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Federal jurisdiction—the "power" of the court—is seen as something separate and unique, with a litany of special effects that define jurisdictionality as the antipode of nonjurisdictionality. The resulting conceptualization is that jurisdictionality and nonjurisdictionality occupy mutually exclusive theoretical and doctrinal space. In a recent Article, I refuted this rigid dichotomy of jurisdictionality and nonjurisdictionality by explaining that nonjurisdictional rules can be "hybridized" with any—or even all—of the attributes of jurisdictionality.

This Article drops the other shoe. Jurisdictional rules can be hybridized, too, and in myriad forms. The result is a far more complex world than what the simple—but fallacious—dichotomy of jurisdictionality and nonjurisdictionality suggests.

Hybridization enables parties and courts to regulate federal jurisdiction in normatively desirable ways. Court control may re-establish power to inject considerations of fairness into jurisdictional issues. Party control may alleviate some of the costs of

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jurisdictionality. Further, hybridization can achieve these regulatory rewards while simultaneously retaining a healthy, formal distinction between jurisdictionality and nonjurisdictionality. The result is a cleaner, truer, and more useful conceptualization of jurisdiction.

INTRODUCTION

As every first-year U.S. law student learns, federal subject-matter jurisdiction is something separate, special, and unique. Nowhere is that lesson driven home more forcefully than in the ancient but oft-assigned case of *Capron v. Van Noorden*.[1] There, a plaintiff brought a diversity action in federal

1. 6 U.S. (2 Cranch) 126 (1804).

court and lost at trial on the merits. The plaintiff then appealed, citing his own failure to allege diversity of citizenship properly. The Supreme Court agreed and vacated the judgment against the plaintiff for lack of jurisdiction, even though it was the plaintiff who invoked that jurisdiction in the first place.[2]

Capron suggests that federal subject-matter jurisdiction is different in kind from other requirements of substance and procedure. Jurisdiction, it is said, is the "power" of the court.[3] As such, and generally unlike matters of procedure or substance, jurisdiction carries with it a standard set of effects: It cannot be consented to; jurisdictional defects cannot be waived, forfeited, or excused for equitable reasons, and they may be raised by any party any time before final judgment; judgments entered without jurisdiction are void; and the court has an obligation to assure itself of its own jurisdiction at all times.[4]

By most accounts, these are uniformly held, well-established, and uncontroversial principles. Courts and commentators reiterate these principles with a certitude that shuns hesitation or question.[5] Their repetition has entrenched the idea of jurisdiction as a rigid antipode to nonjurisdictional law, such as procedural rules and substantive elements. A court either has jurisdiction or does not, and, when it does not, there is nothing to do but dismiss the case.[6]

I aim to shake things up a bit. In previous work, I have attempted to refute the rigid dichotomy of jurisdictionality and nonjurisdictionality by explaining that a nonjurisdictional rule can have any—or even all—of the attributes of jurisdictionality.[7] Such hybridized nonjurisdictional rules have their own salutary role to play in legal regimes by permitting nonjurisdictional rules and doctrines to have a broad range of effects that better implement the rules' norms and goals. One example is state sovereign immunity, which could be cast as a mandatory but nonjurisdictional rule that the defendant can waive but that, like a jurisdictional rule, the court has no discretion to refuse to apply once properly invoked.[8]

That nonjurisdictional rules can have jurisdictional effects causes these two categories to collide and erodes the antipodal definition of jurisdictionality as altogether different from nonjurisdictionality. Hybridizing nonjurisdictionality with jurisdictional effects undermines jurisdictionality's separate sphere of uniqueness and raises the question whether jurisdictionality may be subject to a similar hybridization.

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2. *Id.* at 126–27.
3. *See infra* note 18.
4. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (setting out characteristics of subject-matter jurisdiction).
5. *See infra* notes 18–24.
6. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868).
7. *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1 (2008).
8. *See id.* at 15–33. I am not wedded to this characterization. Indeed, I propose a counter-characterization of state sovereign immunity in Part III of this Article.

This Article offers an answer: jurisdictional rules can have features of nonjurisdictionality, too. Hybridization offers more accurate ways of conceptualizing doctrines that are otherwise difficult to place in the jurisdictional-nonjurisdictional dichotomy. Further, by circumscribing jurisdiction and incorporating more judicial and party control, hybridization can reduce the costliness of jurisdiction. Finally, hybridization can achieve all this while retaining a healthy, formal distinction between jurisdictionality and nonjurisdictionality.[9]

A closer look at *Capron* gives a preview of how jurisdiction can be hybridized. Note that whether diversity of citizenship actually existed in *Capron* was unclear. The problem was that the plaintiff failed to *allege* diversity of citizenship, and the record in the lower court showed no evidence of diversity of citizenship.[10] But none of that means that diversity of citizenship did not *in fact* exist. For all the Supreme Court knew, the two parties might actually have had diverse citizenships, giving the lower court proper jurisdiction.

That possibility was of little concern because the Supreme Court relied on a rule that was different from—indeed, was *irrelevant to*—the question of whether diversity of citizenship actually existed. Instead, the Court's rule was that federal trial courts lack jurisdiction "unless the record shews that the parties are citizens of different states."[11] That rule relegates jurisdictionality to a question of proof not unlike that required for substantive elements of a claim.

Perhaps it makes sense that the actual presence of diverse parties is a jurisdictional requirement. But that does not mean that the test for, and mechanisms of, *proving* diversity of citizenship are also jurisdictional requirements. One might, instead, consider whether such tests and mechanisms should be amenable to typical nonjurisdictional features, such as equitable estoppel, waiver, and forfeiture. Those nonjurisdictional features might then affect the ultimate jurisdictional determination.

Divorcing the core question of federal jurisdiction from its nonjurisdictional mode of proof may seem strange today, but, historically, a party waived its objection to the lack of jurisdiction in federal court by failing to follow proper procedure. In *Capron*'s time, a defendant waived any objections to subject-matter jurisdiction by filing an answer instead of a plea in abatement.[12] Parties could concoct federal jurisdiction by pleading and not

9. Because my broader thesis is that jurisdictionality and nonjurisdictionality can be blended, there is some irony in my attempt to continue to use these terms with a meaning linked to their traditional definitions. I will have more to say about that in the Conclusion, but my excuse for now is that the lexicon is not yet big enough to differentiate various hybridizations with single monikers. I hope that phrases like "jurisdictional yet subject to judicial discretion" might be understandable enough.

10. Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 126 (1804).

11. *Id.*

12. *See* Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1839–40 (2007).

objecting to the jurisdictional requirements, even if the parties' allegations contradicted factual reality.[13] Parties could admit jurisdictional facts.[14] As a result, many cases were litigated and decided by federal courts that otherwise lacked jurisdiction to do so.[15]

Things are different now,[16] but, as I will argue, they are far less different than conventionally thought. Even today, federal law often links jurisdiction to nonjurisdictional procedures. Some jurisdictional doctrines and statutes incorporate nonjurisdictional features inherently or expressly. Nonjurisdictional timing rules can control the temporal scope of jurisdictional decision making. Jurisdictional questions can depend upon nonjurisdictional preconditions. Rules of proof can regulate jurisdictional fact-finding. In each of these cases, jurisdictional rules are hybridized with nonjurisdictional rules or features. The result is a far more complex world than what the oversimplified dichotomy of jurisdictionality and nonjurisdictionality suggests.

Hybridization, then, offers a cleaner and more accurate picture of the relationship between jurisdictionality and nonjurisdictionality. Doctrines such as personal jurisdiction, sovereign immunity, mootness, and discretionary declination of jurisdiction do not fit comfortably into either one exclusively; rather, they all have features of both jurisdictionality and nonjurisdictionality. By reconceptualizing the jurisdictionality-nonjurisdictionality relationship, hybridization more accurately explains how these doctrines function.

Hybridization begets regulation. Hybridizing jurisdictionality with non-jurisdictionality can, in effect, confine jurisdictional determinations to specified circumstances and conditions. In some cases, the federal courts may regulate jurisdiction through the exercise of judicial discretion or consideration of equitable circumstances. In other cases, the parties may regulate jurisdiction through considerations of waiver, consent, or forfeiture.

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13. *Id.* at 1838–39 ("Indeed, as discussed below, the parties could even collude to have their case tried in federal court with a combination of a plaintiff's proper jurisdictional plea and a defendant's non-objection."); *id.* at 1877 ("The [common law] encouraged gaming of the system to secure jurisdiction when it did not—under some alternative set of proofs—really exist. . . . The result was that federal courts continued to hear cases even when it became clear that jurisdiction may have been lacking in fact, or even concocted.").

14. *See* Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 511 (1967).

15. *See* Collins, *supra* note 12, at 1832–33 ("Emphasis on the pleadings, when coupled with limited procedural opportunities to go behind the narrowly construed record, carried with it the possibility—often realized—that cases outside of Article III or Congress's implementing statutes would be heard by the federal courts."). At a minimum, however, as *Capron* itself suggests, the party seeking federal jurisdiction would have to properly invoke it.

16. *Compare* United States v. Cotton, 535 U.S. 625, 630 (2002) ("[An] elastic concept of jurisdiction is not what the term 'jurisdiction' means today, e.g., the courts' statutory or constitutional power to adjudicate the case.") (internal quotation marks omitted), *with infra* text accompanying notes 70–81 (describing the more elastic historical concept).

Jurisdictional regulatability is antithetical to the modern conception of jurisdiction as largely independent of party or court control. But that conception is theoretically and descriptively wrong. And jurisdictional regulatability has the potential to be normatively desirable. Increased court control may reestablish the power to impose considerations of fairness onto jurisdictional issues. Increased party control may alleviate some of the costs of jurisdiction. Jurisdiction can, and perhaps should, be regulable through hybridization.

At the same time, I am not yet prepared to banish jurisdiction entirely. Jurisdiction can play important structural, expressive, and psychological roles. Hybridization, by focusing rather than eliminating jurisdictionality, also helps to reaffirm it. Hybridization, perhaps paradoxically, both connects and distinguishes jurisdictionality and nonjurisdictionality, and, in the process, it both softens and strengthens jurisdiction.

This Article explores the complex and understudied world of hybridized jurisdiction. Part I situates my thesis in the broader literature of jurisdictionality. It shows how nonjurisdictional rules may be hybridized with jurisdictional features and theorizes how jurisdictional rules might be hybridized similarly. Part II tells a descriptive story of hybridized jurisdictional rules as neither new nor controversial nor particularly uncommon and develops an original taxonomy to categorize and illustrate the various types of hybridized jurisdictional rules in federal courts. Part III then analyzes the prescriptive utility of the taxonomy in helping to classify ill-fitting doctrines in a more accurate, hybridized way. Finally, Part IV offers a normative account of hybridized jurisdictional rules by focusing on the beneficial regulatory power to which hybridization can subject jurisdictional doctrine. I conclude with some brief observations of the implications of my insights to the literature and current federal doctrine.

I.
JURISDICTIONALITY AND NONJURISDICTIONALITY

This Part introduces jurisdictional theory and situates my thesis in the broader literature of jurisdictionality. It shows how nonjurisdictional rules may be hybridized with jurisdictional effects and theorizes how jurisdictional rules might be hybridized similarly.

A. Traditional Conceptualization: A Rigid Dichotomy

The usual conceptualization of jurisdictionality and nonjurisdictionality is that of separate spheres and mutually opposing characteristics—they are antitheses of each other. As one commentator has put it, "[i]n modern Anglo-

American legal doctrine, legal issues are either 'jurisdictional' or 'non-jurisdictional.'"[17]

Jurisdiction is typically defined as the "power"[18] or basic "authority"[19] of a federal court. It protects nonlitigant systemic values of federalism, separation of powers, and judicial-resource allocation,[20] which cannot be safeguarded adequately by the parties or the court. Thus, jurisdiction typically is characterized by a rigid set of effects that place it beyond the control of the parties: A jurisdictional rule can be raised at any time, including for the first time on appeal; it obligates the court to police compliance sua sponte; and it is not subject to principles of equity, waiver, forfeiture, consent, or estoppel.[21] Jurisdiction is "inflexible" and "without exception."[22] Without it, a court's only option is to dismiss.[23] As one commentator has stated, "[s]o sanctified is [jurisdiction's] formula that a halo of constitutionality surrounds it."[24]

By contrast, nonjurisdictionality is concerned with matters of substance and procedure and can be subject to party and court control. Such control has value. The parties can choose which rules are worth litigating and which are not, thereby conserving resources for more important issues. The court can inject fairness and equity if individualized circumstances call for them. As a result, nonjurisdictional rules usually are defined as having all the inverse effects of jurisdictionality—they can be waived, forfeited, or consented to, and they are subject to equitable exceptions, estoppel, and judicial discretion.[25]

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17. Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 4 (1994). *But cf. id.* at 4 n.4 (acknowledging examples of "quasi-jurisdictional" or "almost jurisdictional" issues); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 135 (2008) (characterizing the statute of limitations in the Tucker Act as a "more absolute" bar).

18. *See Cotton*, 535 U.S. at 630 (characterizing jurisdiction as "the courts' statutory or constitutional power to adjudicate the case"); McDonald v. Mabee, 243 U.S. 90, 91 (1915) (characterizing jurisdiction as "power"); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is power to declare the law . . . ."); Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22 (1981) ("The concept of subject-matter jurisdiction in our legal system refers to the motive force of a court, the root power to adjudicate a specified set of controversies.").

19. *See* Kontrick v. Ryan, 540 U.S. 443, 455 (2004) (referring to jurisdiction as "a court's adjudicatory authority"); Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1617 (2003) (rejecting a definition of "power" and instead characterizing jurisdiction as a facet of "authority").

20. *See* Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 59 (2008) ("As 'power,' jurisdiction embodies societal values, such as federalism, separation of powers, and a limited national government.").

21. *See* Dodson, *supra* note 7, at 4–5.

22. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577 (1999); *see also* Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884) (same).

23. *See McCardle*, 74 U.S. (7 Wall.) at 514; Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 250 (1867) ("If there were no jurisdiction, then there was no power to do anything but to strike the case from the docket.").

24. Dan B. Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C. L. REV. 49, 49 (1961).

25. *See* Dodson, *supra* note 7, at 5.

Courts and commentators often make this dichotomy between jurisdictionality and nonjurisdictionality quite rigid and explicit, suggesting that jurisdictionality and nonjurisdictionality are mutual opposites in both their formal natures and their functional effects.[26] The distinction between jurisdictionality and nonjurisdictionality, as Perry Dane has written in the context of time limits, "always rests on an explicit contrast. . . . [I]f [a rule] is jurisdictional, the court will read it or treat it one way; if it is not jurisdictional, the court will read it or treat it another way."[27]

Indeed, the contrast is so stark that a court often will invoke the mantra of jurisdictionality and imply that a defined set of effects inexorably flows from the jurisdictional characterization without further analysis. For example, in *Day v. McDonough*, the Supreme Court stated, "[a] statute of limitations defense . . . is not 'jurisdictional,' hence courts are under no obligation to raise the time bar sua sponte."[28] The Court's assumption was that a certain defined set of nonjurisdictional attributes necessarily follows from the nonjurisdictional characterization. The converse assumptions flow from characterizations of jurisdictionality.[29] This logic is rampant among courts and commentators.[30]

Perhaps the most poignant recent illustration of the jurisdictionality-nonjurisdictionality dichotomy in action is the 2007 Supreme Court case of *Bowles v. Russell*. There, Keith Bowles, convicted of murder in state court, petitioned for a federal writ of habeas corpus, which the district court denied.[31] Under 28 U.S.C. § 2107, Bowles had thirty days to appeal to the court of appeals.[32] Bowles failed to meet that deadline and, after it passed, asked the

26. *See, e.g.*, Collins, *supra* note 12, at 1831 ("[J]urisdictional questions are exceptional [in their ordering and effects] and escape the application of many ordinary principles that would be applicable to the resolution of nonjurisdictional questions.").

27. Dane, *supra* note 17, at 12.

28. Day v. McDonough, 547 U.S. 198, 205 (2006) (emphasis omitted); *see also id.* at 213 (Scalia, J., dissenting) ("We have repeatedly stated that the enactment of time-limitation periods such as that in § 2244(d), without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture.").

29. *See, e.g.*, Cook v. United States, 246 F. App'x 990, 994 (6th Cir. 2007) ("[J]urisdictional rules are mandatory; therefore, their time limits cannot be waived.").

30. *See, e.g.*, United States v. Lee, 242 F. App'x 209, 210 (5th Cir. 2007) (per curiam) ("[T]ime limits not imposed by statute are not jurisdictional. The specific implication is that these time limits may be waived.") (citations omitted); *Cook*, 246 F. App'x at 994 ("[C]laim-processing rules are not jurisdictional—thus, their time limits can be waived.") (emphasis omitted) (citation omitted); E. King Poor, *Jurisdictional Deadlines in the Wake of* Kontrick *and* Eberhart*: Harmonizing 160 Years of Precedent*, 40 CREIGHTON L. REV. 181, 207 n.172 (2007) ("The importance of the distinction [between jurisdictional and nonjurisdictional characterizations] was that non-jurisdictional deadlines are subject to equitable exceptions, described as 'waiver, estoppel, and equitable tolling.'") (quoting Zipes v. Trans World Airlines, Inc. 455 U.S. 385, 393 (1982)).

31. Bowles v. Russell, 551 U.S. 205, 207 (2007).

32. 28 U.S.C. § 2107(a) (2006).

district court to reopen the deadline to appeal,[33] as § 2107 allowed him to do.[34] The district court granted Bowles's motion on February 10, 2004.[35]

In its order, the district court specifically gave Bowles until February 27, 2004, to file his notice of appeal.[36] Apparently, no one objected to the district court's order. Following the order, Bowles filed his notice of appeal on February 26, sixteen days after his motion had been granted and within the time allowed by the district court's order.[37] Unfortunately, 28 U.S.C. § 2107(c) limits reopened time periods to fourteen days.[38] Thus, Bowles's notice of appeal—though timely under the district court's order—was untimely under the statute.

The state immediately moved to dismiss Bowles's appeal as untimely, and the court of appeals granted the state's motion. The Supreme Court affirmed, holding § 2107(c) to be a jurisdictional rule.[39] Because the rule was jurisdictional, the Court explained, it barred the appeal even if the defect was induced by the district court's misleading order, and despite any unfairness or inequity to Bowles.[40]

There is much to criticize about *Bowles*,[41] but for my purposes, it helps to illustrate the rigid division between jurisdictionality and nonjurisdictionality. Once the Court held the rule to be jurisdictional, it assumed that the jurisdictional effects automatically applied, and the underlying circumstances—no matter how compelling—became irrelevant. The Court offered no analysis of why; rather, it merely assumed the truth of its major premise: all jurisdictional rules are immune from equitable exceptions.

The four justices in dissent adhered to the other side of the dichotomy. They would have characterized the rule as nonjurisdictional.[42] From that conclusion, according to the dissent, it automatically followed that Bowles's equitable excuse was viable.[43] There was some precedent justifying this

33. *Bowles*, 551 U.S. at 207.

34. 28 U.S.C. § 2107(c).

35. *Bowles*, 551 U.S. at 207.

36. *Id.*

37. *Id.*

38. 28 U.S.C. § 2107(c).

39. *Bowles*, 551 U.S. at 214 ("Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement.").

40. *Id.* at 213 ("And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations."); *id*. at 214 ("Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the 'unique circumstances' doctrine is illegitimate.").

41. For some of that criticism, see Scott Dodson, *The Failure of* Bowles v. Russell, 43 TULSA L. REV. 631 (2008), and Scott Dodson, *Jurisdictionality and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 42 (2007), http://www.law.northwestern.edu/lawreview/colloquy/2007/21/.

42. *Bowles*, 551 U.S. at 216–18 (Souter, J., dissenting).

43. *Id.* at 216 ("While a mandatory but nonjurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion.").

position,[44] but the thrust of the dissenters' argument was primarily based on a major premise that was the antipode of the majority's: all nonjurisdictional rules are (at least presumptively) subject to equitable exceptions.

Bowles thus illustrates the customary conceptualization of jurisdictionality and nonjurisdictionality as occupying mutually exclusive doctrinal space. According to that conceptualization, if a rule is jurisdictional, it falls into one basket with one defined set of effects; if it is nonjurisdictional, it falls into a different basket with a defined set of inverse effects.[45]

B. Expanding Definitions: Hybridized Nonjurisdictional Rules

As I have argued elsewhere, this rigid dichotomy is false, at least from the perspective of nonjurisdictional rules.[46] In contrast to the conventional wisdom, nothing inherent in the nature of nonjurisdictionality prevents nonjurisdictional rules from having jurisdictional effects.[47] Indeed, some nonjurisdictional rules currently exhibit jurisdictional attributes. For example, certain rules of bankruptcy procedure are nonjurisdictional yet may not be susceptible to party consent, waiver, or forfeiture.[48] Rules 33 and 45(b) of the Federal Rules of Criminal Procedure, which provide a rigid deadline of seven days to file a motion for a new trial, are nonjurisdictional, yet a court may not excuse noncompliance with them for equitable reasons.[49] In a federal habeas case, a state cannot forfeit or be estopped from asserting the nonjurisdictional defense

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44. *See* Thompson v. INS, 375 U.S. 384, 387 (1964) (per curiam) (reaffirming the "unique circumstances" doctrine), *overruled by Bowles*, 551 U.S. at 214; Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217 (1962) (per curiam) (recognizing the "unique circumstances" doctrine), *overruled by Bowles*, 551 U.S. at 214.

45. Recent cases suggest that the Court may be open to a more nuanced approach. In *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), the Court phrased the question presented as whether the 120-day deadline at issue had "jurisdictional consequences." That might be an implicit acknowledgment that even a nonjurisdictional rule could have jurisdictional effects. However, the Court did not pursue this possibility, instead falling back on the question whether the deadline is jurisdictional or nonjurisdictional. Concluding that the deadline is nonjurisdictional, the Court stated that it does not have jurisdictional attributes, but the Court did not explain why. It appears that the Court simply fell back into the dichotomy. *See* Scott Dodson, *Two Cheers for* Henderson, CIVIL PROCEDURE AND FED. COURTS BLOG (Mar. 2, 2011), http://lawprofessors.typepad.com/civpro/2011/03/commentary-two-cheers-for-henderson.html. In *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the Court held § 157(b)(5) of the Judicial Code to be nonjurisdictional and then engaged in a separate (though relatively perfunctory) analysis as to whether the provision was waivable. The Court concluded that it *was* waivable, however, and thus dropped the provision entirely into the nonjurisdictional basket. Still, these cases suggest that the Court is becoming more receptive to nuanced, as opposed to binary, characterizations.

46. *See* Dodson, *supra* note 7, at 6 ("This automatic characterization of nonjurisdictional rules as the inverse of jurisdictional rules . . . is erroneous.").

47. *See id.* (arguing that "nonjurisdictional rules are not inherently prohibited from having jurisdictional effects"); *see also* Dane, *supra* note 17, at 39 ("[L]egal rules can be mandatory without being jurisdictional.").

48. *Cf.* Kontrick v. Ryan, 540 U.S. 443, 457 n.12 (2004) (noting that a debtor and creditor may not be able to consent to time-barred claims that would prejudice other creditors).

49. *See* Eberhart v. United States, 546 U.S. 12, 19 (2005) (calling them "inflexible").

of exhaustion absent the state's express waiver.[50] Federal courts may, in appropriate circumstances, raise certain nonjurisdictional defenses sua sponte even if the defendant forfeited them.[51]

The conceptual dichotomy relegates these hybridized outliers to exceptional status, but they have salutary roles to play in our justice system. As an institutional matter, hybridization offers a broader range of available categorizations, from which the most appropriate effects can be selected and used.

Take, for example, a specific nonjurisdictional hybrid that I have called a "mandatory rule."[52] A mandatory rule is a nonjurisdictional rule that can be waived, forfeited, or consented to. But, when the rule is properly invoked, a court has no discretion to excuse its noncompliance, even for compelling equitable reasons.[53] For example, the exhaustion requirement of the Prison Litigation Reform Act—which states that "no action shall be brought with respect to prison conditions under § 1983 of this title, or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted"[54]—is a mandatory but nonjurisdictional limit that can be waived but is not subject to court discretion.[55]

Such a rule has benefits. Waiver, forfeiture, and consent allow the parties to choose whether the rule is something worth litigating or not. These features also allow intrasuit settlements—"I won't challenge this deadline if you don't challenge that deadline." They promote finality by ensuring that parties' decisions not to challenge noncompliance will not later be raised by the court to unravel months (or perhaps years) of litigation.[56] And they can make a complex litigation markedly simpler by disposing of many issues by consent.[57]

A mandatory rule's immunity to discretion and equity also can have virtues. Rigidity incentivizes compliance with the rule (or clarity in securing a waiver of the rule from the other party). It also promotes finality and furthers reliance interests if the opposing party is depending on the rule. Finally, it fosters equality across cases by preventing case-specific equitable excuses and conserves judicial resources by avoiding the need for courts to grapple with a

50. 28 U.S.C. § 2254(b)(3) (2006) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.").

51. *See, e.g.*, Day v. McDonough, 547 U.S. 198, 206–07 (2006) (referring to a habeas petitioner's procedural default under the nonjurisdictional independent and adequate state grounds doctrine).

52. *See* Dodson, *supra* note 7, at 9.

53. *See id.* at 9–10. An example might be the sixty-day notification period of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(b)(1), which the Supreme Court has classified as "mandatory" without resolving its jurisdictional status. *See* Hallstrom v. Tillamook County, 493 U.S. 20, 25–31 (1989).

54. 42 U.S.C. § 1997e(a).

55. *See* Jones v. Block, 549 U.S. 199, 211 (2007).

56. *See* Dodson, *supra* note 7, at 10 (elaborating on these values).

57. *See* Stern v. Marshall, 131 S. Ct. 2594 (2011) (recognizing this virtue of waiver).

host of different equitable situations to determine whether and under what circumstances noncompliance is justified.[58] These features of mandatory rules can be useful.

Mandatory rules have downsides—namely, that the equitable circumstances barred from consideration in a particular case might be extremely compelling—but it seems indisputable that, in some areas of the law, the virtues of rigidity can outweigh those of individual fairness. The hybridized "mandatory rule" gives rule makers a tool to choose in those areas.

Hybridization of nonjurisdictional rules proves two points. The first is that the dichotomy between nonjurisdictionality and jurisdictionality is not so rigid. The second is that hybridization can have desirable effects, such as increasing the diversity of options available for setting and enforcing legal norms.

C. New Frontiers: Hybridized Jurisdictional Rules

One might respond that hybridization makes sense for nonjurisdictional rules but that hybridizing jurisdictional rules is another matter entirely. After all, nonjurisdictionality lacks the formal identity of jurisdictionality as "power" independent of party or court control. Thus, one might welcome hybridization of nonjurisdictional rules yet be resistant to hybridization of jurisdictional rules. This reaction is quite sensible in light of the modern conceptualization of jurisdictionality as special, but it falters on three major fronts: theory, history, and modern practice.

1. Theory

Jurisdiction is not, as a matter of theory, as special as the conventional rhetoric makes it out to be. As Evan Tsen Lee has powerfully argued, there is no inherent conceptual difference between jurisdictional doctrines and nonjurisdictional issues such as merits[59] (and perhaps procedure). Jurisdiction cannot mean "power" in the descriptive sense, for a court has the *ability* to enter a judgment that then could be enforced even if the court lacks subject-matter jurisdiction.[60] Instead, jurisdiction goes to the normative question of legitimate authority.[61] Jurisdiction, in other words, "denotes a presumption in favor of the legitimacy of the prospective judgment."[62]

But questions pertaining to the nonjurisdictional areas of merits and procedure also speak to the legitimacy of the judgment. And all three

58. *See* Dodson, *supra* note 7, at 10 (explaining these virtues).

59. Lee, *supra* note 19, at 1614 ("[T]here is no hard conceptual difference between jurisdiction and the merits.").

60. *Id.* at 1616–17. Even if such a judgment would be void for lack of subject-matter jurisdiction, the issuing court still *in fact* entered a purportedly valid judgment that might still be enforced.

61. *Id.* at 1617.

62. *Id.* at 1622.

categories—merits, procedure, and jurisdiction—speak to legitimacy in ways that are difficult to distinguish from each other. It is true that one could conceive of jurisdiction as "authority to decide" and merits as "authority to decide in a particular way,"[63] but, ultimately, both go to the authority and legitimacy of the resulting judgment.

Consider, for example, the relative legitimacy of the following: A judgment that is correct on the merits but rendered by a court that lacks jurisdiction,[64] a judgment that is incorrect on the merits but rendered by a court that has jurisdiction,[65] or a judgment that seems correct on the merits and rendered by a court that has jurisdiction but resulted from a drastically flawed procedure.[66] Each scenario has its own illegitimacy (of the forum, of the verdict, or of the process), and although those illegitimacies can be framed in different ways, they implicate the same concern—namely, the acceptability of the judgment. Consequently, there is no reason why a defect in jurisdiction should cause any special illegitimacy.

To be sure, particular defects may justify particular effects, but they do not hinge on generalized notions of "jurisdiction." Thus, protection of state-court authority, particularly when a state is not otherwise involved, might help support the imposition of nonwaivable features for certain rules, including jurisdictional rules. But not all jurisdictional rules further such a goal. And, many nonjurisdictional rules are designed to serve values not adequately protected by the parties.[67] The inability to theorize a compelling distinction between jurisdictionality and nonjurisdictionality erodes the special status that jurisdictionality's rhetoric has rarefied.[68]

Nevertheless, I do believe that there are good reasons to retain a healthy, formal distinction between jurisdictionality and nonjurisdictionality—though hybridization makes definitions more difficult. I will have more to say about

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63. *See* Pope v. United States, 323 U.S. 1, 14 (1944) ("Jurisdiction to decide is jurisdiction to make a wrong as well as a right decision."); Dane, *supra* note 17, at 33 ("[A] court without jurisdiction does not even have the right to be right.").

64. For support of such a judgment, see Dobbs, *supra* note 14, at 492 ("In old-fashioned terminology, this is morally wrong. It is unfair to the winning party. . . . Further, it is bad administration of justice; it is inefficient as well as unfair, and it quite properly raises grave public doubts about the judicial system.").

65. For some criticism of such a judgment, see Lee, *supra* note 19, at 1623 ("Suppose the day after Bush v. Gore it was revealed that the justices in the majority had had a covert telephone conference call with Governor Bush in which the candidate promised to appoint a certain conservative jurist to fill the first vacancy on the Court. . . . Clearly the fact that the Court had jurisdiction over the subject matter would no longer secure legitimacy for the decision.").

66. For more on the legitimacy effects of procedure, see Lawrence Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

67. Nonjurisdictional bankruptcy rules, for example, may properly be nonwaivable by a creditor if other creditors' interests will be affected. *See* Kontrick v. Ryan, 540 U.S. 443, 457 n.12 (2004) (acknowledging this point).

68. For more on the value of legitimate authority, see generally Joseph Raz, *Legitimate Authority*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979).

that below.[69] For now, my point is just that the difficulty in conceptually segregating jurisdictional authority and nonjurisdictional authority suggests that jurisdictionality and nonjurisdictionality are more linkable than they might otherwise be thought.

2. History

Historically, the idea of jurisdictionality has changed over time, and the rhetoric of jurisdictionality as something special is a relatively modern conceptualization. As Laura Fitzgerald has shown, English equity courts created their own subject-matter jurisdiction by developing their own equitable defenses and forms of relief, which then gave equity courts jurisdiction to hear and decide common-law claims.[70] Similarly, Dan Dobbs has demonstrated that jurisdiction was often consented to in English courts.[71]

Even U.S. courts have not always treated jurisdiction the way they treat it today. Fitzgerald has argued that Article III incorporated the flexibility of English equity jurisdiction.[72] Federal courts did not emphasize the rigidity of jurisdictionality until around 1900.[73] As a result, as Michael Collins has recounted, "certain of the qualities commonly associated with the federal courts' concededly limited subject matter jurisdiction remained less than fully settled throughout much of the nation's history."[74]

A prime example is the pre-twentieth century use of pleading practice to establish jurisdiction, a practice that left jurisdiction's establishment largely within the parties' control and subject to their consent and waiver.[75] Before 1875, "waiver of jurisdictional objections was commonplace,"[76] and it was a "long settled rule that parties could admit jurisdictional facts."[77] At common law, a party who raised a plea in abatement challenging a jurisdictional issue conceded the merits,[78] and other procedural rules prevented parties from challenging jurisdiction under certain circumstances.[79] As a result, "federal

69. *See infra* text accompanying notes 236–38.

70. *See* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1253–54 (2001) ("So, too, courts of equity defined their own subject matter jurisdiction by developing unique substantive defenses to the enforcement of rights created at common law.").

71. Dobbs, *supra* note 24, at 51.

72. *See* Fitzgerald, *supra* note 70, at 1208–09 (discussing the relationship between Article III and English equity-court traditions).

73. Dane, *supra* note 17, at 99–105 (tracing this history).

74. Collins, *supra* note 12, at 1831.

75. *Id.* at 1832.

76. *Id.* at 1876.

77. Dobbs, *supra* note 14, at 511.

78. *See* BENJAMIN ROBBINS CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 126 (1880); JAMES GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 300 (1832).

79. *See, e.g.*, Hartog v. Memory, 116 U.S. 588, 590 (1886) ("Neither party has the right . . . without pleading at the proper time and in the proper way, to introduce evidence, the only purpose of which is to make out a case for [jurisdictional] dismissal."). This was not necessarily a consistent

courts continued to hear cases even when it became clear that jurisdiction may have been lacking in fact, or even concocted."[80] It was not until 1936 that jurisdictionality attained and solidified the special stature that is conventionally thought to characterize it today.[81] This stature is therefore quite recent in light of jurisdiction's long history.

3. Modern Practice

In addition to theory and historical practice, certain features of current practice undermine the special status of jurisdictionality. As a matter of existing doctrine, jurisdictionality is not as pure as the rhetoric makes it out to be. I will describe the impurities in more detail in Part II, but three brief examples will help set the stage.

a. Jurisdiction to Determine Jurisdiction

The first example is the odd doctrine "jurisdiction to determine jurisdiction."[82] The idea behind it is that a court necessarily needs some power to decide whether it has jurisdiction or not.[83] The traditional view of this doctrine is that a federal court actually has subject-matter jurisdiction for purposes of deciding the jurisdictional question.[84] But only the Constitution and Congress together can give a federal court subject-matter jurisdiction, and nothing suggests that they have done so for such purposes.[85] Instead, "jurisdiction to determine jurisdiction" is a judge-made "bootstrap,"[86] and its existence runs contrary to the limited nature of federal jurisdiction, which is supposedly immune from court control and policy necessities.[87] This traditional

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position between 1875 and 1936, when the Court went through a transition period regarding jurisdictionality. *See, e.g.*, Morris v. Gilmer, 129 U.S. 315, 326–29 (1889) (allowing a party's otherwise tardy jurisdictional challenge).

80. Collins, *supra* note 12, at 1877.

81. *See id.* at 1834 (explaining that the 1875 Act began a trend that culminated with the *McNutt* decision in 1936).

82. For a seminal article on the topic, see Dobbs, *supra* note 14. For an authoritative modern treatment, see KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE §§ 4.4, 5.1 (2d ed. 2009).

83. *See* Tex. & Pac. Ry. Co. v. Gulf, Colo. & Santa Fe Ry. Co., 270 U.S. 266, 274 (1925) ("Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist."); RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1580 (4th ed. 1996) ("A federal court always has jurisdiction to decide whether it has jurisdiction.").

84. *See* United States v. United Mine Workers, 330 U.S. 258 (1947) (holding that a court has jurisdiction to issue lawful injunctions to preserve the status quo while the jurisdictional issue is being decided).

85. *But see* Sager, *supra* note 18, at 22 (asserting that "once a court is established and empowered to decide a group of cases, it necessarily acquires some jurisdiction from its very status as a court" and that "jurisdiction to decide jurisdiction" is "implicit in the grant or grants of jurisdiction upon which the court is founded").

86. *See* Note, *Res Judicata and Jurisdiction: The Bootstrap Doctrine*, 53 HARV. L. REV. 652 (1940). The term was made famous by Dobbs, *supra* note 14.

87. For a recent exploration of the doctrine, see Kevin M. Clermont, *Sequencing the Issues for*

view of "jurisdiction to determine jurisdiction" thus shows that jurisdictionality is more malleable than it presupposes.

A slightly different perspective of "jurisdiction to determine jurisdiction" is that it is essentially a doctrine of issue preclusion,[88] or, as perhaps more appropriately cast, a "rule of jurisdictional finality."[89] In this formulation, which is reflected in the Restatement,[90] the primary point of the doctrine is usually to preclude relitigation of jurisdiction once a judgment is rendered. In short, a judgment often precludes relitigation of the rendering court's subject-matter jurisdiction, even if the rendering court lacked subject-matter jurisdiction.[91]

Even as a kind of preclusion doctrine, however, the "rule of jurisdictional finality" says something about jurisdiction. After all, a traditional hallmark of subject-matter jurisdiction is that a judgment entered by a court that lacks subject-matter jurisdiction is void and has no preclusive effect.[92] The "rule of jurisdictional finality" is a judicially created exception[93] that grants preclusive effect on the question of subject-matter jurisdiction, and this is true even if the jurisdiction of the rendering court was never challenged expressly. The doctrine softens the typical effects of jurisdictionality, the lack of which should result in a void and nonpreclusive judgment.[94]

Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion, 63 FLA. L. REV. 301, 317–18 (2011).

88. There are some differences between "jurisdiction to determine jurisdiction" and preclusion. *See* CLERMONT, *supra* note 82, at §§ 4.4(B)(2)–(3), 5.1(A)(1)–(3) (distinguishing jurisdiction to determine jurisdiction from claim and issue preclusion).

89. Durfee v. Duke, 375 U.S. 106, 115 (1963). Perhaps the first case articulating this principle was *McCormick v. Sullivant*, 23 U.S. (10 Wheat.) 192, 199 (1825) (holding that a judgment was res judicata even if issued without subject-matter jurisdiction).

90. RESTATEMENT (SECOND) OF JUDGMENTS § 12, at 115 (1982) ("When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in a subsequent litigation except [under certain conditions].").

91. *See* Chicot Cnty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940) ("[Federal courts'] determinations of [whether they have jurisdiction to hear a case] may not be assailed collaterally."); Stoll v. Gottlieb, 305 U.S. 165, 171 (1938); *see also* Clermont, *supra* note 87, at 317 ("Because the issue of jurisdiction or notice was actually litigated and determined, even if erroneously, the defendant cannot relitigate the same issue in subsequent litigation."). There appear to be some exceptions. *See* Kalb v. Feuerstein, 308 U.S. 433 (1940) (allowing collateral attack under the Bankruptcy Act); RESTATEMENT (SECOND) OF JUDGMENTS § 12, at 115 (1982) (setting out three exceptions); Clermont, *supra* note 87, at 318 (acknowledging that a jurisdictional ruling will not preclude relitigation "in special circumstances, such as where the court *plainly* lacked subject-matter jurisdiction or where the judgment *substantially* infringes on the authority of another court or agency").

92. *See* Dobbs, *supra* note 14, at 496 n.31 (expressing this "traditional view").

93. Preclusion law is judicially created. *See* Dan B. Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEX. L. REV. 854, 882–90 (1965).

94. Preclusion is a nonjurisdictional affirmative defense. *See* FED. R. CIV. P. 8(c). Thus, the operative effect of "jurisdiction to determine jurisdiction" is established only by the invocation of the preclusion defense by a party, and it may be avoided by a party's waiver or forfeiture of the defense.

The justification for the "rule of jurisdictional finality" helps explain that softening in a decidedly un-jurisdiction-like way. Preclusion is necessary, the Supreme Court has explained, to curtail endless litigation about subject-matter jurisdiction.[95] A more pragmatic and sensible justification could not be conceived, but it is nonetheless antithetical to jurisdictionality, which usually marginalizes such considerations to irrelevancy. That jurisdictionality must yield in such an event suggests that it is not as resistant to practical considerations as the trope might suggest.

b. Resequencing

The second example is the recently developed doctrine of resequencing.[96] The traditional conception of jurisdiction is that it must be resolved at the outset—the court cannot proceed to decide other nonjurisdictional matters until it has satisfied itself of jurisdiction.[97] This conceptualization reflects a temporal manifestation of the rigid distinction between jurisdictionality and nonjurisdictionality. And it coincides with the "power" conception of jurisdiction, without which the court lacks the power to resolve other issues.[98]

But this rigidity has softened in recent cases, in which the Supreme Court has expressed a willingness to allow lower courts to resolve a case on nonjurisdictional procedural grounds even when jurisdictional issues remain unresolved.[99] In *Sinochem International Co. v. Malay International Shipping Corp.*, for example, the Court allowed the dismissal of a case under the nonjurisdictional procedural doctrine of forum non conveniens without first establishing the existence of subject-matter jurisdiction.[100] At the same time,

95. *See* Durfee v. Duke, 375 U.S. 106, 113–14 (1963) ("It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined.") (quoting *Stoll*, 305 U.S. at 172); *see also* Dobbs, *supra* note 14, at 499 (calling it "quite a valuable tool in stopping wasteful litigation").

96. For extended treatments of the subject, see Clermont, *supra* note 87; Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725 (2009); Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1 (2001); Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1 (2010).

97. *See* Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884) ("Without jurisdiction the court cannot proceed at all in any cause."); *see also* Collins, *supra* note 12, at 1830–31 (calling jurisdiction a "first principle").

98. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception."); *cf. Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is power to declare the law.").

99. *See* Fitzgerald, *supra* note 70, at 1207 ("But in significant cases, forming a competing tradition with its own deep roots, the Court has exchanged [its] formal, jurisdiction-first view for a more malleable approach . . . .").

100. *See* Sinochem Int'l Co. v. Malay Int'l Shipping Corp., 549 U.S. 422, 431 (2007) (allowing dismissal under the forum non conveniens doctrine without first establishing subject-matter jurisdiction); *cf.* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583–88 (1999) (allowing dismissal

the Court has insisted that satisfaction of jurisdiction is a prerequisite for deciding the merits of a case.[101]

Resequencing thus shifts the line from between jurisdictionality and nonjurisdictionality to between jurisdictionality and merits. The division between jurisdiction and merits leaves out a broad swath of nonjurisdictional procedural issues (such as forum non conveniens) that could be lumped in with jurisdictional issues for resequencing purposes.[102] In resequencing, then, matters of jurisdiction are not so special after all.[103] They share commonality with nonjurisdictional matters of procedure as well, and that commonality is expressed in terms of malleability.

c. Discretionary Declination of Jurisdiction

The third example is in the judicially created discretion, which courts repeatedly exercise, to decline jurisdiction. If jurisdiction is a "virtually unflagging obligation,"[104] federal courts seem to have missed the memo. As David Shapiro has shown, federal courts routinely choose not to exercise jurisdiction, even if jurisdiction is proper, and despite the common rhetoric that jurisdiction is not subject to court control.[105] Abstention doctrines are the main culprit, with the Supreme Court allowing, and even requiring, lower federal courts to dismiss cases when jurisdiction is proper because of the consideration of other values.[106] But other doctrines exist as well, such as prudential standing

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for lack of personal jurisdiction without first establishing subject-matter jurisdiction); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997) (calling class certification determinations "logically antecedent" to Article III standing issues).

101. *See Sinochem*, 549 U.S. at 431 ("Jurisdiction is vital only if the court proposes to issue a judgment on the merits."); RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1412 (6th ed. 2009) ("If the record fails to disclose a basis for federal jurisdiction, the court must suspend determination of the *merits* of the controversy unless the failure can be cured.") (emphasis added).

102. Clermont, *supra* note 87 (arguing that resequencing allows a court to dismiss on procedural questions such as abstention, exhaustion, class certification, and venue before any jurisdictional determination).

103. True, jurisdiction differs from procedure in that the latter can be bypassed in favor of a merits determination while the former cannot. *See id*. Jurisdiction may indeed have its own special quirks. But my point here is merely to suggest that those quirks are overstated.

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

105. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) ("[S]uggestions of an overriding obligation, subject only and at most to a few narrowly drawn exceptions, are far too grudging in their recognition of judicial discretion in matters of jurisdiction."); *see also* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 990 (2009) (discussing abstention in the context of jurisdictional obligation).

106. *See* FALLON ET AL., *supra* note 101, at 1049–152. For indictments of abstention on these grounds, see Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 103–04 (1986); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

and the judicially created justiciability doctrine of declining jurisdiction over a case despite authorization to hear the case under Article III.[107] This discretion demonstrates that jurisdiction's unique ideal of isolation and impenetrability is attained less frequently than it purports.

II.
HYBRIDIZED JURISDICTION: A TAXONOMY

For these reasons, we should rethink jurisdiction and its relationship to nonjurisdictional values and effects. Jurisdiction need not be cast as so inflexible, isolated, and special. In this Part, I begin that process by developing a taxonomy to frame the various ways that jurisdictionality can incorporate, link with, and relate to elements of nonjurisdictionality. No doubt there are other ways to classify and group the different types of hybridizations, I offer my particular taxonomy to spur further thinking on the topic, not to maintain that my classifications operate to the exclusion of others.

A. Incorporated Hybridization

The form of hybridization with the strongest connection between jurisdictionality and nonjurisdictionality involves jurisdictional rules and doctrines that, as a matter of their own definitions or conceptualizations, incorporate nonjurisdictional features. Incorporation can occur as a matter of judicial doctrine or as a matter of statutory expression.

1. Doctrinal Incorporation

The quintessential jurisdictional doctrine that incorporates nonjurisdictional features is personal jurisdiction. In its modern conception, personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty but as a matter of individual liberty."[108] Because of this basis, the requirement of personal jurisdiction can, like other personal rights, be waived, consented to, or forfeited.[109] It is even subject to estoppel principles imposed

107. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 501 (1975). For discussions of prudential standing, see FALLON ET AL., *supra* note 101, at 128–29; William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 251–53 (1988).

108. Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest."). The traditional conceptualization of personal jurisdiction, of course, was one of governmental power and territorial sovereignty. *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."), *abrogated by* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). For a recent discussion of the doctrine, see A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617 (2006).

109. *See Ins. Corp.*, 456 U.S. at 703–04 (discussing both express and implied waiver); FED. R.

under the aegis of the Federal Rules of Civil Procedure's sanctions provisions.[110] It is therefore a jurisdictional doctrine that inherently incorporates nonjurisdictional features.

The takeaway from personal jurisdiction is revolutionary: doctrinal incorporation essentially broadens the definitional scope of jurisdictionality to include nonjurisdictional matters. Either personal jurisdiction is *not* jurisdictional,[111] or personal jurisdiction is a kind of hybrid. Viewing personal jurisdiction as a definitional hybrid is a fundamentally different kind of conceptualization of jurisdiction than that to which we are accustomed. If jurisdiction can incorporate nonjurisdictional features, then it is no longer limited to the rigid set of characteristics currently associated with jurisdiction. Doctrinal incorporation opens the door to broadening our understanding of the nature of jurisdiction.

2. Statutory Incorporation

Personal jurisdiction, though, could be cast as an anomaly because of its nexus to the Due Process Clause and its separate jurisdictional status and because it is not *subject-matter* jurisdiction, which is the power of the court over the cause irrespective of one party's wishes.

Perhaps personal jurisdiction is different, which is why I have described it separately (though I will have more to say about the scope of doctrinal incorporation later). But that does not mean that subject-matter jurisdiction cannot incorporate nonjurisdictional features too. Congress, after all, controls the subject-matter jurisdiction of the federal courts, and there is no reason why it could not draw those jurisdictional boundaries with nonjurisdictional features in mind. Congress can then authorize these boundaries to move, or perhaps bulge, based on party conduct or equity or judicial discretion. This may result in jurisdictional boundaries that are more circuitous than straight, but they are no less jurisdictional.[112]

CIV. P. 12(h)(1) (providing for waiver of the personal jurisdiction defense).

110. *See id.* at 705–06 (estopping the defendant from asserting the personal jurisdiction defense as a sanction for failing to comply with jurisdictional discovery requests).

111. I am open to this characterization of personal jurisdiction, but I remain agnostic for purposes of this Article. I aim here to show that if the doctrine is jurisdictional, then hybridization provides a viable explanation of how that characterization can make sense and of what that characterization then means for our conceptualization of jurisdictionality.

112. *See* Dane, *supra* note 17, at 65 ("[I]magine a time limit that . . . did explicitly provide that it would not apply in the event of excusable neglect. Is there anything that would prevent the line so drawn from being jurisdictional? Admittedly, it would be a complicated, even difficult, jurisdictional line. But many jurisdictional lines are complicated and difficult."); Scott Dodson, *Appreciating Mandatory Rules: A Reply to Critics*, 102 NW. U. L. REV. COLLOQUY 225, 229–30 (2008), http://www.law.northwestern.edu/lawreview/Colloquy/2008/7 (making a similar point).

A ready example is § 2107.[113] Section 2107(a) states that no appeal shall bring a judgment for review unless a notice of appeal has been filed within thirty days of the judgment.[114] The Court has held that deadline to be jurisdictional.[115] Section 2107(a) by itself seems fairly clear, simple, and easily characterized as jurisdictional: unless a notice is filed within thirty days, the court of appeals has no jurisdiction.

Section 2107(c), however, complicates matters. That provision allows a court to extend the thirty-day deadline "upon a showing of excusable neglect or good cause."[116] The power to extend the deadline can be exercised retroactively, even if the motion to extend is filed *after* the expiration of the initial thirty-day deadline.[117] Section 2107(c) also allows a district court to "reopen" the deadline retroactively upon a finding that the putative appellant did not receive timely notice of the judgment and that no party would be prejudiced.[118] The statutory jurisdictional limit thus expressly contemplates judicial discretion and considerations of equity.

It is true that the statutory powers to tinker with the jurisdictional deadline under § 2107(c) are given to the district court rather than the appellate court, but Congress could have given them to the appellate court, and the difference is immaterial for my purposes here. The general point would be the same in either case: the appellate deadline may be jurisdictional, but its boundary is affected by the equitable discretion of the federal courts and on party conduct (as in making an appropriate and timely motion). The statute expressly incorporates nonjurisdictional features into its jurisdictional limit.

At first blush, this statutory hybridization in appellate jurisdiction seems odd because considerations of equity and judicial discretion are antithetical to jurisdictional custom. But, to reiterate, nothing inherent in jurisdictionality prevents this kind of incorporation. Nonjurisdictional considerations may create bulges in the jurisdictional line, but that does not make the line itself any less jurisdictional.

3. Implied Incorporation

The civil appellate deadline in § 2107(c) is an obvious candidate for incorporated hybridization because it expressly permits extensions of the jurisdictional thirty-day deadline based on the discretionary factor of "good

113. Another example might be 28 U.S.C. § 1367(c) (2006), which allows district courts discretion to decline to exercise supplemental jurisdiction. I discuss § 1367(c) in more detail below. *See infra* text accompanying notes 214–227.

114. 28 U.S.C. § 2107(a).

115. Bowles v. Russell, 551 U.S. 205, 214 (2007) ("Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement.").

116. 28 U.S.C. § 2107(c).

117. *Id.* (stating that the motion may be filed "not later than 30 days after the expiration of the time otherwise set for bringing appeal").

118. *Id.*

cause." The text itself explicitly incorporates nonjurisdictional features, so the characterization naturally follows.

But what if the text is not so clear? In a less clear case, the taxonomy might make room for incorporated hybridization that is implicit, if not explicit. Those who subscribe to interpretive tools that go beyond express terms might find little difference between express and implied hybridization. The critical point I want to highlight here is that, whatever one's preferred interpretive methodology, the mere characterization of a statutory limit as *jurisdictional* does not preclude implicit incorporation of nonjurisdictional features.

Expanding the taxonomy's "statutory incorporation" category to statutes with implicit incorporation might address a number of troublesome circumstances. Justice Hugo Black's dissent from the denial of certiorari in *Teague v. Regional Commissioner of Customs* illustrates one possibility.[119] In that case, the petitioner filed two days outside § 2101's ninety-day statutory deadline to file a petition for certiorari[120] because an unusually severe snowstorm delayed the mail for four days.[121] The statute did not expressly encompass an exception for untimely petitions, but Justice Black nevertheless would have allowed the petition. He wrote:

> I agree, of course, that we should follow the statute. But we must first determine what the statute means. . . . [The Court] suggest[s] that the statute deprives this Court of all power to hear cases filed after the 90-day period, regardless of whether the delay was caused by snowstorms making the transportation of the mails impossible. Under no known principle of statutory construction can such an interpretation of § 2101(c) be supported. The statute does not say explicitly that the time limitation may be inapplicable under certain extenuating circumstances but it also does not say that the time limit must be ruthlessly applied in every conceivable situation, without regard to hardships involved or extenuating circumstances present. The Court therefore must decide what is the more sensible interpretation of the statute. I for one cannot think of any purpose Congress might have had that could possibly be served by holding that a litigant can be defeated solely because of a delay that was entirely beyond his control.[122]

Perhaps Justice Black was arguing for an exception to the statutory limit based on equitable considerations. If so, that argument would have been at odds with the modern conception of jurisdictionality, for equity cannot overcome a

119. 394 U.S. 977 (1969).

120. 28 U.S.C. § 2101.

121. Teague v. Reg'l Comm'r of Customs, 394 U.S. 977, 977, 981 (1969) (Black, J., dissenting from denial of certiorari). A related example is Justice Douglas's dissent from a denial of certiorari in *Deal v. Cincinnati Bd. of Educ.*, 402 U.S. 962, 962–64 (1971) (arguing that the certiorari deadline should be excused for a petition filed one day late because the petition would have been timely if not lost by the courier).

122. *Teague*, 394 U.S. at 982–83 (Black, J., dissenting from denial of certiorari).

jurisdictional bar. But if jurisdictionality can be hybridized, and if that hybridization can be implied, then Justice Black's argument can be characterized in a different way that is far more satisfying. One need not argue for a judicially created exception at all. Rather, one can construe the jurisdictional statute as implicitly incorporating nonjurisdictional features, much as § 2107(c) does expressly. Following that implicit hybridization is *consistent* with jurisdictionality, not contrary to it.[123]

One might rightfully object here on the ground that implicit incorporation functionally looks a lot like judicial derogation of jurisdictional limits. I do not mean to sanction judicial disregard of statutory limits, whether jurisdictional or not. But I do mean to argue that a jurisdictional statute can incorporate nonjurisdictional features, such as equity and discretion. And if one believes that statutory directives can be implicit as well as explicit, then there is no reason why those implied directives cannot be hybridizations. Under such an interpretive methodology, construing a jurisdictional statute to implicitly incorporate nonjurisdictional features can be justified as *following* the statute, rather than being in derogation of it. The point here is that things may depend upon one's preferred method of statutory interpretation, but they ought *not* depend upon the jurisdictional nature of the statute at hand.

B. Linked Hybridization

A second form of hybridization is not inherently or textually incorporated into jurisdictional contours but instead manifests itself through a direct connection between jurisdictionality and nonjurisdictionality. This "linked hybridization" encompasses jurisdictional rules and doctrines that are tied to nonjurisdictional rules or doctrines in ways that condition jurisdictionality on nonjurisdictional occurrences. Linked hybridization, unlike incorporated hybridization, treats the jurisdictional and nonjurisdictional features as coupled but distinct, allowing them to be segregated analytically for differential treatment. There are two subspecies in this category: triggers and preconditions.

1. Triggers

Triggers are nonjurisdictional timing mechanisms for controlling jurisdictional questions. The trigger does not affect the answer to the jurisdictional question except to the extent that the answer changes based on *when* the question is answered. In visual terms, the jurisdictional bullet fires only when the trigger is pulled. Nothing can stop the bullet once the trigger is pulled, but when and how that trigger is pulled is subject to nonjurisdictional considerations.

The quintessential trigger is the time-of-invocation rule. The traditional conceptualization of jurisdiction is that it must be established at the time a party

123. For a related discussion of *Teague* and jurisdictional time limits, see Dane, *supra* note 17, at 18–20 (arguing that jurisdictional limits need not be read literally and mercilessly).

invokes the federal forum.[124] This time-of-invocation rule is consistent with the "power" theory of jurisdiction: if a court lacks jurisdiction, it has no authority to do anything other than dismiss.[125]

Despite its connection to judicial power, the time-of-invocation rule is itself a nonjurisdictional rule. In other words, the time-of-invocation rule can be shifted or discarded based on traditionally nonjurisdictional justifications. Shifting the rule can make a profound difference in jurisdictional determinations because developments in cases as they progress can change jurisdictional entitlements. Thus, for example, a case between non-diverse parties with a federal claim and a related state claim that is filed or removed to federal court based on federal-question jurisdiction can stay in federal court even after the federal question claim is dismissed because jurisdiction was settled at the time of invocation.[126] Similarly, a case that originally had no basis for federal jurisdiction and thus was filed in state court can, if it later acquires a basis for federal jurisdiction, be removed to federal court because the jurisdictional question was settled not at the time of state filing but at the time of federal removal.[127]

One can quibble over the proper temporal place for jurisdictional determinations, but I am not concerned with that issue here. Rather, the critical feature of the time-of-invocation rule for my purposes is that the rule is nonjurisdictional. The Court confirmed its nonjurisdictional character in *Caterpillar Inc. v. Lewis*,[128] in which a case was removed to federal court on grounds of diversity jurisdiction, but in fact a non-diverse defendant existed at the time of removal. Accordingly, at the time when jurisdiction should have been assessed, the court lacked jurisdiction. Later, the jurisdictional defect was

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124. Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824) ("It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events.").

125. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception."). On the other hand, the rule allows a federal court to hear a case in which jurisdiction was established at the time of invocation even if subsequent events would destroy jurisdiction. *See infra* text accompanying note 126.

126. *See* Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 583–84 (2004) (Ginsburg, J., dissenting) ("The Court has long applied Marshall's time-of-filing rule categorically to postfiling changes that otherwise would *destroy* diversity jurisdiction."); St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294–95 (1938) ("It uniformly has been held that in a suit properly begun in the federal court the change of citizenship of a party does not oust the jurisdiction. The same rule governs a suit originally brought in a state court and removed to a federal court."); *id.* at 289–90 ("Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."). There are exceptions to this general rule, of course. *See, e.g.*, 28 U.S.C. § 1447(e) (2006) (authorizing remand after a post-removal joinder that destroys subject-matter jurisdiction).

127. *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 73 (1996) (interpreting 28 U.S.C. § 1441 as embodying the time-of-removal rule); *cf.* 28 U.S.C. § 1446(b) (providing for removal when an amended pleading makes clear that the case "has become removable").

128. 519 U.S. 61 (1996).

"cured" when the non-diverse defendant settled and was dismissed, leaving all diversity requirements satisfied.[129]

Although the jurisdictional defect had been cured, the statutory defect—noncompliance with the time-of-invocation rule—remained.[130] Nevertheless, the Court held that, because the case had already gone to trial, "considerations of finality, efficiency, and economy" overcame the time-of-invocation requirement.[131] *Caterpillar* thus makes clear that the time-of-invocation rule is nonjurisdictional and susceptible to policy values that could not apply to a jurisdictional doctrine.[132] In short, the time-of-invocation rule is a trigger for the jurisdictional determination, but nonjurisdictional considerations help determine *when* that trigger is pulled.

Note that the time-of-invocation rule is not entirely divorced from jurisdictional requirements. If the time-of-invocation rule applies and requires dismissal, the dismissal is for lack of subject-matter jurisdiction under Rule 12(b)(1), with all the normal characteristics of a jurisdictional defect.[133] In other words, the time-of-invocation rule does trigger a jurisdictional bullet. But the point here is that the trigger itself is subject to nonjurisdictional considerations and, in cases not governed by statute, purely court created.[134] Thus, the procedural rule controls the jurisdictional question.

2. Preconditions

Preconditions are antecedent nonjurisdictional events that link directly to jurisdictional questions.[135] Take, once again, the appellate deadline of § 2107, which requires that a "notice of appeal" be "filed" within the time window.[136] The statute conditions appellate jurisdiction on the existence of a timely filed notice. But what constitutes a "notice" or a "filing" is not defined in the statute

129. *Id.* at 64, 73.

130. *Id.* at 73.

131. *Id.* at 75. Despite the nonjurisdictional status of the time-of-invocation rule, not all of its manifestations are overcome by this combination of factors. *See* Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 574 (2004) (refusing to shift the rule for post-invocation changes of citizenship of a continuing party).

132. Other cases have held similarly. *See* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 836–38 (1989) (correcting a time-of-filing flaw in an original diversity action); Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699 (1972) (correcting a time-of-removal flaw); Baggs v. Martin, 179 U.S. 206, 209 (1900) (curing a time-of-filing defect); *cf.* Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 16 (1951) (expressing the same principle in dictum).

133. *See Grupo Dataflux*, 541 U.S. at 574–75 ("Unless the Court is to manufacture a brand-new exception to the time-of-filing rule, dismissal for lack of subject-matter jurisdiction is the only option available in this case.").

134. *See id.* at 583 (Ginsburg, J., dissenting) (explaining that the "practical time-of-filing rule [is not derived] from any constitutional or statutory text").

135. I introduced this concept in Dodson, *supra* note 112, at 229. *See also* Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399, 410 (1986) ("[N]otice of appeal timing limitations simply impose a mandatory precondition to acquiring appellate jurisdiction . . . .").

136. 28 U.S.C. § 2107(a) (2006).

and thus may be subject to some judicial discretion in interpretation. Thus, for example, the word "notice" can mean an appellate brief as well as a formal notice of appeal.[137] In addition, the term "filed" can include a pro se prisoner's delivery of the petition to prison officials.[138]

The latter scenario was at issue in *Houston v. Lack*, a case in which a pro se prisoner filed a habeas petition that was denied by the district court. The prisoner drafted a notice of appeal and, twenty-seven days after the judgment, delivered the notice to prison officials for forwarding to the court. The notice was then filed with the court four days later—one day after the thirty-day deadline.[139] The Supreme Court noted that the statute "does not define when a notice of appeal has been 'filed' or designate the person with whom it must be filed."[140] The corresponding rules, the Court acknowledged, do specify that the notice must be filed with the clerk of the district court, but they do not state *when* that must happen.[141] Considering the special difficulties confronting pro se prisoner litigants seeking to ensure timely filing of appellate papers, the Court construed "filed" to mean, in cases of pro se prisoners, delivery to prison officials.[142]

Other examples abound. A "final" decision is required for federal appellate jurisdiction,[143] but what constitutes a "final" decision may be subject to some nonjurisdictional considerations. Thus, an interlocutory district-court order can be deemed "final" under the judicially created "collateral order" doctrine if, among other things, the issue is "too important" to be denied immediate review.[144] Also, a district court can exercise discretion to render certain nonfinal decisions as final if it finds that there is "no just reason for

137. *See* Smith v. Barry, 502 U.S. 244, 245 (1992) (treating an appellate brief as a "notice of appeal" for purposes of Rule 3 of the Federal Rules of Appellate Procedure).

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

139. *Id.* at 268.

140. *Id.* at 272. The Court was unanimous on this point. *See id.* at 278 (Scalia, J., dissenting) (conceding that "the statute itself does not define when a notice of appeal has been 'filed' or designate with whom it must be filed").

141. *Id.* at 273 ("The question [under Rules 3 and 4] is one of timing, not destination . . . . [N]either Rule sets forth criteria for determining the moment at which the 'filing' has occurred.").

142. *Id.* at 270–71.

143. 28 U.S.C. § 1291(a) (2006). Another "finality" rule governs Supreme Court appellate jurisdiction over state-court decisions and admits of some exceptions despite its jurisdictional nature. *See* 28 U.S.C. § 1257(a); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 479–83 (1975). For a discussion of these finality requirements in the context of jurisdictional clarity, see Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1 (2011). For criticism of the collateral-order rule, see Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237 (2007).

144. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (defining the collateral-order doctrine as "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated"); *see also* United States v. Nixon, 418 U.S. 683, 690–92 (1974) (holding an order rejecting a claim of executive privilege to be appealable).

delay."[145] Finally, a district court can certify an interlocutory decision as appealable if it finds that the decision "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[146]

Note that these preconditions to jurisdiction differ from procedural preconditions to suit. Procedural preconditions to suit, such as exhaustion requirements, are preconditions, but they are not jurisdictional hybridizations because they do not implicate jurisdictional determinations at all. Instead, they are stand-alone procedural rules that may be raised by way of defense or, perhaps more often, by way of a motion under Rule 12(b)(6) or Rule 12(c).[147] By contrast, preconditions to jurisdiction are nonjurisdictional requirements whose satisfactions are necessary for the exercise of jurisdiction.[148]

A competing take on preconditions is that they are merely interpretations of jurisdictional requirements and thus are themselves jurisdictional.[149] Because appellate jurisdiction requires a "final" decision, it could be argued that a determination of finality is not a nonjurisdictional precondition but rather an interpretation of an inherent component of appellate jurisdiction. Jurisdictional terms may need judicial explication just as any other terms, and that explication does not necessarily hybridize them with nonjurisdictional features.

In general, I agree that some interpretations of jurisdictional terms are themselves jurisdictional and unhybridized. The statutory directive that a corporation is a citizen of its state of incorporation[150] is a jurisdictional requirement that seems, at least on its face, unsusceptible to direct hybridization (though a more subtly linked hybridization might still occur at the proof stage).[151]

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145. FED. R. CIV. P. 54(b).

146. 28 U.S.C. § 1292(b). One could interpret this as a form of statutory incorporation of hybridization instead of a precondition, in that § 1292(b) creates an exception to the finality requirement of appellate jurisdiction that is grounded in judicial discretion. My thanks to David Shapiro for prodding me on this point.

147. *See, e.g.*, Reed Elsevier Inc. v. Muchnick, 130 S. Ct. 1237, 1241, 1246 (2010) (holding the registration requirement of the Copyright Act to be a precondition to suit); Jones v. Block, 549 U.S. 199, 216 (2007) (holding exhaustion to be a mandatory but nonjurisdictional precondition to suit); Zipes v. TWA, 455 U.S. 385, 393 (1982) (holding the limitations period for filing a Title VII lawsuit to be a nonjurisdictional precondition to suit).

148. *See* Pinion v. Dow Chem., U.S.A., 928 F.2d 1522, 1525 n.3 (11th Cir. 1991) ("As mandatory preconditions to our exercise of jurisdiction, however, filing rules like Rule 4(a) are 'jurisdictional' in the sense that, absent compliance, we can acquire no jurisdiction of the cause even if it is otherwise within our competence."); *cf.* Smith v. Barry, 502 U.S. 244, 248 (1992) ("Although courts should construe [the 'notice' requirement] liberally when determining whether it has been complied with, noncompliance is fatal to an appeal.").

149. My thanks to Sam Jordan for encouraging me to think through this counterproposal.

150. 28 U.S.C. § 1332(c).

151. *See infra* text accompanying notes 153–77.

In other circumstances that are more ambiguous, such as the finality requirement, an interpretative characterization may be plausible. I do think that some requirements, such as the "filed" requirement of § 2107, are more clearly preconditional than interpretive. But I concede that, in many cases, both characterizations are possible. My primary aim is not so much to definitively resolve the characterization as to demonstrate the viability of hybridization as a possibility, and then to open the floor for debate.

Having said that, however, I generally find the hybridization characterization more satisfying than the interpretative characterization for two reasons. First, hybridization narrows jurisdiction more than interpretation, which seems to retain full jurisdictional status, and, for reasons discussed in Part IV, the narrowing of jurisdiction has much to commend it.[152] Second, hybridization helps resolve the tension between jurisdictionality and discretion better than interpretation. Hybridization conceptually disaggregates the jurisdictional issue (whether the appellate court has jurisdiction, an issue that is not subject to discretion) from the nonjurisdictional issue (whether the decision below is "final," which is subject to discretion) in a way that alleviates the tension. By contrast, interpreting a purely jurisdictional requirement in a flexible way exacerbates the tension.

For those who insist that the finality doctrine is still just a matter of interpretation, the taxonomy demonstrates how a modest reorientation of the conceptualization of the interpretative process can be useful. Instead of thinking of the finality doctrine as a flexible interpretation of a firm jurisdictional phrase, the use of implied-incorporation hybridization discussed above might suggest that Congress implicitly incorporated flexibility into the meaning of "finality." Hybridization thus provides an alternative to the interpretive theory.

C. Indirect Hybridization

The subtlest form of hybridization is what I term "indirect hybridization." These are jurisdictional rules and doctrines that cross paths with generalized nonjurisdictional rules or doctrines in ways that can allow for the mixing of the two, but they are not linked as directly as preconditions or timing rules. There are at least two subspecies of indirect hybridization. The first encompasses matters of proof, and the second encompasses prophylactic rules.

1. Matters of Proof

Jurisdiction itself is "a legal conclusion, a *consequence* of facts rather than a provable 'fact.'"[153] In other words, jurisdiction flows from the determination of certain facts. But the determination of those facts may not itself be

152. *See infra* text accompanying notes 236–38.

153. Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536, 541 (7th Cir. 2006) (Easterbrook, J.).

jurisdictional. To the contrary, our adversarial system delegates to the parties the primary role in the identification, isolation, development, and proof of facts, including jurisdictional facts.

Party control over these facts and the nonjurisdictional rules that attach to them enable regulation of jurisdiction in a number of ways. The following examples illustrate how.

Normal diversity jurisdiction requires that the amount in controversy exceed $75,000.[154] There is no dispute that the amount-in-controversy threshold is a jurisdictional issue—if the amount does not exceed that threshold, then the court lacks diversity jurisdiction.[155] But how does the court determine whether that requirement is met?

The answer is that the court relies upon a series of standards of pleading and proof that lead to a "formal" finding on jurisdiction that may be at odds with the "actual" existence or nonexistence of jurisdiction.[156] The reason is that the law requires that a decision be made one way or another, and the need for a decision can be more important than the correctness of the decision.[157] Further, because the parties select the facts and arguments that the court considers, the court may reach a decision that, though justified on what the parties present, nevertheless is incorrect.[158] In other words, procedural mechanisms govern and control the jurisdiction-determining process.

Several procedures illustrate how this occurs. At the pleading stage, the plaintiff's good-faith allegation controls unless it can be shown to a legal certainty that the plaintiff cannot recover that amount.[159] As long as the allegation is in good faith and unchallenged, then the court has jurisdiction. But because jurisdiction is predicated on the parties' pleading choices, it may have little

154. 28 U.S.C. § 1332(a).

155. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (calling the amount-in-controversy requirement "an ingredient of subject-matter jurisdiction").

156. These terms are akin to what Michael Pardo calls "procedural accuracy" and "material accuracy" and to what Robert Summers calls "formal legal truth" and "substantive truth." Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1470 (2010); Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding—Their Justified Divergence in Some Particular Cases*, 18 LAW & PHIL. 497, 498 (1999).

157. *See* Summers, *supra* note 156, at 505–06 ("The law almost invariably calls for a definite decision, for or against one side to litigation. . . . [T]he judicial proceeding may be characterized less as a search for substantive truth than as a search for a definite winner.").

158. *See id.* at 504 ("[T]he fact-finder is merely to sit back and hear evidence presented by the opposing lawyers, evidence which at least in some cases would fall short of the whole truth that might be found were the court itself to make an independent investigation."); *id.* at 505 ("Among other things, this means that some facts may be formally found or not found, even though the substantive truth be otherwise. Because of any number of factors, one side may fail to introduce enough evidence to establish a fact, even though the evidence is available.").

159. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288–89 (1938) ("The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. . . . It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.").

factual basis. In fact, jurisdiction may be lacking, but the law allows the parties' pleadings to establish it anyway. This mechanism is especially important in valuing equitable remedies for purposes of the amount-in-controversy requirement because the valuation is so dependent upon party assessment.[160]

This pleading mechanism is not unlike the pre-1875 tradition of using pleadings to establish subject-matter jurisdiction.[161] There are some differences, of course. For example, under pre-1875 doctrine, the defendant could waive its objections to jurisdictional pleadings,[162] whereas modern doctrine prevents a defendant from waiving, consenting to, or forfeiting jurisdictional challenges. But the similarity is still strong: under either regime, the plaintiff's pleading can, in the absence of contrary assertions or proof, establish jurisdiction.[163]

If a party or the court challenges the facts underlying the amount-in-controversy allegation, then the party invoking federal jurisdiction must prove those facts by a preponderance of the evidence.[164] But here, too, procedural rules regulate jurisdiction. The court likely will hold a hearing, take evidence and testimony, find facts, and then make a ruling on the jurisdictional issue.[165] In such a hearing, the Federal Rules of Evidence apply.[166] Those are

160. *Cf.* Brittain Shaw McInnis, Comment, *The $75,000.01 Question: What is the Value of Injunctive Relief?*, 6 GEO. MASON L. REV. 1013, 1018–19 (1998) (stating that the diversity statute provides no guidance on how to value equitable relief for purposes of the amount-in-controversy requirement so that the plaintiff's evaluation will usually control).

161. *See supra* text accompanying notes 75–80.

162. *See* Collins, *supra* note 12, at 1876 (recounting the prevalence of jurisdictional waiver); *see also* Dobbs, *supra* note 14, at 511 (recounting the practice of admitting jurisdictional facts).

163. For a recent application of the principle that some contestation is required to enable scrutinization of the jurisdictional facts, see Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536, 543 (7th Cir. 2006) (Easterbrook, J.) ("None of Meridian's jurisdictional allegations was contested, so the standard of proof is irrelevant.").

164. *See* McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) ("If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence."). This burden can be difficult for defendants justifying removal in the face of a complaint that lacks an allegation for sum-certain relief. *See* Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 MO. L. REV. 681, 683–85 (1997) (explaining and discussing those difficulties). For a different view, see Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1008–09 (2006) (arguing that when jurisdictional facts going to the amount-in-controversy determination overlap with the merits, merely a prima facie standard applies to establish the jurisdictional facts).

165. *See* Jerome B. Grubhart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 537–38 (1995) ("Normal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements, and any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone.").

166. *See* FED. R. EVID. 101 (applying the Rules to "proceedings" in federal courts); FED. R. EVID. 1101(d) (providing for exclusions that do not mention jurisdictional determinations); *Meridian Security*, 441 F.3d at 541 (asserting that the proof must be founded upon "admissible evidence"); *cf.* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) ("doubt[ing]" that normal evidentiary rules do

nonjurisdictional rules governing what evidence can and cannot be considered in the determination. In addition, certain waiver rules apply to the production of and objection to evidence at a court hearing.[167] Finally, a burden of proof will be imposed on one of the parties. These rules allow for party manipulation of evidence used to establish or refute jurisdiction.[168]

To illustrate, say a case is filed in Delaware federal court on diversity jurisdiction grounds. The plaintiff alleges that she is a domiciliary of New York. She also alleges that the defendant, a corporation, is a citizen of Delaware because it is incorporated there and has its principal place of business there.[169] The Supreme Court has held that a corporation's principal place of business ordinarily is where the company's "main headquarters" is.[170] This defendant, however, has two separate headquarters offices, one in Delaware and one in New York. Neither party, though, raises the possibility that the defendant is a citizen of New York because both parties prefer to litigate in a federal forum.[171]

Nevertheless, on a motion for summary judgment, it comes to the attention of the judge that the defendant may be non-diverse because its principal place of business is actually located in New York rather than Delaware. Accordingly, the judge holds a hearing on the defendant's citizenship to determine whether, at the time of filing, the defendant's principal place of business was New York or Delaware.

In that hearing, the parties cannot stipulate jurisdiction, but how far down the fact ladder does the jurisdictional bar to stipulation go? Can the parties instead stipulate to certain facts that would tend to show that the defendant's principal place of business is Delaware? If a fact supporting that result is objectionable hearsay, but no one objects to it as such, must the court accept it? If a fact undermining that result is hearsay and both parties object on that ground, must the court exclude it?[172] Can the parties use admissions made in a response to a request for admissions to bind the court's fact finding?[173] If the

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not apply in the analogous scenario of class certification).

167. *See, e.g.*, FED. R. EVID. 103 (requiring contemporaneous objections that are waived if not made); *id.* 408 (excluding offers to compromise as evidence in certain circumstances).

168. To go even one step deeper, nonjurisdictional discovery procedures and mechanisms control parties' access to jurisdictional discovery for use in the proof stages. For a comprehensive analysis of jurisdictional discovery, see S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489 (2010).

169. *See* 28 U.S.C. § 1332(c) (2006) (establishing requirements for corporate citizenship for diversity purposes).

170. Hertz Corp. v. Friend, 130 S. Ct. 1181, 1193 (2010).

171. It is worth noting that the party's pleadings alleging the defendant's principal place of business could easily pass the Rule 11(b) test of good faith because the question of corporate citizenship can, as the Supreme Court conceded, be a "hard case[]" that may be susceptible to reasonable, though contradictory, applications. *Id*. at 1194.

172. Potentially yes. *See id.* at 1195 (stating that jurisdictional proof must be "competent").

173. Potentially yes. *See* Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536, 541 (7th Cir. 2006) (stating that a defendant can prove jurisdiction using "contentions interrogatories or admissions

judge also wants to keep the case, can the judge discharge her duty by asking the defendant's CEO where the company's main control occurs, and, upon receiving the answer of "Delaware," find jurisdiction in the face of no other proffered evidence or testimony?[174]

These questions are designed to elicit a point: whether jurisdiction exists is a complicated inquiry that is obscured by the application of various procedural rules, party actions, and court decisions that occur within the confines of the proof mechanism of the adversary system. They are not fanciful questions. As a real-world example, some courts have held that Rule 408(a) of the Federal Rules of Evidence prohibits the use of settlement materials to prove or contest the amount in controversy for purposes of determining diversity jurisdiction, even if those materials might resolve the jurisdictional issue more accurately.[175] Further, nonjurisdictional procedures that would allow jurisdiction to be determined based on party conduct and judicial discretion are constitutional,[176] and Congress rarely prescribes a method for establishing jurisdiction, leaving such procedures to the discretion of the judiciary.[177]

The point of all this is that the practical realities of our adversarial system apply to, and therefore exert some control over, jurisdictional proof. Those nonjurisdictional mechanisms, therefore, indirectly hybridize with the jurisdictional questions they govern in a way that allows the nonjurisdictional features to control the underlying jurisdictional determination.

2. Prophylactic Rules

A second form of indirect hybridization is the use of prophylactic rules to resolve jurisdictional questions. Prophylactic rules set boundaries apart from the line at issue. Typical prophylactic rules include clear-statement rules and presumptions.[178] Prophylactic rules are judicially created and based on a

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in state court").

174. Potentially no, though not necessarily for jurisdictional reasons. *See Hertz*, 130 S. Ct. at 1195 ("[W]e reject suggestions such as, for example, the one made by petitioner that the mere filing of a form like the Securities and Exchange Commission's Form 10-K listing a corporation's 'principal executive offices' would, without more be sufficient proof to establish a corporation's 'nerve center.'").

175. *See, e.g.*, McDevitt v. Guenther, 522 F. Supp. 2d 1272, 1284–86 (D. Haw. 2007). Other courts have allowed the evidence, but primarily under a recognized exception to the Rule as opposed to on grounds that the Rule does not apply to jurisdictional hearings at all. *See, e.g.*, McPhail v. Deere & Co., 529 F.3d 947, 956 (10th Cir. 2008).

176. Collins, *supra* note 12, at 1883 (pointing out that the Constitution does not prescribe the procedures for establishing jurisdiction, and that the historical practice of allowing jurisdiction by consent suggests that such procedures are constitutional); Dobbs, *supra* note 14, at 506 ("Certainly there is nothing unconstitutional about jurisdiction by estoppel.").

177. *See* Wetmore v. Rymer, 169 U.S. 115, 120–21 (1898) (noting the lack of congressionally prescribed procedures and stating that such an absence reflected an intention to delegate the adoption of such procedures to the courts).

178. For a seminal treatment of these topics, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV.

consideration of judicial discretion and competing policies.[179] Much like rules of proof, prophylactic rules regulate jurisdiction indirectly.

Take, for example, the presumption that a statutory condition is nonjurisdictional unless Congress expressly ranks it as jurisdictional.[180] Conceivably, a statutory limit could be jurisdictional without express indication that it should be treated as such.[181] Yet the presumption (if not overridden by other factors) would require federal courts to exercise jurisdiction anyway until Congress amended the statute with clearer language. Another example is the presumption, created in *Michigan v. Long*, that a state-court decision on a federal claim is based on federal law unless the state court clearly states that its decision is based on an independent and adequate state ground.[182]

Such presumptions are nonjurisdictional in nature. They are creatures of the judiciary. And it is up to the courts' discretion when and how they are employed. Thus, the Supreme Court has imposed the statutory presumption to guard against the waste of resources that jurisdictionality can produce.[183] And it imposed the *Michigan v. Long* presumption to ease its own burden when interpreting state-court opinions.[184]

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593 (1992) (cataloguing variants of clear-statement rules and the levels of clarity required for each).

179. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010) (arguing that clear-statement rules are inappropriate as constitutional prophylaxes).

180. *See* Reed Elsevier v. Muchnick, Inc., 130 S. Ct. 1237, 1245 (2010) (analyzing whether the Copyright Act's registration requirement "clearly states" that it is jurisdictional); Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006) ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.") (citation omitted). These are statutory-coverage examples. For a discussion of the *Arbaugh* clear-statement rule in a procedural context, see Dodson, *supra* note 20, at 66–71. Other examples of presumptions and clear-statement rules abound, particularly in the jurisdiction-stripping context. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (imposing a clear-statement rule for legislation purporting to strip judicial review over executive-detention decisions); Calcano-Martinez v. INS, 533 U.S. 348, 351 (2001) (refusing to read statute as stripping original habeas jurisdiction absent clear statement). For commentary, see James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1498–500 (2000) (discussing alternative review mechanisms); Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 SUP. CT. REV. 1, 46 (supporting the use of clear-statement rules for jurisdiction stripping in detention cases).

181. *See, e.g.*, Bowles v. Russell, 551 U.S. 205, 209–11 (2007) (holding the appellate deadline to file a civil notice of appeal to be jurisdictional despite the lack of express indication of jurisdictionality).

182. *See* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (presuming, absent a clear statement, that the state-court decision rests upon an independent and adequate state ground, and that the state court decided the issue according to federal law, thereby rendering the decision appealable to the U.S. Supreme Court). The independent and adequate state-law ground is a component of appellate jurisdiction. *See* Sochor v. Florida, 504 U.S. 527, 534 n.* (1992).

183. *See Arbaugh*, 546 U.S. at 515 (adopting a clear-statement rule because of the threat of "unfairness" and "waste of judicial resources").

184. *See Long*, 463 U.S. at 1041 ("In this way, both justice and judicial administration will be greatly improved.").

The nonjurisdictional stature of clear-statement rules and presumptions is even clearer when one recognizes that the Court just as easily could have crafted these presumptions in the inverse direction—*against* jurisdiction. Under that inverse presumption, a statutory limit would be jurisdictional unless Congress clearly stated otherwise, and a state-court decision would be deemed to have been decided on state-law grounds unless the state court clearly stated otherwise.[185] Those inverse presumptions, by the way, could be justified on the grounds that federal courts ought not overstep their jurisdictional mandates and that, as a result, the more legitimizing course would be to decline jurisdiction absent a clear basis for exercising it.[186]

Which direction is most proper is not my concern here. Rather, I mean to highlight the distinction between the jurisdictional authorization to hear a case and the procedural power to control that authorization. Presumptions and clear-statement rules are procedural mechanisms, developed and set by judicial discretion, that create space between the existence of jurisdiction and the exercise of jurisdiction. Within that space, adherence to the procedural rule affects the jurisdictional inquiry.

III.
THE EXPLANATORY POWER OF THE TAXONOMY

The taxonomy described in Part II can help characterize and explain doctrines and rules that otherwise would not fit comfortably into the jurisdictional-nonjurisdictional dichotomy. This Part shows how the taxonomy can both broaden and focus the conceptualizations of some of these troublesome doctrines.

A. Indirect Hybridization

Sovereign immunity is the right or privilege of the sovereign to be immune from private suits without its consent.[187] Although there are various ways to characterize the doctrine,[188] one way is as a limitation on federal-court jurisdiction. After all, the primary textual manifestation of state sovereign immunity is the Eleventh Amendment, which speaks of limiting the "[j]udicial power of the United States."[189] The Court has sent mixed signals in its characterization of state sovereign immunity, but at least some of those signals

185. Indeed, before *Michigan v. Long*, the Court sometimes applied just this inverse presumption. *See id.* at 1038–39 (explaining prior practice).

186. For a discussion of the "direction" or jurisdictional presumptions and clear-statement rules, see Dodson, *supra* at 143, at 37–40.

187. For an excellent and extended treatment of state sovereign immunity, see CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972).

188. For an argument that sovereign immunity itself is nonjurisdictional, see Dodson, *supra* note 7, at 19–28 (providing the argument that state sovereign immunity is mandatory but nonjurisdictional).

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

have cast it as jurisdictional.[190] And many commentators have considered the immunity to be jurisdictional.[191]

Despite its potentially jurisdictional status, state sovereign immunity can be waived.[192] Also, it is subject to a judicially created exception for prospective injunctive or declaratory relief against a state officer.[193] Finally, state sovereign immunity need not be raised and policed sua sponte by a federal court.[194]

One way to reconcile these features of sovereign immunity is to say that the doctrine is not jurisdictional. That characterization, which I have explored elsewhere,[195] has some appeal because it reflects the modern idea of jurisdiction as separate, unique, and unalloyed. But it creates tension with the text of the Eleventh Amendment and with court precedent.[196]

As the taxonomy shows, the availability of jurisdictional hybridization opens up other options. Perhaps sovereign immunity could be jurisdictional despite having nonjurisdictional features, such as waivability. One view would

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190. *Compare* Sossamon v. Texas, 131 S. Ct. 1651, 1657–58 (2011) ("For over a century now, this Court has consistently made clear that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.") (internal quotation marks omitted), *and* Monaco v. Mississippi, 292 U.S. 313, 320 (1934) (stating that state sovereign immunity is a restriction on jurisdiction), *with* Edelman v. Jordan, 415 U.S. 651, 677–78 (1974) (stating that state sovereign immunity "sufficiently partakes of the nature of a jurisdictional bar"), *and* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997) (calling it "a sovereign immunity from suit, rather than a nonwaivable limit on the Judiciary's subject-matter jurisdiction"); *cf.* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 513–15 (1940) (holding a judgment entered against the United States without its consent to be void for lack of jurisdiction under federal sovereign immunity).

191. *See, e.g.*, Bradford C. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1833 (2010) ("Similarly, the Amendment is framed as a restriction on '[t]he Judicial power' and therefore limits all forms of jurisdiction recognized by Article III."). For an argument that some facets of state sovereign immunity are components of *personal* jurisdiction, see Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002) (characterizing Eleventh Amendment immunity as subject-matter jurisdiction and residual sovereign immunity as personal jurisdiction). For a characterization of federal sovereign immunity as a "jurisdictional defense," see Hydrogen Tech. Corp. v. United States, 831 F.2d 1155, 1162 n.6 (1st Cir. 1987).

192. *See* Clark v. Barnard, 108 U.S. 436, 447 (1883) ("The immunity from suit belonging to a State . . . is a personal privilege which it may waive at pleasure . . . ."); *see also Sossamon*, 131 S. Ct. at 1658 ("A State, however, may choose to waive its immunity in federal court at its pleasure."); Lapides v. Bd. of Regents of the Univ. of Ga., 535 U.S. 613, 620 (2002) (holding that a state's voluntary removal to federal court waives Eleventh Amendment immunity).

193. *See Ex parte* Young, 209 U.S. 123, 159–60 (1908) (allowing such a suit); *see also* Fitzgerald, *supra* note 70, at 1210–11 (exploring the jurisdictional basis of the *Young* exception). Some theorize *Young* as a component of immunity rather than an exception to it, but that is not the way the current Court views it. *Compare* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 28 (1963), *with* Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1642 (2011) (calling the *Young* doctrine an "exception" to state sovereign immunity).

194. *See* Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 394 (1988) (Kennedy, J., concurring) (stating that "courts need not raise the issue *sua sponte*"); Dodson, *supra* note 7, at 28–29 (explaining why state sovereign immunity need not be policed sua sponte).

195. *See* Dodson, *supra* note 7, at 19–28.

196. *See supra* note 190.

be to categorize sovereign immunity as an inherent incorporation doctrine—much like personal jurisdiction. Under this formulation, sovereign immunity is jurisdictional, but the concept of its jurisdictional stature has been broadened to include nonjurisdictional features attendant to it. Sovereign immunity, then, along with personal jurisdiction,[197] could be considered a true hybrid—a jurisdictional doctrine with nonjurisdictional features. Although that may seem strange, the taxonomy suggests that there is a place for such a creature.

Another way to characterize sovereign immunity under the taxonomy would be as a jurisdictional doctrine that contains a precondition—the precondition being a proper invocation of immunity by the state entity. In other words, the question of sovereign immunity is not reached unless the state has properly invoked it. Proper invocation, however, could be subject to nonjurisdictional considerations such as waiver or consent. A state's failure to properly invoke immunity thus would result in the jurisdictional question never being reached.

The point is not to resolve the characterization of state sovereign immunity definitively but rather to use the taxonomy to explore its characterization possibilities—and their capacities to reconcile the tensions within the doctrine—in greater depth. I am now on the record as proposing three different ways to characterize state sovereign immunity, and so no doubt others will chastise me for failing to come to some resolution on it. But getting to a resolution myself has never been my goal. I mean only to offer new ways of conceptualizing this difficult doctrine so that those who must settle on a characterization have a variety of conceptual frameworks to aid in doing so.

B. Mootness

The Supreme Court has linked the doctrine of standing to Article III's case-and-controversy requirement in a way that characterizes standing as jurisdictional.[198] Although the Court has been less clear about the doctrine of mootness,[199] the prevailing view is that mootness also is linked to Article III's

197. The parallels between the two, at least outside the context of the literal text of the Eleventh Amendment, are striking. *See Schacht*, 524 U.S. at 394 (Kennedy, J., concurring) (recognizing that "the immunity bears substantial similarity to personal jurisdiction requirements"); Nelson, *supra* note 191 (arguing that non-Eleventh Amendment state sovereign immunity is a doctrine of personal jurisdiction).

198. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004). Note that prudential components of the doctrine, even if not part of Article III's requirements, might still be characterized as jurisdictional. *See id.* at 11–12 (calling them "judicially self-imposed limits on the exercise of federal jurisdiction" (citation omitted)); *cf. infra* text accompanying notes 214–228 (making a similar argument for abstention doctrines). For the definitive exposition of the standing, mootness, and ripeness doctrines, see FALLON ET AL., *supra* note 101, at 100–22.

199. The Court has been somewhat clearer that ripeness is a jurisdictional component of Article III's ban on advisory opinions. *See, e.g.*, Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297 (1979); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 82 (1978). *But see* Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536, 538 (7th Cir. 2006) (claiming that ripeness is

jurisdictional requirements. In the 1964 case *Liner v. Jafco, Inc.*, the Court stated, "Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy."[200] Though dictum, the sentiment largely has been followed in both the Supreme Court and the lower courts.[201]

The difficulty with a jurisdictional characterization is that the Court also has recognized three prudential exceptions to the doctrine that are neither found in Article III nor even related to the values underlying the doctrine: the "capable of repetition yet evading review," "voluntary cessation," and class-action exceptions.[202] The very existence of these exceptions clashes with a simple but powerful syllogism: jurisdictional doctrines admit to no judicially created exceptions. Mootness is a jurisdictional doctrine. Therefore, no exceptions should be allowed.[203]

The tension between the jurisdictional stature of mootness and its judicially created exceptions has caused commentators to criticize the doctrine as "lack[ing] a coherent theoretical foundation"[204] and "incomprehensible."[205] Even Supreme Court Justices have leveled criticism on this basis.[206] The result is that the Court has settled, as it has with sovereign immunity, into an

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not a limit on subject-matter jurisdiction); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 167 (1987) (arguing normatively against a jurisdictional characterization).

200. 375 U.S. 301, 306 n.3 (1964).

201. *See* Honig v. Doe, 484 U.S. 305, 317–18 & n.5 (1988) (considering a mootness argument not raised by any party and for the first time on appeal); Spencer v. Kemna, 523 U.S. 1, 7 (1998) ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings . . . . The parties must continue to have a 'personal stake in the outcome' of the lawsuit.") (citation omitted); Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 573 & n.49 (2009) (detailing the precedent); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 612 (1992) (explaining that the *Liner* dictum "was broadly accepted in subsequent Supreme Court opinions").

202. Hall, *supra* note 201, at 576–77. The Supreme Court has routinely characterized these as "exceptions" to mootness, though it has been clearer about the characterization of the "capable of repetition but evading review" exception than about the "voluntary cessation" and class actions exceptions. *See, e.g.*, United States v. Juvenile Male, 131 S. Ct. 2860, 2865 (2011) (reaffirming the characterization of the "capable of repetition but evading review" doctrine as an "established exception to mootness"); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189–93 (2000) (discussing "the long-recognized exceptions to mootness"). For a thorough review of these exceptions, see FALLON ET AL., *supra* note 101, at 189–91.

203. Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 692 (1990) ("If mootness is an article III requirement, then how can the Court create broad exceptions based on the desire to facilitate judicial review . . . ?"); Hall, *supra* note 201, at 562–64, 584–85 (making the same point).

204. Hall, *supra* note 201, at 562.

205. Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 490 (1996).

206. *Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 411 (1980) (Powell, J., dissenting) ("Since the question is one of power, the practical importance of review cannot control.").

unsatisfying characterization of mootness as a "flexible" doctrine[207] that "derives from" the Article III case-and-controversy requirement.[208]

Others have tried to reconcile the jurisdictionality of the mootness doctrine with its exceptions by recharacterizing the mootness doctrine (or parts of it) as nonjurisdictional.[209] My theory of hybridization suggests another way, which begins by challenging the syllogism's major premise that jurisdictional doctrines admit to no judicially created exceptions. If I am right, then mootness and its exceptions could be reconciled through hybridization, resulting in a uniform and more coherent doctrine.

For example, one could conceive of mootness and its prudential exceptions as a form of incorporated hybridization. Mootness is a jurisdictional requirement, but it expressly incorporates into its contours some prudential considerations, including the exceptions developed by the Court. Under this conceptualization, the exceptions do not allow the court to hear a moot case but rather are part of the definition of mootness itself. The voluntary-cessation principle is a prime illustration of this hybridization: if conduct is voluntarily ceased, the case is simply *not* moot as a definitional matter.[210] Such an explanation suggests that the much-maligned flexible characterization of mootness may be exactly right—if only the conceptualization of jurisdictionality is broadened to include such flexibility in its contours.

Or perhaps the jurisdictional limit underlying mootness is controlled timing-wise by a trigger, a consideration that parallels Henry Monaghan's famous assertion that mootness is "the doctrine of standing set in a time frame."[211] The timing rule for the Article III determination is the inverse of the statutory-jurisdiction determination. Unlike the time-of-invocation rule,[212] the usual Article III rule is that standing must exist at all stages of review "and not simply at the date the action is initiated."[213] But if—like the time-of-invocation rule for statutory jurisdiction—the timing rule for justiciability is nonjurisdictional, then it could be shifted or changed for prudential reasons. This would mean that standing would only need to exist at certain points in the

207. *Geraghty*, 445 U.S. at 398–401.

208. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

209. *See, e.g.*, Hall, *supra* note 201 (arguing that the exceptions apply to the "prudential" component of the mootness doctrine rather than the component grounded in Article III); Lee, *supra* note 201, at 654–68 (arguing for wholesale deconstitutionalization of mootness); Pushaw, *supra* note 205, at 490–93 (same). I am sympathetic to these arguments.

210. There is some support for this definitional characterization in the cases. *See, e.g.*, United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (stating that voluntary cessation "does not make the case moot").

211. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973). I am aware that the Court disclaimed this description of mootness in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

212. *See supra* text accompanying notes 124–134.

213. Roe v. Wade, 410 U.S. 113, 125 (1973); *see also* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 21 (1994) ("[A] case must exist at all the stages of appellate review.").

litigation, and those points could be set based on nonjurisdictional considerations. If, for example, the capable-of-repetition-but-evading-review principle applies, then it would apply not as an exception to the jurisdictional doctrine itself but rather to the nonjurisdictional timing rule that Article III requirements must be determined at all stages. In such a case, if the plaintiff had standing and the case was not moot at the time of filing, then Article III was satisfied at the time of invocation. As in other jurisdictional contexts, subsequent events, such as the elimination of the plaintiff's interest, would become irrelevant to the jurisdictional determination.

Again, the point is not to determine whether or what hybridization is correct; rather, the point is to focus attention on the availability of hybridization as a mechanism for resolving the internal tensions of the mootness doctrine.

C. Discretionary Declines of Jurisdiction

The supplemental-jurisdiction statute allows a court to decline to exercise claims over which it admittedly has supplemental jurisdiction if, in the discretion of the court, jurisdiction is not warranted.[214] It also allows a court to retain supplemental jurisdiction claims for adjudication on the merits even after the dismissal of all anchor claims that gave rise to federal jurisdiction in the first place.[215] For example, in a case that presents both federal and state claims, if the plaintiff voluntarily dismisses the federal claims, the district court could, in its discretion, keep the state claims even if the parties were non-diverse. The Supreme Court has held these statutory authorizations to be constitutional under Article III.[216] A number of jurisdictional-hybridization issues arise from these circumstances.[217]

The first issue is whether the discretionary decline of supplemental jurisdiction is itself jurisdictional. In *Carlsbad Technologies, Inc. v. HIF Bio, Inc.*, plaintiffs filed a patent lawsuit in state court, alleging violations of state and federal law. The defendant removed the entire case to federal district court. Thereafter, the district court dismissed the only federal claim in the lawsuit for failure to state a claim, and it declined, pursuant to the statute,[218] to exercise supplemental jurisdiction over the remaining state-law claims. Accordingly, the district court remanded the state-law claims back to state court.

The plaintiff appealed the remand order, arguing that the district court should have exercised supplemental jurisdiction over the state-law claims because they implicated federal patent-law rights. The court of appeals

214. 28 U.S.C. § 1367(c) (2006) (setting out guidance for the exercise of such discretion).

215. *Id.*

216. *See* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350–51 (1988) (holding pendent claims constitutional).

217. A related doctrine with similar implications is the Supreme Court's original jurisdiction, which the Court has treated as discretionary. *See* Shapiro, *supra* note 105, at 561.

218. 28 U.S.C. § 1367(c)(3).

dismissed the appeal, finding that the remand order could be colorably characterized as a remand based on lack of subject-matter jurisdiction and, therefore, barred from review under § 1447(d).[219]

The Supreme Court held that a remand order based on a discretionary decline of supplemental jurisdiction was not a remand "for lack of subject-matter jurisdiction" under the removal statute.[220] The Court reasoned that the discretionary decline of supplemental jurisdiction is not a jurisdictional matter.[221] It analogized to remands based on abstention doctrines, which the Court also had held not to be "for lack of subject-matter jurisdiction."[222] In essence, *Carlsbad* viewed discretion to decline jurisdiction as a separate, nonjurisdictional override of the jurisdictional grant. Under the Court's view, jurisdiction exists only according to the grant and its jurisdictional exclusions, not according to any exercise of discretion. The discretionary decline of supplemental jurisdiction would then be a nonjurisdictional remand of a case over which the court nevertheless has and continues to have jurisdiction.

Carlsbad may have reached the right result in characterizing the court's exercise of discretion as nonjurisdictional.[223] For my purposes here, I am agnostic on that question. I only note that using my taxonomy might have led to the conclusion that the exercise of discretion was, in fact, jurisdictional. Two potential hybridizations explain how.

The first possibility is viewing discretion as incorporated into the jurisdictional determination in a manner similar to the statutory incorporation of "good cause" in § 2107(c). The exercise of judicial discretion enables a court to shift the boundaries of its jurisdiction by using nonjurisdictional considerations, but the result is a jurisdictional decision. The nonjurisdictional feature of judicial discretion is part and parcel of the jurisdictional boundary, such that the

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219. Carlsbad Techs., Inc. v. HIF Bio, Inc., 129 S. Ct. 1862, 1863–65 (2009).

220. *Id.* at 1864–65. The Court previously had held that a district court may remand, rather than dismiss, supplemental jurisdiction claims that had been removed from state court to federal court. *See Cohill*, 484 U.S. at 357.

221. *Carlsbad*, 129 S. Ct. at 1867. The Court thus held the remand order appealable despite § 1447(d)'s bar on such review. The appealability of remand orders at issue in *Carlsbad* has generated significant controversy. For a review of that controversy and the powerful argument that mandamus should be used to review remand orders rather than exceptions to § 1447(d), see James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493 (2011).

222. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711–12 (1996). Abstention doctrines allow federal courts to decline to exercise jurisdiction for a variety of reasons, many of which are within their discretion. *See* Shapiro, *supra* note 105, at 574–88. I note that Class Action Fairness Act (CAFA) jurisdiction has a similar discretionary provision. *See* 28 U.S.C. § 1332(d)(3) (providing that a district court "may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction" over certain class actions).

223. Or, perhaps, *Carlsbad* meant to say only that a discretionary decline of supplemental jurisdiction under § 1367(c) is nonjurisdictional only for purposes of the appealability of remand orders under § 1447(d) while leaving open the possibility that it is jurisdictional for other purposes, such as a dismissal in a case originally filed in federal court.

discretionary decision to decline jurisdiction withdraws jurisdiction, while the discretionary decision to exercise jurisdiction establishes it.

Carlsbad overlooked this possibility by assuming that the exercise of discretion could never be jurisdictional.[224] But hybridization allows jurisdictional doctrines to incorporate discretion. The exercise of discretion may shift the jurisdictional line, but it still results in a jurisdictional ruling. *Carlsbad* at least should have entertained the possibility that supplemental jurisdiction could incorporate discretion instead of assuming that discretion is anathema to jurisdiction.

The second possible hybridization employs a trigger shift. *Carlsbad* involved non-diverse, private parties litigating a federal claim and several state claims at the time of removal. Later, the court dismissed the only federal claim and declined to retain supplemental jurisdiction over the remaining state claims.[225] Under normal operation of the time-of-invocation trigger, the jurisdictional assessment occurred at the time of invocation and fixed the jurisdictional determination before the dismissal of the federal claim. Although the district court had jurisdiction to consider the remaining state-law claims, the supplemental-jurisdiction considerations of "judicial economy, convenience and fairness to litigants" overrode that jurisdiction.[226] Thinking about supplemental jurisdiction in this way causes the anomaly of basing jurisdiction upon these nonjurisdictional considerations. But because the time-of-invocation rule is nonjurisdictional, it could be shifted to the time that the court exercises its discretion under § 1367(c). And, conveniently, the considerations for shifting the time-of-invocation rule are quite similar to those for exercising discretion under supplemental jurisdiction.[227] If the time-of-invocation rule shifts to the time of discretion, then the jurisdictional determination would be made anew based on circumstances existing in the case at that time—when the federal claim has been dismissed and no basis for federal jurisdiction remains. The result is that the time-of-invocation rule stays with the determination of jurisdiction, and any resulting decision on jurisdiction is itself jurisdictional.

D. Various Statutory Preconditions

The taxonomy recognizes that preconditions to jurisdiction need not themselves be jurisdictional. This helps explain a number of other doctrines. One obvious possibility is the need for effective service of process before

224. *Carlsbad*, 129 S. Ct. at 1867 (reasoning that because the declination is discretionary, it is nonjurisdictional).

225. 28 U.S.C. § 1367(c).

226. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); *see also* 28 U.S.C. § 1367(c) (setting out bases for discretionary decline of jurisdiction).

227. *Compare Gibbs*, 383 U.S. at 726 (encouraging consideration of "judicial economy, convenience and fairness to litigants"), *with* Caterpillar Inc. v. Lewis, 519 U.S. 61, 75 (1996) (shifting the time-of-invocation rule for reasons of "finality, efficiency, and economy").

personal jurisdiction will attach. Service could be thought of as a precondition to the court's exercise of jurisdiction over a defendant, but service itself is nonjurisdictional.[228] Other nonjurisdictional preconditions might include the presentation requirement in the Social Security Act,[229] the need to obtain a right-to-sue letter from the Equal Employment Opportunity Commission before filing a Title VII action,[230] and the requirement that a tax-refund applicant timely pay his entire assessed deficiency in full.[231] Note that the curability of noncompliance with a precondition does not make it any less of a precondition; as the taxonomy acknowledges, timing rules may also be employed as nonjurisdictional features, such that the curing of a precondition can be thought of as a nonjurisdictional time shift for satisfying the precondition.

IV.
A NORMATIVE PICTURE

The previous Parts provided a theoretical account of jurisdictional hybridization and explored analytically some of its effects on current doctrine. This Part sketches out the normative picture for jurisdictional hybridization.

A. The Benefit of Jurisdictional Regulation

Jurisdictional hybridization enables jurisdictional regulation. Linking jurisdictionality with nonjurisdictionality allows more court and party control of jurisdictional issues, questions, and contours. That, in turn, has several benefits. Court control and discretion permit greater consideration of those features—equity, discretion, efficiency, and economy—that jurisdictionality eschews. Party control may mitigate some of the costs of jurisdiction by allowing the parties to select only those issues that warrant litigation. In short, if equity or discretion ought to be applied but for a characterization of jurisdictionality, jurisdictionality ought to be limited.

In that vein, reconsider *Bowles*, in which the Court rejected a habeas petition that was timely under the lower court's timeline but was untimely under the governing statute. No one disputes the gross unfairness to Bowles when he relied on the erroneous district-court order to his detriment. If not for the jurisdictional characterization, he would have been excused from his noncompliance and entitled to an appeal. The problem for Bowles was the

228. *See, e.g.*, FED. R. CIV. P. 12(h) (deeming waivable objections to service); *id.* 12(a)(1)(A)(ii) (deeming service waivable).

229. *See* Mathews v. Eldridge, 424 U.S. 319, 328–30 (1976) (characterizing it as a jurisdictional precondition).

230. *See* Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091, 1093 (4th Cir. 1982) (discussing the precondition).

231. *See* 28 U.S.C. § 7422 (setting out the requirements for filing an action for a refund); United States v. Baggot, 463 U.S. 476, 478–79 (1983) (interpreting the statute to require prepayment of the assessment).

characterization of the deadline as jurisdictional. The dissent in *Bowles* argued that that characterization ought not control, but the taxonomy provides an alternative answer. Under a hybridization theory, the deadline can be jurisdictional, but that jurisdictionality is regulated by the equity of the circumstances. Much as Justice Black would have held in *Teague*, the statute could be read to implicitly incorporate considerations of equity and discretion. The majority might still be correct that the thirty-day deadline is jurisdictional, but equity and discretion might help determine when that deadline has been met.[232] In other words, both the jurisdictional stature of the deadline and the exceptional circumstances doctrine might live together in harmony.

One additional nuance above and beyond *Bowles* is that the hybridization of jurisdictional doctrines with nonjurisdictional rules does not mean that those nonjurisdictional rules have only nonjurisdictional effects. As mentioned earlier in this Article, nonjurisdictional rules can have jurisdictional effects,[233] and there might be good reasons why nonjurisdictional controls of jurisdiction should themselves have some jurisdictional effects. Waivability, for example, is a product of catering to the adversary system, and there may be good reason not to cater so much to the adversary system on matters of jurisdiction.[234] Thus, for example, a nonjurisdictional timing rule may be subject to judicial discretion yet also be immune from party waiver or consent. The point is not to eliminate jurisdictional features and effects from jurisdictional rules; the point is to free them from the confines of the jurisdictional-nonjurisdictional dichotomy so that they can be mixed and matched in a way that best fits the particular rule and circumstances at hand.

In this regard, I do not mean to suggest that my taxonomy manifests levels of preference for setting that optimal hybridization. Perhaps incorporated hybridization regulates jurisdiction most effectively and appropriately in one set of circumstances, while indirect hybridization does so in a different set of circumstances. My purpose in setting out the taxonomy is merely to show the options that exist for hybridization and that, as a whole, they have value.

Hybridization, no doubt, incurs countervailing costs. A dichotomy is simple, easy to understand, and relatively easy to categorize in most cases.

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232. For a similar argument, see Perry Dane, *Sad Time: Thoughts on Jurisdictionality, the Legal Imagination, and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 164, 167–68 (2008), http://colloquy.law.northwestern.edu/main/2008/01/sad-time-though.html.

233. *See supra* text accompanying notes 46–58.

234. *See* Hall, *supra* note 135, at 419 ("[I]f a procedural rule protects interests larger than those of the immediate parties, if there are greater societal concerns at stake, then waiver may not be appropriate. In such cases, the immediate parties' cognizance of the error is not an adequate proxy for the degree of societal harm. The interests that are prejudiced by the defect may outweigh the harms to judicial efficiency caused by delay in raising the defect."); *cf.* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 379–83 (1942) (making the analogical point that the waivability of evidentiary objections or admissions ought not apply in non-adversarial administrative proceedings).

Hybridization complicates things. But as a descriptive matter, jurisdictional complexity exists, whether we like it or not. One would have to turn a blind eye to reality to adhere to the dichotomy and suffer the resulting costs of inaccuracy and doctrinal confusion. And jurisdictional complexity, despite its costs, has some great virtues, which I have explored elsewhere.[235]

At bottom, the normative argument is a complicated one. It likely turns on the circumstances and may ultimately depend upon empirical assessments. I suspect that hybridization will have great benefits in some areas and perhaps fewer benefits in others. More study must be done to sort the normative questions out, and, rather than do that here, I simply sketch out the normative picture and leave it to future projects to flesh that picture out in concrete circumstances.

But there is an important payoff that ought to be embraced: the acceptance of hybridization as an option. Without hybridization, jurisdictionality is always rigid, isolated, and costly. It is also, at least in some of the examples I have laid out, in tension with itself. With hybridization as an option, perhaps those costs and tensions can be mitigated profitably. At the very least, hybridization gives courts and legislatures a fuller range of options for crafting the most appropriate rule, with the most appropriate effects, for the particular circumstances it governs.

B. The Benefit of Jurisdictional Solidarity

At the same time that hybridization softens the harshness of jurisdiction, hybridization reaffirms it. As Evan Lee has forcefully argued:

> [B]anishing the term "jurisdiction" from our legal lexicon is out of the question. Centuries of Anglo-American jurisprudence are built upon the notion that something called "jurisdiction" is a predicate for moving forward in adjudication. Equally importantly, eliminating the doctrines of jurisdiction would be extremely disruptive to, and inefficient for, the administration of justice.[236]

In addition, jurisdiction has a structural role to play in determining the scope of authority of law-speaking institutions, particularly when a case passes from one to another.[237] It performs an expressive role in affirming that certain limitations are important or fundamental. And it has the psychological boon of allowing, in

235. *See generally* Dodson, *supra* note 143.

236. Lee, *supra* note 19, at 1628; *see also* Dane, *supra* note 232, at 166 ("[A] fundamental postulate of the idea of jurisdiction, as a classical feature of our legal culture, is that jurisdictionality is more than just a label for certain consequences. If a rule is jurisdictional, it really does implicate the authority of a court.").

237. *See* Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1460 (2006) ("I argue that if a rule operates to shift authority from one law-speaking institution to another in the case of compliance, and is premised on a policy decision that compliance makes that institution more proper for resolution of law than another, then the rule can justifiably be treated rigidly.").

some circumstances, a judge to wash his or her hands of the issue, even if the rule leads to harsh or unjust results. In short, although it has its costs, jurisdiction has its benefits too.

My theory of hybridization retains these virtues. Hybridization regulates and narrows jurisdiction but does not eviscerate it. To the contrary, it reaffirms its importance. Hybridization is both conjoining and defining. It allows jurisdictionality to combine with nonjurisdictionality, but, at the same time, it reinforces what is and is not jurisdictional by forcing detailed consideration of the characterization of various components of the rule.

To illustrate, consider sovereign immunity. Without hybridization, sovereign immunity is difficult—perhaps impossible—to characterize as jurisdictional because it can be waived or consented to. These nonjurisdictional characteristics inhibit any attempt to classify sovereign immunity as an unalloyed jurisdictional doctrine.

Hybridization, however, permits a jurisdictional characterization of sovereign immunity by reconciling the tension. Opening the doctrine up to hybridization exposes the waiver component as a nonjurisdictional feature of (whether incorporated in or linked to) the jurisdictional doctrine as a unit. By dissociating troublesome features, calling them what they are, and then rejoining them under the hybridization theory, nonjurisdictionality and jurisdictionality coexist, with a clearer picture of each. The concept of jurisdiction, its expressive function, and its structural role thus all remain intact.

Further, my theory of hybridization can help reconcile apparent conflicts between the nature of jurisdiction and the availability of judicial discretion. Professor Fred Bloom, for example, has argued that jurisdiction is a "lie" because although it purports to be inflexible and rigid, courts regularly exercise discretion over its boundaries.[238] My theory takes a somewhat different view. The conventional understanding of jurisdiction as special and unique may be a lie, but revealing that truth should help assuage Bloom's concerns.

The timing rules of *Caterpillar*, which allow nonjurisdictional considerations to shift the determination of jurisdiction from the time of invocation to the time of final judgment, provide an illustration. Bloom argues that *Caterpillar* used considerations of efficiency and economy to adjust diversity jurisdiction.[239] That would be true if the time-of-invocation rule were itself jurisdictional. But it is not. The time-of-invocation rule is linked to subject-matter jurisdiction, but it is itself nonjurisdictional. Thus, the efficiency and economy concerns in *Caterpillar* applied only to overcome a nonjurisdictional defect, something permissible even under the traditional conceptualization of jurisdiction.

238. Bloom, *supra* note 105, at 1004.

239. *Id.* ("But cost and convenience—like weight and expedience—are not part of diversity's calculation.").

CONCLUSION

Jurisdiction needs a new vision. It is not so separate and unique as its recent history supposes. And it is not as binary as many seem to think. Perhaps jurisdiction is akin to property—with a bundle of consequences.[240] Whatever its meta-theory, jurisdiction is a doctrine that is subject to various considerations that are not captured by a dichotomy. Indeed, it can be hybridized with nonjurisdictional features and considerations in a host of different ways.

Hybridization has benefits. It offers new ways of conceptualizing difficult doctrines. Sovereign immunity, mootness, and discretionary declines of jurisdiction all illustrate the struggle to use a rigid dichotomy to capture nuance. Hybridization provides a way out that allows for more sensible and useful conceptualizations. Hybridization also enables regulation of jurisdiction in ways that can be beneficial to parties and to the judicial system as a whole by limiting the high costs of jurisdiction. Jurisdiction, then, can be harnessed both to minimize its costs and maximize its advantages.

Part of the challenge in re-envisioning jurisdictionality will be to create a new lexicon to describe hybridization's effects. Because the modern conceptualizations of jurisdictionality and nonjurisdictionality are antipodally defined, hybridization requires a new terminology to communicate blended rules. "Nonjurisdictional" no longer means having a defined set of functional effects. Likewise, something "jurisdictional" that is hybridized with nonjurisdictional features loses some of its definitional power.

I am not convinced that the terms are worthless, however. They may operate at a more diffuse level of specificity, but that does not mean that such labels should be discarded. As argued in Part IV, the term "jurisdiction" may still have powerful structural, expressive, and psychological roles to play even when divorced from a set of functional effects. What are needed, however, are additional labels for the specific hybrids at hand. I have named some here, but there are countless others to explore. I suspect (and hope) that those monikers will come as the use of the hybrids becomes more accepted.

240. I owe this insightful rumination to Professor Evan Tsen Lee.