co., 255 U.S. 180 (1921).

tional rules. But there are reasons to believe that hybrid rules have some promise, and at least more promise than unified clear jurisdictional rules. The first step toward finding out is in acknowledging that overarching clarity in jurisdictional rules is inherently complex, difficult, and, in most cases, illusory.

CONCLUSION

Henry Adams once denounced simplicity as "the most deceitful mistress that ever betrayed man."[271] I have tried here to show that the ideal of simple and clear jurisdictional rules is deceptively complex and uncertain. And, at the very least, we ought to be skeptical of the mantra of clear and simple jurisdictional rules.

Perhaps I am biased—academics tend to have a preference for the complex because, well, it gives us something to write and talk about.[272] But I have tried to acknowledge that jurisdictional clarity and simplicity do have their place. They just need a narrower scope to be able to accomplish what they have the capacity to accomplish. The same goes for jurisdictional complexity and uncertainty: they can be used appropriately as well. The real value will come from using both sets of features together in their respective roles.

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[271] Henry Adams, The Education of Henry Adams 441 (1918).
[272] Schuck, supra note 73, at 34–38.